4. The Public Interest Test

4.1 Role of the 'public interest' in National Competition Policy

As has been emphasised throughout this paper, governments agreed to implement the NCP package because they could see that the reforms would play a major role in enhancing the performance of the economy and the welfare of the community as a whole.

The Council has consistently argued – in its Annual Reports, publications such as its 1996 explanatory booklet on Public Interest matters (NCC 1996a), and in speeches and parliamentary briefings – that NCP reform is about competition as a *means* rather than an end in itself. The aim is to use competition to improve productivity, lower prices, improve standards of service and enhance the community's living standards and employment opportunities.

While the NCP package in its entirety was designed to serve the public interest, many of the individual reforms are subject to additional safeguards to weigh the costs and benefits of reform on a case-by-case basis. These public interest safeguards arise in several contexts of the NCP program:

1 The merits of proceeding with three key reforms – competitive neutrality, the structural reform of public monopolies, and the reform of anti-competitive legislation – are subject to a public interest test set out in clause 1(3) of the Competition Principles Agreement.

2 One of the criteria for declaring infrastructure services for third party access under the Trade Practices Act (TPA) is that access must not be contrary to the public interest.

3 Authorisation of anti-competitive practices prohibited by the TPA can be sought from the ACCC on the grounds net public benefits.

4 The Council may be called upon to weigh the costs and benefits of Commonwealth, State or Territory laws providing statutory exemptions from the TPA.

4.2 Clause 1(3) of the Competition Principles Agreement

Under clause 1(3) of the Competition Principles Agreement (CPA), the merits of applying three central NCP reforms – competitive neutrality, the structural reform of public monopolies, and the reform of anti-competitive legislation – should be determined on a case by case basis by applying a public interest test.

The public interest test was written into the NCP framework to allow *all* relevant factors to be considered when deciding whether restrictions on competition are warranted. The test provides for consideration of an array of public interest matters, including the environment, employment, social welfare and consumer interests as well as business competitiveness and economic efficiency (see Appendix 1). The public interest test in clause 1(3) is neither exclusive nor prescriptive. Rather, it provides a list of *indicative* factors a government could look at in considering the benefits and costs of particular actions, and allows governments to also take other factors into consideration.

Weighing benefits and costs involves difficult judgements which can only be assessed on a case-by-case basis. This is because a broad range of considerations will apply, and not all will be relevant in every circumstance.

The Council's approach, as outlined in its 1997-98 Annual Report, is that the NCP agreements give social and environmental values no more or less weight than

financial considerations in determining where the public interest lies. In other words, the presumption is that all public interest considerations intrinsically carry equal weight.

For example, a review into the merits of a statutory marketing arrangement should consider such matters as the impacts of barriers to competition on the level and stability of farmers' incomes, the welfare of Australian consumers, implications for the value of Australian exports, environmental impacts, administrative and regulatory costs, effects on regional development and employment, economies of scale in transport and marketing, agricultural productivity and implications for value-adding industries.

A challenge for review bodies and for governments is to focus on outcomes that benefit the *community as a whole*, rather than providing special treatment for certain groups at the expense of others. Most anti-competitive restrictions benefit someone. But where this imposes costs on others (such as forcing consumers to pay higher prices than would otherwise be necessary), it is important that each side of the argument be weighed in an objective and transparent manner.

At the same time, it is important that the impacts of reform on the individuals, regions and industries directly exposed to reform are taken into account. It is also important that any trade-offs between the interests of different groups are made explicit so that governments can objectively consider whether compensatory measures are warranted.

For these reasons, the Council has consistently stressed the importance of independent, transparent and rigorous *processes* by governments in considering public interest matters. This is essential to maintain community confidence that public interest considerations have been objectively examined. The Council's position on this matter is also reflected in the approach endorsed by the Hawker Committee (Hawker 1997, Recommendation 1).

Once public interest considerations have been rigorously assessed in an independent and transparent forum, the best course of action – whether to implement reform or not to do so – will be apparent, and the public interest would be best served by governments adopting the recommendations accordingly.

A number of State and Territory reviews have recommended that restrictions on competition be retained in the community interest. Where these reviews use transparent, independent and objective processes, the Council has accepted these outcomes as satisfying the intent of the NCP agreements.

The degree of rigour required in a public interest assessment depends to some extent on the circumstances. For example, the Council does not seek to promote excessively bureaucratic processes for relatively minor matters.

Conversely, it would not be appropriate to *exempt* an area from reform without first conducting a rigorous cost-benefit analysis – to do so would be to invite claims that reform has been suppressed to satisfy vested interests. Similarly, where the net public benefit is unclear, or where there are claims that reform is against the public interest, decisions should be based on an objective assessment of the facts.

In general, the process followed should reflect the significance and complexity of the particular reform or issue (taking into account such matters as the range of affected stakeholders and community sensitivity). As a minimum, however, interested parties should be given the opportunity to participate and should have confidence that their views will be taken into account and given due consideration.

The process for *measuring* costs and benefits requires judgement. The Hawker Committee cited a range of approaches currently in use, but accepted the use of both quantitative and qualitative assessments where appropriate. It also noted the need for greater guidance to local governments in the practicalities of conducting public benefit assessments. The Council notes that this problem is now being addressed in Queensland with comprehensive training programs, and encourages the wider use of this approach.

