CENTRE FOR
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NCP review of the Northern Territory Optometrists Act

Prepared for Territory Health Services

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Contents

Executive summary v

1 Introduction 1

Progress in the review of optometrists acts in other jurisdictions 2

2 The 'industry' and its customers 3

3 NCP principles 4

4 The legislation and its objectives 6

Objectives 6

Links with other jurisdictions 6

What the act does 7

5 Nature of restrictions on competition and their effects 9

Restrictions on entry and exit 10

Restrictions on price and type of input used in the production process 13

Restrictions on advertising and promotional activities 15

6 The balance between costs and benefits of restrictions 16

Benefits 16

Costs 17

Balance between benefits and costs 18

7 Alternative ways of achieving objectives 23

8 Recommendations 25

APPENDIX *27*

A Terms of reference 29

Boxes, charts and tables

1.1 Acts to be reviewed 2

Executive summary

THE REVIEW OF THE *OPTOMETRISTS 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.

The final chapter makes recommendations arising from the review.

Features of the legislation that have been identified as potentially restricting competition include:

- persons carrying out functions as optometrists must be registered, holding appropriate qualifications;
- professional qualification standards and criteria used in establishing what constitutes a 'fit and proper person' when registering an optometrist could restrict entry to the market;
- professionally trained people with skills in allied fields (other than medical practitioners), or people with a narrower range of optical skills than optometrists, are precluded from all aspects of practising optometry, even though they have or could readily obtain skills to undertake particular optometric tasks;

- a firm or company is not permitted to practise optometry unless all of its members and employees engaged in optometry are registered optometrists;
- no person other than an optometrist shall sell spectacles, other than sunglasses, except in accordance with a prescription written by a medical practitioner or optometrist;
- optometrists are not permitted to use and prescribe drugs for testing and treating eyes (though under provisions of the *Poisons and Dangerous Drugs Act*, optometrists can use some drugs, but not prescribe them); and
- a person who is not registered as an optometrist cannot use the title 'optometrist' or 'optician' or a name or title indicating that he or she is a registered optometrist or advertising to that effect.

On the basis of our assessment of the objectives of the act and the benefits and costs of each restriction identified, we conclude the following.

- The objectives of the act should be made explicit and an up to date definition of what is optometry included.
- It is in the public interest that registration of optometrists should continue with title protection provided registrants. But for title protection to provide value to the public, registrants must be able to demonstrate evidence of continuing competency to practise optometry.
- Restrictions on rights to practise provided optometrists should be modified.
- It is in the public interest that persons other than qualified optometrists who can demonstrate to the board's satisfaction their capacity to practice an aspect of optometry should be allowed to do so.
- Restrictions preventing optometrists who are trained to use drugs from using them for the measurement of the powers of vision are not in the public interest and should be removed.
- Restrictions on who can be members of optometry firms and companies are not in the public interest and should be removed.

The above changes, if implemented, will place a much greater responsibility than at present on the board to determine the professional capability of optometrists and perhaps other allied professionals to perform on an ongoing basis various aspects of optometry.

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 to undertake an independent review of the *Optometrists 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 *Optometrist Act* is one of 12 Northern Territory health acts to be reviewed (box 1.1).

In undertaking this review we held preliminary consultations with stakeholders involved in optometrical practice in the Northern Territory, including officers of Territory Health Services (THS). A number of relevant documents were reviewed, including a 1998 report on *Protecting the Public Interest — A Review of the Northern Territory 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 *Optometrists Act* that potentially restrict competition.

Newspaper advertisements drew attention to the review and the issues paper, and called for submissions for interested parties. Two submissions were received from the Optometrists Board and Colin Rubin (optometrist). Further consultations were held with interested parties to discuss aspects of their submissions. This report documents the findings and recommendations of the inquiry.

