National Competition Council

Considering the Public Interest under the National Competition Policy

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Abbreviations

ACCC	Australian Competition and Consumer Commission
COAG	Council of Australian Governments
CPA	Competition Principles Agreement
GBE	Government Business Enterprise
TPA	Trade Practices Act

1 Introduction

The competition policy agreements signed at the meeting of Council of Australian Governments (COAG) in April 1995 set out the processes agreed by governments for pursuing further micro-economic reform in Australia.

> The *Conduct Code Agreement* (Conduct Code), in conjunction with the *Competition Policy Reform Act 1995* and the various State and Territory application legislation, sets out processes for amendments to the competition laws of the Commonwealth, States and Territories to extend the coverage of Part IV of the *Trade Practices Act 1974* (TPA) to all businesses in Australia, irrespective of their legal form or ownership.

> The *Competition Principles Agreement* (CPA) establishes the principles agreed by governments in relation to prices oversight, structural reform of public monopolies, review of anti-competitive legislation and regulation, third party access to essential infrastructure facilities, the elimination of any net competitive advantage possessed by government businesses, and the application of the competition principles to local government.

> The *Agreement to Implement the National Competition Policy and Related Reforms* sets out the conditions for provision of financial transfers from the Commonwealth to the States and Territories (with a link to local government through the Financial Assistance Grants pool) following the National Competition Council's advice to the Commonwealth Treasurer of State and Territory progress in meeting the agreed competition reforms.

Some in the community have expressed concerns about possible adverse social consequences arising from some pro-competitive reform. For example, some claim that the Conduct Code, which extends Part IV of the TPA to government business activities, may have implications for the delivery of certain agricultural marketing arrangements and the practices of some professions. It is also claimed that CPA requirements under clause 3 (to implement competitive neutrality principles for significant government business activities) and clause 5 (to review and reform all anti-competitive legislation by the year 2000) may mean that desired social and economic outcomes available to groups in the community such as the aged will no longer be available by means of non-transparent cross subsidies or protected market positions.

A central feature of the National Competition Policy is its focus on competition reform 'in the public interest'. In this respect, the guiding principle is that competition, in general, will promote community welfare by increasing national income through encouraging improvements in efficiency. This approach is supported by a range of research, including that undertaken by the Industry Commission which projected significant gains to Australia from fully implementing the agreed competition policy reforms.[1]

Despite this focus on increased competition, governments have some flexibility to deal with circumstances where competition might be inconsistent with the weighting placed by the community on particular social objectives. The aim of this paper is to point to those processes by which public interest matters can be considered within the National Competition Policy agenda. The paper offers guidance on the use of CPA subclause 1(3) as a means of considering the

[1] Industry Commission 1995, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*, March.

community benefits and costs of reform, and discusses other mechanisms available to governments to maintain anti-competitive arrangements in the public interest.

2 Competition and the Public Interest

Australians are increasingly recognising that improvements in the competitiveness of the Australian economy will improve economic efficiency and play a vital role in enhancing overall community welfare by increasing the productive base of the economy. Governments endorsed this view in signing the intergovernmental competition policy agreements in April 1995.

Nonetheless, while competition is generally consistent with economic efficiency goals and the interests of the community as a whole, there may be situations where there is conflict with certain social objectives. For example, governments may wish to confer benefits on a particular group for equity reasons. Governments also implement restrictions on competition for reasons of 'market failure'. This occurs where special features of a market mean that unfettered competition reduces the welfare of the community. Governments argue that it is in the 'public interest' to restrict competitive outcomes in such instances.

There are three processes by which governments can seek to exempt anti-competitive arrangements from reform in the public interest. Each requires consideration of public interest issues.

> Subclause 1(3) of the CPA provides a mechanism by which governments can examine the merits of proceeding with an agreed reform action by assessing whether the costs of reform are justified.

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

> Statutory exemption for certain prohibitions can be provided under section 51 of the TPA for conduct which is approved by a Commonwealth, State or Territory law which expressly refers to the TPA.[2]

2.1 CPA subclause 1(3)

CPA subclause 1(3) provides for examination of the relationship between the overall interest of the community, competition and desirable economic and social outcomes. It allows governments to assess the net benefit of different ways of achieving particular social objectives.

> "Without limiting the matters that may be taken into account, where this Agreement calls:
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> (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
>
> (b) for the merits or appropriateness of a particular policy or course of action to be determined; or
>
> (c) for an assessment of the most effective means of achieving a policy objective;
>
> the following matters shall, where relevant, be taken into account:
>
> (d) government legislation and policies relating to ecologically sustainable development;
>
> (e) social welfare and equity considerations, including community service obligations;

[2] Throughout this paper, the terms 'exemption' and 'exception' are used in relation to processes that take matters outside competition law and policy reform. 'Exemption' is used as an all encompassing term to describe the variety of procedures available to achieve this end. 'Exception' is specifically used in relation to the process provided under section 51 of the TPA.