In considering community benefits and costs, it is important that both short-term and longer-term factors are taken into account. It is often the case that the costs of reform – such as employment losses in firms directly exposed to reform – are short-term, upfront and concentrated, whereas benefits – such as cheaper prices to consumers and flow-on benefits of new jobs elsewhere in the economy – are often longer term and widely dispersed throughout the community. For this reason, a "first glance" consideration may only provide part of the overall picture.

4.3 Third party access to infrastructure

In considering an application to declare infrastructure services for third party access under Part IIIA of the Trade Practices Act (see section 1.4), the Council must consider, among other things, whether access would 'not be contrary to the public interest.'

The expression of this criteria in the negative reflects the fact that other criteria for access already consider a number of public interest matters – for example, access must promote competition, avoid wasteful duplication of infrastructure, and not put human health and safety at risk.

The term 'public interest' is not defined in the TPA – and the definition in clause 1(3) of the CPA does not apply for the purposes of the Act. However, the Council indicated in its 1996 publication *The National Access Regime* that in considering this matter, it would weigh any benefits of access regulation (such as cheaper prices and more efficient use of resources) against costs (such as regulatory and compliance costs). The Council indicated that the environment, regional development and equity are other public interest matters that might arise in the context of access regulation.

For example, in its recommendation to the Commonwealth Treasurer on an application for declaration of certain rail freight services in Queensland (NCC 1997b), the Council considered a range of public interest issued advanced by some parties against declaration. These included:

- the concurrent development of a State access regime covering the service;
- the implications for a nationally consistent approach to rail reform;
- implications for investment;
- effects on economic efficiency; and
- implications for industrial relations, employment and regional development.

4.4 Authorisation and notification under the Trade Practices Act

Authorisation of anti-competitive practices prohibited by the TPA can be sought from the Australian Competition and Consumer Commission (ACCC) on the grounds that there is a net public benefit from maintaining the practice.

Notification is a similar process conferring automatic immunity from the competitive conduct rules upon notification of particular conduct to the ACCC.

In effect, each process recognises that some restrictive trade practices provide net benefits to the community.[13]

The meaning and import of the 'public benefit' under the TPA does not rely on a legislative definition, but on judgements made in previous cases. The ACCC and the Australian Competition Tribunal recognise the public benefit to include:

- the promotion of competition in an industry;
- economic development, eg in natural resources through encouragement of exploration, research and capital investment;
- fostering business efficiency, especially where this results in improved international competitiveness;
- industry rationalisation, resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions;

[13] The ACCC has the power to grant an authorisation for anti-competitive agreements, primary boycotts, exclusive dealing arrangements, resale price maintenance agreements, and mergers which lessen competition. The ACCC cannot grant an authorisation for the misuse of market power. Notification provides immediate immunity from legal proceedings for exclusive dealing, and immunity for third line forcing at the end of the prescribed period from the time that the ACCC receives the notice.

- industrial harmony;
- assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;
- improvements in the quality and safety of goods and services and expansion of consumer choice;
- supply of better information to consumers and business to permit informed choice in their dealings;
- promotion of equitable dealings in the market;
- promotion of industry cost savings resulting in contained or lower prices at all levels of the supply chain;
- development of import replacements;
- growth in export markets; and
- steps to protect the environment.[14]

In making judgements about a particular case, the ACCC seeks factual evidence of benefits and costs to assess whether the net benefit to the public would outweigh the likely anti-competitive detriment. The goal of economic efficiency is often central in defining whether a public benefit arises, although there may be other benefits in its absence.

For governments facing requests from sectional interests for 'special treatment', the authorisation process provides a systematic, arms length assessment of the public benefit. Thus, an advantage of requiring an interested party to apply for its activities to be authorised by the ACCC is that the public benefit of the activities must be justified in an independent forum. Adoption of such an approach on a

[14] This list was cited by the Commission in Re ACI Operations Ltd (1991) ATPR 50-108 and is published in brochures by the ACCC for public use

consistent basis could reduce the pressure on governments to exempt anti-competitive behaviour through other means such as statutory exemptions (see below).

4.5 Statutory exemptions – s 51 of the Trade Practices Act

In some special cases a government may prefer to exempt the conduct of market participants from Part IV of the TPA by passing its own legislation to provide that protection, rather than obliging them to apply to the ACCC for an authorisation. Statutory exemptions of this kind can be provided under section 51 of the TPA.

Under the *Conduct Code Agreement*, States and Territories must provide written notification to the ACCC of any legislation reliant on section 51 within 30 days of the legislation being enacted. However, the Commonwealth Minister has the discretion to override such legislation. If the Minister wishes to override the legislation after four months or longer have elapsed, the Minister must call on the National Competition Council to report on:

- whether the benefits to the community from the legislation outweigh the costs;
- whether the objectives achieved by restricting competition by means of the legislation can only be achieved by restricting competition; and
- whether the Commonwealth should make regulations overriding the State or Territory legislation.

While the Conduct Code Agreement does not specify the form of the test the Council should apply in reporting on community benefits and costs, the Council indicated in its 1996 publication *Considering the Public Interest under the National Competition Policy* that it would apply the factors listed in clause 1(3) of the CPA.