1.1 Acts to be reviewed

- ***Optometrists Act***
- *Dental Act*
- *Radiographers Act*
- *Community Welfare Act*
  - Community Welfare Regulations
  - Community Welfare (Childcare) Regulations
- *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*

Progress in the review of optometrists acts in other jurisdictions

Other Australian jurisdictions are at various stages in conducting NCP reviews of their optometrists acts. Reviews have been completed in Victoria and Tasmania, and new legislation enacted in those states. A new act is expected in New South Wales this year.

At the start of the NCP review process there were large differences in the degree of regulation of optometrists between jurisdictions. Regulation was greatest in Tasmania and least in Western Australia and South Australia. The NCP process is moving jurisdictions toward less regulation and reducing the disparities in regulations between them.

The new Victorian act has deregulated restrictions on ownership of optometrist companies completely, but ownership controls remain in Tasmania. In Victoria the board has now been given power to authorise optometrists to use therapeutic drugs. And, while only registered optometrists can practice optometry, registered orthoptists are now able to measure refraction and prescribe glasses (but not contact lenses) at the request or referral of a registered optometrist or medical practitioner within six months of the request or referral. In Tasmania the previous monopoly that optometrists had on the sale of spectacles has been removed.

2 *The 'industry' and its customers*

CONSUMER NEEDS FOR EYE HEALTH are met by optometrists, opthamologists (who are qualified medical practitioners providing specialist medical eye care services including surgery), opticians and optical firms (who dispense spectacles but do not test and are not permitted to prescribe) and orthoptists (who correct defective vision by means of exercises of the eye muscles). Only optometrists are regulated by the *Optometrists Act*. Services supplied by optometrists include eye examination and vision correction by way of an optical appliance or orthoptic treatment and the prescribing, dispensing and fitting of spectacles and contact lenses, but exclude the use of drugs for these purposes.

There are currently 69 optometrists registered to practise in the Northern Territory. Of these, 26 have Northern Territory addresses. The number of registered optometrists who are currently practising in the Northern Territory is less. Once registered, there is no requirement for annual renewal of registration. Currently, there are no orthoptists practising in the Northern Territory.

All optometrists work in the private sector. Most are set up in small owner–operator practices. Their customers are the general public — people from all age groups and sectors of the community. Some big optical firms dispensing spectacles have an associated registered optometrist who tests and prescribes. However, the optometrist will be a separate business identity.

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 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 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 OPTOMETRISTS ORDINANCE was introduced in 1958 and an Optometrists Amendment Act in 1983. In the second reading speech in 1958, the Minister noted that at the time all states had laws dealing with the registration of optometrists and 'now it is necessary to produce the same sort of legislation in the Northern Territory as we have a resident, well qualified optometrist practicing in Darwin'. There have been attempts to rewrite the act over the past decade, but a formal product has not yet emerged.

Objectives

There are no stated objectives in the act. The implicit objective is to protect the public from incompetent service providers who might do eye damage through incorrect diagnosis and prescription. When objectives are clearly stated, their contemporary relevance and how well they have been achieved can be readily assessed. In his second reading speech introducing the optometrists bill, the Minister stated that:

> The bill is designed primarily to protect the public from charlatans who make up lenses to other than a proper optometrist's or eye specialist's prescription and thereby injure the vision of those who wear the made up spectacles. In the second place, of course, it protects the optometrist himself from the operations of charlatans.

A revised act should state the objectives of the legislation. These objectives should be stated in terms of protecting the public from incompetent service providers.

Links with other jurisdictions

Each of the other jurisdictions in Australia have their own optometrists acts which register and regulate the activities of optometrists in their jurisdiction. As noted earlier, regulations do, however, differ substantially between jurisdictions.

Optometrists must complete a four year degree. Mutual recognition operates throughout Australia and New Zealand. The purpose of the Mutual Recognition Act is to ensure that a person registered in one or more jurisdictions would be

accepted as qualified in all other jurisdictions. All jurisdictions have similar entry criteria for registration and similar disciplinary arrangements.

What the act does

The act provides for the registration of persons engaged in the practice of optometry and controls an optometrical practice. Optometry is defined in the act as:

> The employment of methods (other than methods which involve the use of drugs) for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid of the power of vision.