(f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;

(g) economic and regional development, including employment and investment growth;

(h) the interests of consumers generally or of a class of consumers;

(i) the competitiveness of Australian businesses; and

(j) the efficient allocation of resources."

The CPA states that these factors (and any others) may be considered in balancing the benefits of a particular policy or course of action against the costs, to determine the appropriateness or most effective means of achieving a policy objective. In this respect, subclause 1(3) provides governments with a consistent approach to assessing whether the commitments to reform contained in the intergovernmental agreements threaten desired social objectives. The inclusion of the subclause in the CPA reflects the desire of governments to make clear their view that competition policy is not about maximising competition per se, but about using competition to improve the community's living standards and employment opportunities.

2.2 Authorisation and notification under the Trade Practices Act

Although Part IV of the TPA prohibits anti-competitive conduct, such as agreements that substantially lessen competition, exclusive dealing and price fixing, it is possible for such conduct to be exempted from legal proceedings by the processes of authorisation or notification.

The current authorisation scheme permits the ACCC to 'authorise' certain voluntary conduct where it assesses that the public benefit from the conduct in question exceeds the anti-competitive detriment.

Notification is a similar process conferring automatic immunity from the competitive conduct rules upon notification of particular conduct to the ACCC. Immunity is ongoing until such time as the ACCC revokes the notification on public benefit grounds.

In effect, both processes recognise that some restrictive trade practices provide net benefits to the community.[3]

The meaning and import of the 'public benefit' under the TPA does not rely on a legislative definition, but on judgments 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;

[3] 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 eg 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.[4]

In assessing an application for authorisation, the ACCC examines the effect on competition in the market overall, rather than the effect on individual competitors. In making judgments about each 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 will often be central in defining whether a benefit to the public arises, although its absence does not mean that there are not other benefits.

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 consistent basis could reduce the pressure on governments to exempt anti-competitive behaviour through a section 51 exception or some other means.

2.3 Statutory exceptions – section 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 apply to the ACCC for an authorisation.

In the past, governments had been able to use the 'shield of the Crown' to protect State-owned businesses from application of the TPA. The Conduct Code has removed the shield of the Crown, and placed greater restrictions on States and Territories with respect to the section 51 process. Governments can now only exempt conduct from the TPA by laws which expressly refer to the TPA. Existing laws, such as those exempting restrictive arrangements in nominated industries or professions, which do not comply with this requirement will cease to provide protection by 1998.[5]

Under clause 2 of the Conduct Code, States and Territories are to provide written notification to the ACCC of any legislation reliant on section 51 within 30 days of that legislation being enacted. The Commonwealth Minister has the discretion to override such legislation within four months by tabling regulations for the purposes of section 51(1C)(f) of the TPA. If the Minister tables the

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4 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.

5 States and Territories can put in place regulations to effect section 51 exceptions, but such regulations can only exist for a maximum of two years, are subject to Commonwealth override and cannot be extended.

regulations after four months, s/he must also table a report by the National Competition Council on:

> whether the benefits to the community from the legislation referred to in the notice, including the benefits from transitional arrangements, outweigh the costs;

> whether the objectives achieved by restricting competition by means of the legislation referred to in the notice can only be achieved by restricting competition; and

> whether the Commonwealth should make regulations for the purposes of section 51(1C)(f) of the TPA.

While the Conduct Code does not specify the form of the test the Council should apply in reporting on the community benefits and costs under clause 2, the Council considers that the relevant test is provided by considering the factors listed in subclause 1(3) of the CPA. There are two reasons for this. First, the subclause 1(3) factors are those which States and Territories are likely to take into account in assessing the benefits and costs to the community from reforming legislation that restricts competition. The same factors are also likely to be considered in respect of new laws restricting competition (arguably including section 51 exceptions) under CPA subclause 5(5). Second, the factors listed in subclause 1(3) will be taken into account by the Council in conducting any national review of legislation under subclause 5(8) of the CPA.

States and Territories must review existing legislation reliant on section 51 by July 1998 and, if the exception is to be maintained, implement a further section 51 exception. Given the ability of the Commonwealth Minister to override a State exception, and the CPA requirement for governments to review existing and new legislation that restricts competition, it would make sense for jurisdictions to always consider the public interest in terms of subclause 1(3) of the CPA before proceeding with legislation reliant on section 51.

