

CHAPTER 6

THE IMPACT OF NATIONAL COMPETITION POLICY - RELATED ISSUES

The Productivity Commission has said quite clearly that there are massive social changes occurring in Australia. The rural summit identified those massive social, demographic and economic changes. If governments continue to ignore them, continue not to assist communities through the process of change and simply say, 'We can fix your problems by getting rid of national competition policy,' they are being unfair to their constituents. That, I guess, is the big message that perhaps can come out of this committee.¹

Introduction

6.1 During the course of the inquiry the Select Committee received considerable evidence about the administration and implementation of NCP and the practical application of the policy which goes to concerns about good, equitable and efficient governance. The Committee reported on most of these issues in the Interim Report, however, no conclusions or recommendations were made at that time. The Committee is of the view that these issues are of such importance to the success of the policy, that the issues have been discussed again in this chapter and possible strategies proposed to alleviate the concerns expressed. These issues include:

- ◆ The administration of the policy;
 - administrative structures;
 - the lack of oversight by CoAG;
 - administrative Functions;
 - the dual role of NCC;
 - the lack of performance monitoring and data gathering on the impacts of NCP (examined in Chapter 4);
 - administrative activity;
 - the unco-ordinated application of NCP (examined in Chapter 4);

1 Mr Samuel, Committee Hansard, Melbourne, 1 November 1999, p 868.

- the perceived lack of transparency in the review process (examined in Chapter 4);
 - the cost to participants in the review process;
 - the lack of time limits in relation to the declaration of access regimes;
 - the lack of obligation on NCC to conduct public consultation;
- ◆ Infrastructure Access and Competitive Neutrality Issues;
- declaration system;
 - intermodal competition in transport.

Administration

6.2 Throughout the inquiry, the two major themes heard in evidence and produced in submissions were the inappropriate application, or lack of application, of the public interest test and the administration/implementation of the policy. Where the policy is fully understood and processes are open and transparent, people would seem to have little problem in implementing the policy. The ‘patchy’ and disingenuous application of the policy is causing confusion and hardship in the community. There appears to be at least a perceived lack of consistency and fairness of treatment and co-ordination across industries, across sectors, across regions and between states.

6.3 At the higher levels of administration there appears to be a good understanding that NCP is a tool that Governments can use to facilitate the efficient use of resources and to achieve the communities outcomes. However, as administration becomes more removed from the central area of the NCC, implementation seems to become increasingly more doctrinaire or even seen as an excuse to realise other policy objectives related to micro-economic reform.

Lack of oversight by CoAG

6.4 Individual Governments are responsible for their own timetables for the introduction of NCP, however much of this process is driven by their obligations in relation to the Implementation Agreement and the tranche payment process. By 2000 all states agreed to review, and where appropriate, reform all existing legislation which restricts competition. About 2000 separate pieces of legislation have been identified for review. Individual jurisdictions are able to interpret the broader provisions of the Act and the Agreements according to their situation and priorities.

6.5 This approach had the objective of enabling the Commonwealth, states and territories to tailor the implementation of NCP to their individual needs whilst still ensuring a broad level of reform in key infrastructure areas - water, gas, electricity and roads. Reform is therefore proceeding on a number of ‘fronts’:

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- through the review and change or removal of restrictive legislation;
 - through the reforms in major infrastructure to which each state is obligated under the Agreements; and
 - through the processes of ensuring that government businesses are at least competitively neutral, which in some States has been interpreted as corporatisation, privatisation or outsourcing of functions.

6.6 The NCP was agreed between the Commonwealth, State and Territory Governments under the auspices of Council of Australian Governments (CoAG) in 1995. Under the structure agreed in CoAG, the NCC would be subject to CoAG oversight and determination of work priorities.

6.7 The Committee sees NCP as a policy that has all the governments in Australia recognising that interventionist policies increasingly have ramifications beyond their state borders. Cases in point are, the dairy industry, inappropriate pricing of water leading to overuse and salinity problems, and, developments in infrastructure leading to intermodal competition.

6.8 CoAG has not met formally to consider NCP related matters since November 1997, when an agreement on gas was signed. Accordingly, the NCC's basic work program has been the program established in 1996 and under the Agreements. The Committee is not being critical of the NCC prosecuting the agenda set in 1996, but does note that the reform agenda has both moved on and exposed some significant adjustment problems that governments have not addressed by way of review, and, where necessary, altering the NCC's work priorities.