This is a narrow and outmoded definition of optometry. It captures only part of what optometrists are now trained to do and do on a routine basis. The current range of services provided by optometrists also includes the screening and detection of occular diseases. This expanded definition of optometry should be included in a revised act.

The act deals with:

- the setting up of an Optometrists Board and its functions;
- the registration of optometrists by the board and the conditions for cancellation and re-registration; and
- the conduct of optometrical practice.

The act authorises the establishment of an Optometrists Board and specifies its powers and functions. There are a maximum of three board members excluding the chairman or executive officer. One must be a medical practitioner and the others must be registered optometrists. The board has the power to:

- authorise registration of optometrists and refuse, cancel or suspend registration under certain conditions; and
- collect registration fees.

The board regulates the conduct of optometrical practice through the following requirements.

- It requires that no person other than a registered optometrist and medical practitioner can practice optometry and provides penalties if this is violated.
- It requires that a firm or company shall not practise optometry unless all members and employees of the firm or all employees of the company engaged in optometry are registered optometrists.
- It requires that only registered optometrists can use the title 'optometrist'.

- It prevents unregistered persons from claiming through advertisement or otherwise that they are qualified or authorised to practise optometry.
- It restricts optometrists from using and prescribing drugs for testing and treatment of the eyes.

5 *Nature of restrictions on competition and their 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 supplies to and consumers in the markets for those services.

The 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 act regulates standards of service provision through accreditation arrangements, which are applied nationally. Part III of the act provides powers to the board to approve qualifications for registration for optometrists. Applicants must:

- be not less than 21 years of age;
- have passed examinations prescribed by the board or prescribed for registration in other jurisdictions; or
- be registered or certified as an optometrist 'in a part of Her Majesty's dominions outside Australia', which in the board's opinion provides equivalent training and standards;
- be (in the opinion of the board) a fit and proper person to be registered; and
- pay a registration fee.

The wording of dot point three above needs updating.

The board normally requires evidence of an Australian or New Zealand degree in optometry or of registration as an optometrist in another Australian jurisdiction. Applicants with overseas qualifications are usually referred on to the New South Wales registration board of the Optometry Council of Australia. Provision is made for appeals if registration is refused, conditions under which registration may be cancelled or suspended are set out and there are penalties for fraudulent registration.

Section 29 of the act makes it an offence for a person other than a registered optometrist to practise optometry. This gives registrants exclusive rights to undertake the practice of optometry as defined in the act (practice protection).

Each of the restrictions requiring that optometrists cannot practise their profession unless they:

- hold appropriate qualifications;
- be (in the opinion of the board) a fit and proper person to be registered; and
- pay a registration fee

in principle restricts entry to the profession and hence weakens competition. In practice, however, the registration fee of $50 is too small to 'restrict' entry.

The basis for the regulation of optometrists is in terms of the potential for unqualified practitioners to harm the public. The benefits of professional registration are premised on judgements that market forces may not work efficiently in the provision of optometrists' services and that it is better for users of these services to exclude professionally incompetent (or not fit or proper) practitioners at the outset rather than deal with the consequences of their actions later.

The submission from the Optometrists Board noted that, while consumer awareness and knowledge about professional services has generally increased, particularly with the advent of the information age, there still exists considerable information asymmetry to justify restrictions on entry to the practice of optometry to ensure the minimisation of the personal, economic and social consequences of inappropriate and unsafe health care practices.

The act does not define what a fit and proper person should be. It does, however, contain provisions to cancel or suspend registration to persons certified as insane, engaged in habitual drunkenness or addiction to a narcotic drug, engaged in unprofessional conduct or other prescribed conduct, or found guilty of offences which in the opinion of the board render them unfit to practice.

The submission from the Optometrists Board argued that the detailed requirements for registration no longer provide sufficient flexibility to the board in assessing applications. The submission argued that there should be three broad criteria for registration:

- fitness to practise
- competence to practise
- completion of an approved course.

Fitness to practise would include:

- 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 the Northern Territory.