2.4 Assessing the public interest

Australian policy makers have left defining the 'public interest' for trade practices purposes to case-by-case assessment rather than trying to be prescriptive. In this respect, anything deemed to be of value to the community could be judged to be in the public interest. Consistent with this approach, subclause 1(3) is not exclusive or prescriptive. Rather, it provides a list of indicative factors a government could look at in considering the benefits and costs of particular actions, while not excluding consideration of any other matters in assessing the public interest.

The critical unaddressed issues, however, are the weighting which governments apply to the factors listed in subclause 1(3) and the extent to which the interests of the whole community should be traded-off against the interests of particular groups. Weighing benefits and costs involves difficult judgments which can only be assessed on a case-by-case basis. This is because outcomes will be determined, to some degree, by the subject matter of the review which in turn defines the community relevant to the assessment of benefits and costs.

The aim in applying subclause 1(3) is to assess any special treatment in a transparent and consistent manner, with the benefits and costs of particular anti-competitive behaviour subject to public scrutiny. Given that improvements in resource allocation from enhanced competition will offer substantial benefits to the community, an important part of assessing benefits and costs should be whether there are ways of delivering desired social objectives other than exempting an anti-competitive arrangement from reform. In this respect, subclause 1(3) is an aid to assist review rather than a mechanism for imposing blanket exemptions on reform.

A concept related to subclause 1(3) is the 'net benefit to the public' test used by the ACCC in authorising mergers under the TPA. While there is no legislative definition of net public benefit, the ACCC lists a wide variety of matters that could constitute a net public benefit involving the balance of positive and negative impacts of implementing a particular course of action.[6] The ACCC's net public benefit test is perhaps more prescriptive in its application than subclause 1(3). Nonetheless, subclause 1(3) covers many of the same types of matters that the ACCC would take into account in considering whether there is a net public benefit in authorising particular anti-competitive conduct. Accordingly, in supporting an application to the ACCC for authorisation of particular conduct, a government would need to address similar issues to those listed in subclause 1(3).

The determinants of the public interest listed in subclause 1(3) also need to be taken into account before a government exempts anti-competitive conduct through the section 51 legislative process (see section 2.3 of this paper). As section 51 matters are likely to be restrictions on competition, the requirement to ensure that all new anti-competitive legislation complies with subclause 5(5) of the CPA is relevant in requiring an exception to be in the interest of the community. In addition, the Commonwealth Minister can override a State or Territory exception by tabling regulations in the Parliament. Before doing this, it is likely that the Commonwealth Minister would want to assess whether the costs of the exempt activity outweigh the benefits. Indeed, the Minister is required to table a report prepared by the National Competition Council examining these issues if s/he decides to override an exception after four months.

Of necessity, assessing the public interest will require examination of issues 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. An important message is that systematic and transparent consideration of community benefits and costs through bona fide review is a central component of the competition policy reform process. Thus, before deciding to exempt an anti-competitive activity from reform, governments would need to assess the net community benefit of the restriction. However, where the net benefit to the community from a reform measure is clear, the Council does not see a requirement for governments to conduct a formal assessment of the public interest in terms of subclause 1(3).

[6] The factors listed in subclause 1(3) do not affect the interpretation of the public benefit for purposes of authorisation under the TPA by the ACCC. Unlike applications for authorisation which rely on legal precedent, subclause 1(3) of the CPA has no legal form.

3 Particular Competition Reforms and the Public Interest

The CPA commits governments to undertake a range of reforms, including the implementation of competitive neutrality principles (clause 3) and the review and, where appropriate, reform of all anti-competitive legislation (clause 5). Decisions to proceed with both types of reform depend on a government's assessment that the benefits to the community from reform outweigh the costs.

In circumstances where a government is unsure about the costs and benefits to the community, satisfactory progress with reform will involve governments adopting systematic review processes aimed at achieving bona fide reform outcomes. As such, the integrity of review and decision making processes needs to be given considerable weight. Where the net benefit of reform is unclear, decisions about whether reform is appropriate would need to be based on rigorous and transparent examination of costs and benefits.

In considering community benefits and costs, it is important that inter-temporal issues associated with assessing the public benefit are recognised, particularly in relation to legislation review and competitive neutrality. It is often the case that the costs of reform are short-term, upfront and concentrated, whereas benefits are often longer term and dissipated throughout the community. This suggests that any assessment of benefits and costs is likely to be a difficult task, such that a "first glance" consideration may only relate to part of the overall picture of the benefits and costs involved.

3.1 Legislation review

Governments have agreed that legislation should not restrict competition unless 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.