6.9 The disquiet concerning the lack of on-going supervision of the NCC's activities and the attendant accountability questions this raises was evident throughout the length of the inquiry. For example, the Queensland government view of the NCC's work was addressed by Mr Bruce McCallum, Director, Office of The Treasurer:

It is fair to say that the Queensland government supports the principles underlying the NCP reforms, particularly the application of the public benefit test, but has some concerns about the application of the policy, particularly the way the National Competition Council has been undertaking its role. one example is the NCC's expansive and liberal interpretation of the CoAG water agreement and another is the NCC's rather narrow interpretation of community service obligations and what we regard as perhaps a lack of recognition of the legitimacy of CSOs as a policy tool of government. ²

2 Mr B McCallum, Director, Economic Performance Division, Queensland Treasury, Committee Hansard, 7 April 1999, p 208.

6.10 In the South Australian Government Submission, Premier John Olsen noted that he had sought to put NCP on the agenda for the 1999 Premiers' Conference, saying that there was a 'need for adoption of a more balanced approach to implementation.' The SA Submission goes on to note:

The NCC brings its own ideological position to consideration of policy outcomes and should not seek to dictate those outcomes to Governments, particularly in legislation review where final decisions on reform outcomes must rest with elected Governments. The NCC's primary focus should be to ensure that appropriate processes have been adopted in the implementation of NCP requirements, and that due consideration has been given to the public interest in the reform decisions taken by Governments.....

The assessment process must be sufficiently flexible to account for local issues: national uniformity in market arrangements was not an objective of the NCP reform package....³

6.11 The NCC is to be reviewed in 2000 under the terms of the implementation Agreement. In the Committee's view, there is a need for oversight arrangements to be reviewed by the parties to the Agreements as soon as practicable.

Recommendation

26. *That as a matter of urgency, CoAG should determine and implement the post 2000 agenda for NCP.*

6.12 The Committee agrees with the view expressed by the Productivity Commission, that whilst governments may be critical of the NCC, they can find the NCC's stance privately beneficial because it permits issues to be addressed by a third party. Notwithstanding this, the Committee has some sympathy with the South Australian government view that the NCC needs to be given direction and advised to find a better balance between its advisory and 'watchdog' roles. Consequently, the Committee believes that a fair proportion of the blame for the lack of co-ordination of the administration of the policy is due to the lack of guidance by Heads of State – the failure of CoAG to regularly meet, discuss issues of mutual concern and determine priorities and give directions to NCP units, the NCC and ACCC. Because CoAG has not met to consider NCP generally since 1996, the NCC lacks continued direction, accountability and an independent assessment of its workplan.

Oversight of NCC

6.13 At a hearing in Melbourne, questioning by Senators Lightfoot, Murray and Mackay about how the 'public interest' should be determined and those hard questions

3 Submission No 211, South Australian Government, p 3.

about possible exceptions answered, drew various responses. Mr Nettle of the Australian Local Government Association noted:

To me, there is the economic rationalist approachand there is a rational economics approach which is basically a welfare approach. You say to yourself that the pluses we want are lower infrastructure costs, lower communication costs, lower power costs, so people are better off, but we also have to look after human beings and the welfare of people and the welfare of communities for as long as those communities remain. That, Senator Mackay, is really the issue you were dealing with-how you actually go about doing that.⁴

6.14 Although each party to the Agreements is free to determine their own agenda for the reform of legislation and public monopolies, evidence suggests that the process is being driven by the tranche payments from the Commonwealth to the states and territories. These payments are linked to the requirement under Clause 5(3) of the Competition Principles Agreement for each party to have developed a timetable by June 1996, and where appropriate, reform of all existing legislation that restricts competition by the year 2000. These reviews are well under way. The Agreement to Implement the National Competition Policy and Related Reforms, clearly states:

The Competition payments to be made to the States in relation to the implementation of National Competition Policy (NCP) and related reforms will form a pool separate from the FAGs pool and be distributed to the States on a per capita basis. These Competition Payments will be quarantined from assessments by the Commonwealth Grants Commission.

If a State has not undertaken the required action within the specified time, its share of the per capita component of the FAGs pool and of the Competition Payments will be retained by the Commonwealth.