Competence to practise would include:

- English proficiency
- evidence of continued competence as a practitioner.

The requirement for completion of an approved course should be nationally consistent in accordance with the mutual recognition principles and would include any clinical training required.

The submission argued that such criteria can clearly be demonstrated to be in the interest of the public rather than the profession and to be focused on the competence and safety of practitioners, and does not include any criteria that are not based on ensuring the minimum competence required for safe and contemporary practice.

The issue of how to maintain ongoing competence, and training and education to maintain standards once persons are registered, is of concern among members of the optometry profession. Once registered, under the act there is no requirement that optometrists undertake further education and training as a condition of maintaining registration. Technological advances are leading to new and better techniques of analysis and treatment. The Optometrical Association of Australia has a scheme whereby optometrists obtain a set number of points for undertaking various courses.

The submission from the Optometrists Board noted that professional regulation has traditionally focused on skills accumulated prior to registration with little or no attention given to continued competence of practitioners and that current legislation does not empower the board to ensure the continuing competence of practitioners. The submission considered that legislative provisions to ensure continuing competence would help assure the public of the competency of registered practitioners and would help ensure quality. This would protect the public interest. The submission recommended that all health professional regulatory legislation require boards to ensure the continued competence of practitioners.

Under current arrangements, practice protection provided optometrists prevents persons in closely related professions, such as orthoptists, from practising some parts of optometry for which they may be competent to undertake. A concern of

NCP review is that standards not be used to exclude entry of service providers who can achieve outcomes of a required standard for limited tasks, but may have the qualifications to achieve a wider spectrum of outcomes that are not required in particular circumstances. In this regard, it may be desirable to frame legislation in ways that allow horizontal mobility between professions and vertical mobility within professions.

If professional standards for entry into the profession and registration to practise optometry are set too high relative to the standards needed to meet consumer requirements for the service they wish to purchase, then the standards setting process will exclude suitable service providers and restrict competition to the detriment of consumers. Allowing appropriately trained professionals with a narrower range of skills than optometrists to test eyes may increase the availability of such services to consumers at little risk to consumer health.

Good professional behaviour requires that optometrists refer on to more specialised practitioners patients requiring treatment beyond the capability of the optometrist. But under current legislation optometrists are prevented from referring on patients to persons such as orthoptists, who may be capable of refraction testing but who lack the training and skills to detect eye diseases.

No submission responded to the issue of whether the educational and competency standards set for the right to practise optometry are appropriate or whether some parts of optometry should be practiced by persons with different qualifications.

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

The act contains a number of regulations that may be classified as anticompetitive restrictions under this heading. Part IV, section 29 of the act states that a firm or company shall not practise optometry unless all members and employees of the firm or all employees of the company engaged in optometry are registered optometrists. The meaning of this clause is unclear, as is its purpose. One interpretation is that it requires all employees and/or company members to be registered optometrists. But if the qualification 'engaged in optometry' applies to both companies and firms then all the section appears to be saying is that only registered optometrists can practise optometry — a restriction already included in part III, section 29, which states that no person other than a registered optometrist can practise optometry. Any restrictions on the membership of optometry firms and companies would prima facie appear to be uncompetitive.

The Optometrists Board submission noted that the longstanding argument for legislation to contain provisions regulating the ownership of health practitioner

businesses was to protect the public from non-ethical practices of non-health practitioners if such persons were allowed to own health practitioner businesses. But the evidence suggests that such protection is illusory. The submission did not support a continuation of the ownership restrictions, arguing that they deny the professions and the public the benefits from alternative business structures such as access to wider sources of investment, reduced costs to professionals and the public through greater competition and increased efficiencies through innovation, and shield health professionals from competition.

Section 34 of the act specifies that a person other than a registered optometrist shall not sell spectacles (sunglasses excluded) except in accordance with a prescription written by a medical practitioner or by a registered optometrist and produced to him by the person to whom the spectacles are sold. This restriction is prima facie anticompetitive.