Each government is to review and, where appropriate, reform all existing regulation which restricts competition by the year 2000. Reviews of anti-competitive legislation should seek to identify the nature of the restriction on competition, to analyse its effects including on the economy generally, assess and balance the benefits and costs of the restriction, and consider alternative means, including non-legislative approaches, of achieving the objective of the legislation.[7] Once examined, anti-competitive legislation is to be reviewed systematically at least every 10 years. Governments have also agreed to ensure that any proposed new legislation restricting competition provides a net benefit to the community and that the objectives of the restriction cannot be achieved by alternative means.[8]

Examination of the benefits and costs of a particular piece of legislation could specifically have regard to factors such as: the effect of direct or indirect restrictions on competition governing entry and exit of firms or individuals into or out of markets; controls on prices or production levels; quality; level or location of goods and services restrictions; advertising and promotional

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7 Subclause 5(9) describes the elements of the legislation review process.

8 To facilitate legislation review, all governments have published a legislation review timetable, and will report annually on their progress against the timetable. Progress reports are to be consolidated by the Council and published annually.

activity restrictions; restrictions on price or types of inputs used in the production process; costs on businesses in complying with the legislation; the impact of the legislation on consumers; and advantages to some firms over others resulting from, for example, sheltering some activities from the pressures of competition. In conducting a review, governments might give consideration to public consultation, an analysis of the impact on different groups of the existing regulations and of alternatives, and administrative simplicity and flexibility. It is also desirable for reviews to be conducted in an open and transparent manner.

As an example, a consideration of benefits and costs of legislation supporting an agricultural statutory marketing authority or a licensing arrangement should examine the likely public benefits to be gained from maintaining existing arrangements against the costs associated with anti-competitive behaviour.

> Public benefit considerations could encompass, among other things, an assessment of increased returns to producers, stabilised prices, production and incomes, reduced marketing costs and increased demand in the short-term in terms of economic and regional development, including employment and investment growth (subclause 1(3)(g)).

> Public cost considerations could encompass, among other things, an assessment of acquisition, production and pricing controls which adversely affect the efficient allocation of resource use both within the agricultural sector and the wider economy (subclause 1(3)(j)). For example, minimum prices which are set above competitive levels can insulate producers from market disciplines, inhibit productivity improvements, and encourage production at a level which cannot be absorbed. Furthermore, the inefficiencies of higher domestic prices for agricultural commodities may be passed on to end-use industries affecting the competitiveness of Australian business (subclause 1(3)(i)), and ultimately the interests of consumers generally (subclause 1(3)(h)) through higher prices.

3.2 Competitive neutrality

Clause 3 of the CPA outlines the competitive neutrality principles which governments have agreed to apply to significant GBEs and significant business activities which form part of a government agency's wider functions.

As stated in the CPA, the objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities. Resource allocation distortions can arise where government businesses face different costs or disciplines than private sector businesses. This, in turn, has important implications for the efficiency with which the community uses its scarce resources.

Government businesses may have competitive advantages or disadvantages which influence their pricing and production decisions. For example, a government business which enjoys an overall competitive advantage solely because of public sector ownership may be able to set its prices below those of more efficient or equally efficient rivals. If this leads to the government business attracting custom from its more efficient competitors, then the community's scarce resources are not being used as well as they might be. Government businesses which operate inefficiently will use more resources — raw materials, physical capital, management and labour, and technical know-how — than necessary to produce a given level of output. This reduces the availability of resources to other businesses, and increases their cost to all users. Inefficient production processes also increase the costs of production, undermining the government business's financial

performance. Some of the potential sources of ownership-related advantage and disadvantage are listed in Box 1.

Where appropriate, governments are to meet their competitive neutrality obligations by corporatising GBEs and other significant business activities. This encompasses applying full taxes or imposing tax equivalent systems, debt guarantee fees, and regulations on an equivalent basis to the business's private sector competitors. The corporatisation model proposed in subclause 3(4)(a) of the CPA requires adoption of clear business objectives, management independence and accountability, independent performance monitoring, competitive neutrality and an effective system of rewards and sanctions by the government business. Where corporatisation is not considered practicable, the CPA proposes price reforms such that the prices charged by government agencies for goods and services reflect full attribution of production costs, including taxes and charges.

Competitive neutrality reforms could be expected to lead to substantial benefits to the community from improvements in resource allocation and enhanced competition. For example, appropriate pricing of irrigation services will help overcome over-investment in equipment used and salinity and waterlogging problems (which are attributable in part to the underpricing of irrigation services). Nonetheless, a decision to proceed with reform depends on a government's assessment of relevant benefits and costs. As with the review of legislation, the type of factors which jurisdictions can consider in judging the benefits and costs of implementing competitive neutrality principles are those listed in subclause 1(3).