The Optometrists Board submission argued that the intent of section 34 is to protect the public from persons supplying lenses for the correction of vision, particularly contact lenses, that are inappropriate for the client and have not been prescribed by an opthamologist (medical practitioner) or optometrist on the basis of an appropriate examination. It argued that inappropriate lenses or substitution of lenses for those prescribed have great potential to do further harm to an individual's eyesight. The submission considered that the current provision does not articulate this clearly and recommended that it be repealed and a provision included such as: 'A person shall not supply a lens for the correction of vision except in accordance with a prescription written by a registered medical practitioner who is a specialist in opthamology or a registered optometrist.'

Section 33 of the act states that a person other than a medical practitioner shall not employ a method for the treatment of the powers of vision that involves the use of drugs. This restriction that optometrists are not allowed to use and prescribe drugs for testing and treatment also limits the quality of services that optometrists can provide. Contemporary optometry courses now provide training in the use of drugs to treat anterior eye disease. With this restriction in place, the use of drugs for such treatment is restricted to medical practitioners. Under special provisions of the Territory's *Poisons and Dangerous Drugs Act*, optometrists can use some drugs, but they cannot prescribe them. The restriction appears to be anticompetitive.

The submission from the Optometrists Board argued that section 33 is anti-competitive, particularly when considered in relation to the developments in the education of optometrists and their practice in other Australian jurisdictions. It recommended that this provision be repealed consistent with the developments of the scope of optometrists practice in other Australian jurisdictions.

A submission by Colin Rubin also argued that this provision is anticompetitive, noting that optometrists should be allowed to provide the best possible service to their customers by diagnosing and treating run of the mill eye diseases and referring more serious cases to an opthamologist.

Restrictions on advertising and promotional activities

Section 32 of the act prohibits an unregistered optometrist from using the title optometrist or optician or a name or title indicating that he/she is a registered optometrist or advertising to that effect (title protection).

The restriction on the use of the title 'optometrist' may be viewed as being anticompetitive. It may also be viewed as a procompetitive trade description. The Optometrists Board submission argued that the primary purpose of the restriction is to protect the public from conduct that could mislead consumers as to the services, skills or qualifications of a person. The submission considered that, by limiting titles a person may use in the provision of health services, the act does not in any way restrict the services a person may provide, except for those functions that are legislatively required to be undertaken by certain persons.

6 The balance between costs and benefits of restrictions

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 exceed their social costs) is usually made on grounds of 'market failure' in an unrestricted market. 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).

Information asymmetry is a key consideration in the public benefit of most anticompetitive restrictions in health care legislation. The registration, rights of practice and limits on the use of the term optometrist can be viewed as providing valuable information to users on the capabilities of the service provider.

Benefits

The benefits of any restrictions on competition in the *Optometrists Act* need to be assessed in reference to the objectives of the legislation. With no stated objective, the implied objective — to protect the Northern Territory public from incompetent service providers who might do eye damage through incorrect diagnosis and prescription — becomes the benchmark against which the legislation should be

assessed. 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 pubic interest issues nominated in the NCP agreements — namely, the environment, employment, regional effects, and consumer interests as well as the competitiveness of business.

Incompetent treatment could result in physical harm or financial loss to the individual. Costs to individuals may flow on to the broader community through having to support additional optometrical or medical treatments provided through the health system. And misdiagnosis and delayed or inappropriate treatment could also result in an increase in accidents in the workplace or general community. Good eye health plays a part in general health. It is widely accepted that the community as a whole benefits from improvements in the health of its citizens.

It is not unreasonable for the community to require assurance that services are being provided effectively and that there is continuing improvement in their delivery. Governments too, as funders of many health care services, need assurance that individuals and organisations that provide services on their behalf are both effective and efficient. Professional and service organisation standards are therefore of core importance in health care legislation.

Costs

Costs of the restrictions to the optometry industry 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. Annual registration fees, although borne in the first instance by professionals, are likely to be passed on to consumers in fees charged. This is also likely to be the case with compliance costs.