Box 1: Some potential advantages and disadvantages affecting public sector agencies

Potential advantages

- Exemptions from Commonwealth taxes (including company tax, sales tax, financial institutions duty, import duties, fringe benefits tax, fuel excises)
- Exemptions from State and local taxes (including property rates and taxes, land tax, debit tax, franchise and licence fees, payroll tax)
- No requirement to return a profit, rate of return on investments or account for depreciation expenses
- Tied clientele and the opportunity to cross-subsidise commercial operations from monopoly markets
- Immunity from bankruptcy and the threat of takeover
- Exemptions from various Commonwealth and State legislation
- Access to various corporate overheads free of charge (or at reduced rates), including office accommodation, payroll services, human resource services, marketing and IT services
- Cash flow advantages through budget arrangements which give agencies access to funds at the start of the financial year
- Cheaper capital financing (no risk premium where the agency is backed by an explicit or implicit government guarantee)
- Preferential input to tender specifications

Potential disadvantages

- Difficulty in accessing taxation benefits of depreciation, investment allowances and other deductions (eg through the transfer of taxation losses)
- Public sector employment terms and conditions and higher public sector superannuation contributions
- Lower degree of managerial autonomy, for example due to the requirement to comply with Ministerial directives
- Greater accountability costs given the public sector's reporting and regulatory requirements
- Lack of flexibility in reducing or restructuring corporate overheads
- Constitutional and legal constraints, including being subject to Administrative Law
- Lack of direct access to capital markets

Note: The table documents the potential advantages and disadvantages that may be experienced by public sector agencies. It does not imply that all characteristics pertain to all public sector agencies.

Source: Industry Commission 1996, *Competitive Tendering and Contracting by Public Sector Agencies* Report No. 48, AGPS, Canberra, p. 294.

One 'public interest' concern which is sometimes raised is that competitive neutrality reforms require the competitive tendering and contracting of government services, and that this leads to the destruction of regional communities. People who raise this issue are worried about effects on individuals and communities who depend on the employment provided by government agencies. They also believe that loss of a local workforce will reduce the services available to the community.

While the CPA does not require competitive tendering and contracting per se, competitive tendering and subsequent contracting out is nevertheless one means by which governments might meet their competitive neutrality obligations. And examining the cost (on a competitively neutral

basis) of providing a service in-house will help determine whether providing a service in this way is a sensible approach.

However, in considering the relative merits of in-house and external provision, it is appropriate to examine factors in addition to the relative cost of in-house and external provision. One consideration is the value of keeping workers employed in a local region. Another is the convenience of having people readily available to provide a service.

What is important is rigorous and transparent examination of how best to provide a particular service. Review might show that desirable social and regional objectives can be achieved, but in ways which avoid restricting competition. Governments might also find that transparent review helps identify ways to improve current service provision.

4 Conclusion

There is growing community consensus that, in general, a more competitive economy is in the public interest: not for its own sake, but because it enhances overall community welfare. Governments have explicitly recognised the benefits of greater competition by endorsing the pro-competitive reforms contained in the competition policy agreements.

Nevertheless, some people have raised concerns that implementation of competition reforms might prevent the achievement of desired social and economic outcomes. As a result, there have been suggestions that particular arrangements be given a blanket exemption from the reforms required by the competition policy agreements.

Considerations of the public interest are an integral aspect of the National Competition Policy. The CPA explicitly recognises that the benefit to the community from some pro-competitive reforms may not justify the costs. The CPA offers a process, set out in subclause 1(3), by which governments can assess the merits of reform through examining the effect on the 'public interest' in terms of a range of economic and social factors.

Accordingly, rather than automatically exempting particular anti-competitive arrangements from reform where the community benefits are unclear, governments are better placed to conduct systematic and transparent reviews to assess whether reform is in the public interest. Because of the range of factors which may impinge on the public interest, and in particular its sensitivity to the emphasis placed on the various factors which are held to determine it, such reviews are necessarily conducted on a case-by-case basis. By the same token, the Council does not see a requirement for governments to undertake a formal assessment of the public interest where the net benefit to the community from a reform measure is clear.

There are also public interest implications related to governments actions to legislate or make regulations which provide for exemption from the competitive conduct rules of the TPA. The ability of the Commonwealth to override State legislation reliant on section 51 of the TPA, and the CPA requirements to review existing anti-competitive legislation and ensure new legislation complies with the pro-competitive principles in the CPA, suggest that governments should consider the public interest in terms of subclause 1(3) of the CPA before proceeding with legislation reliant on section 51.