The regulations are also likely to involve some efficiency losses in the way services are provided to consumers. For example, the restriction on optometrists using and prescribing drugs for testing and treatment, by limiting the quality of

services they can provide, may force consumers to seek such treatment from more costly providers. The restrictions on competition through barriers to entry to the profession may lead to higher prices for consumers and higher incomes for optometrists. The restrictions on ownership of optometric businesses may limit the size and efficiency of these businesses and their access to capital equipment, leading to higher prices to consumers.

However, some of these restrictions may well be delivering benefits to consumers by protecting them from what may be serious and perhaps irreversible consequences that might flow from the provision of eye services by incompetent or negligent service providers.

Balance between benefits and costs

The following assessment considers in turn the balance between benefits and costs of the potential restrictions on competition identified in the previous chapter.

Registration, right to title, right to practice and practice restrictions

The act specifies qualification requirements and the requirement to be a fit and proper person as conditions of registration. Use of title is restricted to registrants and practice protection is provided by excluding non-registrants from carrying out optometrical services. The restrictions in section 33 (on the use of drugs) and section 34 (on the sale of spectacles) modify and reinforce practice protection.

Consider, first, restricted use of title. Right of title provides a number of public benefits.

- It provides information to potential users of services, increases confidence about service providers and reduces risks that an inappropriate service will be provided.
- It gives a sense of professional identity and professional recognition.
- Health care costs borne by government, contingent on service users in-appropriately choosing unqualified health care providers, are reduced.
- To the extent that risks of professional liability are reduced, costs of professional indemnity cover might also be reduced.
- Continuation of right of title restrictions would reduce the likelihood of the Northern Territory attracting inappropriately qualified service providers.

Costs associated with restricted use of title are confined to the costs associated with registration (registrants' fees and compliance costs, and the administrative costs of the board in processing applications, checking qualifications and other relevant

personal characteristics, the maintenance of registers, investigations regarding complaints and annual reporting). There are no anticompetitive costs since restricted title by itself does not exclude those not registered from providing services.

On balance, registration that restricts use of title to those who hold recognised professional qualifications and satisfy other fitness to practise requirements are comparable to 'trade description' or 'trademark' registration that applies in other areas of commerce. This lowers costs and risks to service users, employers of service providers and indemnifiers of professionals registered to use that title. In these regards, it can be considered procompetitive rather than anticompetitive. Therefore, provided the costs previously identified in relation to what is required to operate the registration system are modest and are borne by their beneficiaries, there appears to be a net public benefit from restricting use of title to those professionally qualified.

It is important to note, however, that for the public to continue to benefit from assigning right to title (and practice protection), registrants must maintain both their competence to practise and their fitness to practise. Evidence of continued competence as a practitioner should therefore be made an integral requirement of continued registration.

Consider next the fit and proper person requirement for registration. The likely public benefits are:

- the community is protected from professionals of known or demonstrated incapacity or bad reputation; and
- the profession is protected from costs imposed on it from unprofessional activities.

Offsetting these benefits, costs could arise, through a potential for the fit and proper person requirement to be used anticompetitively and also inequitably if it is not clarified in the legislation.

On balance, provided there are safeguards against the fit and proper person requirement being used anticompetitively or inequitably, and there is no evidence that it has been used in these ways, benefits are likely to exceed costs. That said, confidence about a net public benefit from continuing with fit and proper person requirements is likely to remain questionable for as long as the requirement remains undefined.

The wording advanced in the Optometrists Board submission to define a fitness to practise requirement appears to be sufficiently clear to preclude any anti-competitive or otherwise inequitable treatment criteria being used under the fit and

proper person heading and hence would enhance confidence in the net public benefit.

Consider next right to practise restrictions. The Optometrists Board submission noted that the public protection rationale for occupational regulation is premised on the belief that regulated professionals deliver safer and higher quality health care than those likely to be provided by an inappropriately educated person and thereby minimise the personal, economic and social consequences of inappropriate and unsafe health care practice.

The benefits of restrictions on practice are that they reduce the risks to the patients and to the community at large from incompetent treatments and they reduce the contingent costs to government in the event of government services having to pick up responsibilities for outcomes from incompetent treatments.

Offsetting these beliefs are a number of costs, as follows.

- There is a social cost (wasted training) if there are restrictions preventing persons from practising what he or she is trained to practise. A clear example of this is the restriction preventing optometrists from using and prescribing drugs for testing and treatment. Some optometrists are sufficiently well trained to competently use drugs for testing and treatment. Others would need to undertake additional training to acquire the necessary level of competence. As a general principle, any health professional should be permitted to engage in practices for which he or she has the appropriate training and competence. In public interest terms, the costs of excluding people from doing what they are professional trained and competent to do are likely to exceed the benefits.
- Restricted rights to practise reduce competition by excluding those potential service providers who are capable of carrying out some or all of the services provided by optometrists, but who are not eligible for registration as an optometrist. This is likely to lead to higher costs to consumers.

In terms of where the public interest lies, the costs of restrictions on rights to practise are likely to exceed the benefits where risk of serious damage, which causes permanent disability to individuals or requires remedial action at cost to government, is small. The benefits of restrictions on rights to practise are likely to exceed the costs where risk of serious damage, which causes permanent disability to individuals or requires remedial action at cost to government, is large.

Whether restrictions on rights to practise optometry are in the public interest therefore comes down to an assessment of the size of the risks of serious damage and associated costs to government of remedial action if non-registered persons are allowed to practise optometry.

The view expressed in the Optometrists Board submission and in consultations with stakeholders is that there is a significant risk of persons unqualified to practise optometry doing serious damage to the eyes of patients. This is particularly the case with the fitting of contact lenses and with the failure to detect occular diseases in patients presenting themselves for eye tests and examinations.

However, for some tasks within optometry, mistakes would not lead to serious and irreversible damage to the eyes. An example is the provision of glasses with an incorrect prescription. And some allied health professionals such as orthoptists have the necessary training and competence to undertake some aspects of optometry, but are excluded from doing so because of practice protection provided to registered optometrists. In these circumstances, based on the principles set out above, retaining practice protection for optometrists in its present form would be unnecessarily restrictive and not in the public interest. From the evidence provided in submissions and consultations, we consider the following to be in the public interest.

- Registration should continue to be required for optometrists and should provide title protection to registrants. Registration should require appropriate academic qualifications and training as determined by the Optometrists Board. Registration should continue to be subject to fit and proper person criteria, but these should be explicitly defined in the act. Registration should involve a practising certificate renewable annually. Annual renewal by the board should be subject to the registrant being able to demonstrate to the board's satisfaction evidence of continuing competence to practise optometry.
- The restriction on rights to practise provided in section 29 of the act, which makes it illegal for a person other than a registered optometrist to practise optometry, should be modified as follows.
  - The board should be given the power to authorise any person, irrespective of professional classification, who demonstrates to the board that he or she is appropriately qualified and experienced to practice an aspect of optometry, to practice that aspect.
- The restriction in section 33 preventing optometrists from using drugs for the measurement of the powers of vision should be removed. Instead, optometrists should be allowed to use drugs for this purpose subject to their demonstrating to the board that they have the necessary qualifications and experience to do so. This may require the undertaking of training courses in some cases. Appropriate amendments would need to be made to the Northern Territory *Poisons and Dangerous Drugs Act* to authorise the use of drugs by suitably qualified optometrists.
- The restriction preventing a person other than an optometrist from selling spectacles other than sunglasses except in accordance with a prescription written by a medical practitioner or optometrist should be replaced with a restriction worded along the following lines.

– A person shall not supply a lens for the correction of vision except in accordance with a prescription written by a registered medical practitioner who is a specialist in opthamology or a registered optometrist or a person otherwise authorised by the board to supply such services.

Restriction on structure of optometry firm or company

The premise for the requirement that a firm or company shall not practise optometry unless all the members and employees are registered optometrists is that non-practitioner members (as owners or employees) may contribute to a lowering of professional standards of optometrical service delivery. No evidence was presented in submissions and consultations to support this premise. The costs of these restrictions are that they may interfere with the optimal structure of the business by limiting its access to capital and business expertise, which in turn will be passed on in higher costs to customers.

On balance, the social costs of this restriction are likely to exceed the social benefits. It is therefore recommended that the restriction, as set out in section 30 of the act, be repealed.

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 key question is whether the implicit objective of the act — to protect the public from incompetent service providers — can be achieved efficiently and effectively, but in less regulatory ways than at present.

Interested parties were invited to comment on this proposition and to suggest less regulatory ways of delivering safe and high quality optometry services to Northern Territory consumers.

The issues paper canvassed a range of alternative, perhaps less costly, mechanisms that might be considered to achieve the consumer protection objectives of the act. These involve less regulatory models as follows.

- A no regulation or self-regulation model in which any person would be able to practise optometry or hold him or herself out as capable of practising optometry. The need for registration would cease. The onus would be on consumers to check the qualifications of optometrists and their capability. This could be done with the help of the Optometrical Association, though not all optometrists might choose to be members of it. Consumers would receive some protection under the Trade Practices and Fair Trading Acts. Civil claims could be made against incompetent practitioners who engaged in malpractice.
  - This deregulatory model is, of course, premised on the assumption that consumers would have sufficient information (or sufficient motivation to get it) about practitioners to make informed decisions without the need for statutory intervention through registration requirements.
- A no regulation or self-regulation model as above, but with the government providing enhanced information to consumers, including official warnings, advertising campaigns and publication of pamphlets about specific professional 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 registration.

- 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.
- A title regulation scheme in which only certified practitioners would be able to use the term 'optometrist', but which would not prevent non-certified practitioners from practising optometry. This would make it easier for consumers to identify qualified persons and help reduce the risk of maltreatment. However, by preventing unqualified persons from using the title, it could be argued that a competitive advantage is conferred on qualified persons through the title regulation.
- Title and core practice restriction whereby qualified persons are identified as are the practices they are allowed to perform. Core practices judged to carry significant risks to the health of consumers would be restricted to those trained and qualified to perform them. The specification of core practices would need to be flexible enough to cope with rapid changes in treatment technologies and changes in the training and capabilities of various types of professionals providing eye services.

These alternatives have traditionally been rejected in the case of most professionals providing health services. No submission commented on the alternative regulatory models raised in the issues paper. 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 for retention must be demonstrated.

An overall net benefit can be concluded for the current registration system though certain changes are required to the act to remove some components that we have assessed as not being in the public interest. It is recommended that:

- a revised act should state the objectives of the legislation. These objectives should be stated in terms of protecting the public from incompetent service providers;
- the definition of what constitutes optometry be updated and expanded to encompass the screening and detection of occular diseases as well as the employment of methods to measure the powers of vision and the adaptation of lenses to aid the power of vision;
- registration of optometrists remain in place with little protection provided registrants:
  - the requirements for registration be reworded to reflect contemporary language,
  - registration be augmented by a practising certificate renewable annually subject to the registrant being able to demonstrate to the board's satisfaction evidence of continuing competency to practise optometry, and
  - fit and proper person criteria continue to be required for registration, but these criteria be explicitly defined in the act;
- restrictions on rights to practise in section 29 be modified with the board given the power to authorise any person, irrespective of professional classification, who demonstrates to the board that he or she is appropriately qualified and experienced to practise an aspect of optometry, to practise that aspect;
- section 33 preventing optometrists from using drugs for the measurement of the powers of vision be removed with authorisation to use drugs made conditional on optometrists demonstrating to the board that they have the necessary qualifications and experience to do so;

- section 34 of the act be modified to read:
  - 'A person shall not supply a lens for the correction of vision except in accordance with a prescription written by a registered practitioner who is a specialist in opthamology or a registered optometrist or a person otherwise authorised by the board to supply such services'; and
- section 29 of the act, which restricts membership of optometry firms and companies, be removed.

Appendix

A 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.