Prior to 1 July 1997, 1 July 1999 and 1 July 2001 the National Competition Council will assess whether the conditions for payments to the States to commence on those dates have been met.⁵

6.15 Professor John Quiggin addressed this point:

I think it is really an agenda that primarily came out of the federal bureaucracy, and the state governments in particular were locked in by the process of so-called compensation payments, under which the federal government undertook to make payments to them conditional on essentially federal agencies, like the National Competition Council,

4 Mr Nettle, Australian Local Government Association, Committee Hansard, Melbourne, 1 November 1999, p 849.

5 Agreement to Implement the National Competition Policy and Related Reforms, 11 April 1995., p2.

judging that the states had made adequate progress in implementation of the policy.

I think that is a bad way of undertaking policy. It is against both the general principles of democratic accountability and the proper division of responsibilities within a federal system of government. Looking at the content of the national competition policy agreement, it follows from that that I argue that this system of conditional payment should be abandoned and that the payments promised to the states under national competition policy should be made unconditional from now on.⁶

6.16 The Committee is concerned that where responsibility for administration/implementation of the NCP has, in all jurisdictions, been placed in treasury or premiers portfolios, the officers responsible will 'go for the money' under the tranche payments. For example, in Western Australia, the Treasury has responsibility and the Regional Development portfolio has a role in NCP: but Mr Morgan of the Regional Development Council said in response to Senator Margetts query about implementation:

My view is that the state Treasury is probably like all Treasuries around Australia. It tries to maximise its income and it takes as little notice of the social impacts of its policy as possible.⁷

6.17 As identified in the interim report, this view of the role of treasury agencies is reinforced when considering the application of funds paid under the tranche payments. Only Queensland has made a substantial attempt to compensate areas for the costs involved in the application of NCP. The Queensland position was explained by Mr McCallum, Director, Economic Performance Division, Queensland Treasury:

The Queensland government has agreed to provide \$150 million over five years, commencing in 1997-98, to assist local governments to meet the costs of NCP reviews and to provide local governments with an incentive to adopt reforms, especially competitive neutrality measures. That money is sourced from the competition payments or the \$750 million component of the payments that Queensland receives from the Commonwealth government.⁸

6.18 In making these funds available the Queensland government has tied them to the performance of NCP reviews. The breakdown in funding was explained by Mr D Mullins, Chief Executive Officer, Esk Council:

6 Prof J Quiggin, Committee Hansard, 7 April 1999, p 196.

7 Mr S Morgan, Chairman, Regional Development Council (Western Australia), Committee Hansard, 17 May 1999, p 319.

8 Mr B McCallum, Director, Economic Performance Division, Queensland Treasury, Committee Hansard, 7 April 1999, p 209.

.. The first component is training, and that is being managed and serviced by the Local Government Association of Queensland and also the local government department.

...

Out of that \$150 million, our council has been earmarked to receive \$35,000 for review and \$487,000 for implementation. As I said before, we have already undertaken the review and we will receive that \$35,000. Obviously, it is possible over the next four years that we will be paid the balance of the \$487,000 in full. But it is also possible that we will not receive even half of that, because the onus is on us to see what we do over the next four years. That \$487,000 is for activities such as a review of our roadworks, water and sewerage and also various other business activities. In the water component, we are looking very closely at our water charging structure.⁹

6.19 The Western Australian Government has also provided per capita funding to local governments but the size of the payments is of questionable value. Senator Lightfoot sought some explanation of State payments to local governments in Western Australia from Mr Brown of the Shire of Jerramungup:

We got a cheque a couple of weeks ago from the state government. That was our first sign of any money back to the local areas through the National Competition Policy.

Senator LIGHTFOOT—As welcome as that was, did that contra any losses or potential losses for you up to the next tranche of 1999-2000?

Mr Brown—Only minor. We got \$2,000-odd dollars.

Senator LIGHTFOOT—Is that all?

Mr Brown—Yes, that was all. It was on a per head of population basis, and it was 80c a head, or something.¹⁰

6.20 The reviews of legislation are determined by agreed timetables with the NCC and largely driven by the NCC 'watchdog' as it reports progress/or lack of it, to the Treasurer to enable him to make decisions about the level of compliance of each State under the Agreement and therefore its level of entitlement. The tranche payment funds are not inconsiderable and as such, are a fairly powerful incentive to conform. Some states have attempted to invoke their rights to maintain restrictive arrangements and have run the gauntlet of the NCC which has recommended on at least two occasions that a state not receive its full entitlement. See Table 2 below:

9 Mr D Mullins, Chief Executive Officer, Esk Shire Council, Committee Hansard, 8 April 1999, p 260.

10 Mr M Brown, Chief Executive Officer, Shire of Jerramungup, Committee Hansard, 17 May 1999, p 311.

TABLE 2: NATIONAL COMPETITION POLICY TRANCHE PAYMENTS (a)

| Year | Per Capita (b) | Per Capita (b) | Per Capita (b) | Per Capita (b) | Competition Payment | | State & Local Government | |
|--------------|-------------------|-------------------|-------------------|-------------------|------------------------|-------------|-----------------------------|--------------|
| | State | Local Govt (c) | Total | Total | \$m | 1994-95 | \$m | 1994-95 |
| | \$m | \$m | \$m | 1994-95 | Prices \$m | Prices \$m | Prices \$m | Prices \$m |
| 1997-1998 | 194 | 14 | 209 | 186 | 219 | * 200 | 428 | 386 |
| 1998-1999 | 392 | 29 | 420 | 365 | 226 | 200 | 646 | 565 |
| 1999-2000 | 604 | 44 | 647 | 546 | 465 | * 400 | 1113 | 946 |
| 2000-2001 | 829 | 60 | 890 | 729 | 479 | 400 | 1369 | 1129 |
| 2001-2002 | 1070 | 78 | 1148 | 914 | 739 | * 600 | 1888 | 1514 |
| 2002-2003 | 1327 | 97 | 1423 | 1101 | 761 | 600 | 2184 | 1701 |
| 2003-2004 | 1600 | 117 | 1716 | 1290 | 783 | 600 | 2499 | 1890 |
| 2004-2005 | 1890 | 138 | 2028 | 1481 | 806 | 600 | 2833 | 2081 |
| 2005-2006 | 2198 | 160 | 2359 | 1675 | 829 | 600 | 3188 | 2275 |
| TOTAL | 10104 | 736 | 10840 | 8286 | 5307 | 4200 | 16147 | 12486 |

* Indicates year in which each additional payment is made

(a) Estimates.

(b) Population growth is assumed to be about 1.1% from 1997-98 onwards.

(c) Reflecting the existing link between the respective pools.

Source: House of Representatives Standing Committee on Financial Institutions and Public Administration, "Cultivating Competition", Report of the Inquiry into Aspects of The National Competition Policy Reform Package, (Australian Government Publishing Service: June 1997) p. 131

Note: Table does not reflect changed payment levels due to the GST.

6.21 Senator Murray asked what should be retained in our society, regardless of economics, regardless of efficiencies? Mr Davis of the Australian Chamber of Commerce and Industry replied:

I think Senator Murray has basically asked a political question, and it is the role of the parliament to answer those exceptionally high-level policy trade-offs. I think that publicly funded officials or those from the private sector who may lead such groups cannot be asked to answer those sorts of questions because it is probably beyond their remit. I think they can advise; I think they can implement legislation, but I think those big framework issues really fall into the domain of the parliament.¹¹

6.22 The Committee is in agreement that these issues are not within the purview of the NCC and other administrators and was repeatedly reminded at a forum in Melbourne that it is the concern and responsibility of civic leaders – politicians duly elected - to make decisions for the good of the majority. However, politicians cannot make such decisions without input from the community and expert administrators.

I am going to flick straight back to you as senators what we really do about the future of national competition policy. I would perhaps urge you though, in doing so, to say, 'Do not throw the baby out with the bathwater.' There are problems with national competition policy, and all those problems you mentioned, Senator Lightfoot, are very real in rural and regional Australia.¹²

6.23 The Committee considers the decision to compensate the states and territories for loss of income from government owned business assets that are opened to competition under competitive neutrality and to compensate for transitional costs incurred in implementing NCP, was an appropriate decision, given the impacts that are becoming evident. However, it is of the view that the competition payments should be used as incentive rather than punishment.

6.24 The Committee considers that more work is required to identify the losers and those who may need specific assistance with transitions under NCP. Part of this work will be to address what the Productivity Commission has identified as the lack of available data that is hindering the assessment of the value of NCP at regional and local levels. Until this lack of data is addressed, it will be difficult to properly assess the benefits of any of the reforms proposed under NCP.

6.25 The view of the Department of Agriculture, Fisheries and Forestry – Australia, where it identifies the need for the application of NCP to be considered in

11 Mr B Davis; Director, Australian Chamber of Commerce and Industry Committee Hansard, 1 November 1999, p 847

12 Mr Nettle, Australian Local Government Association, Committee Hansard, Melbourne, 1 November 1999, p 849.

the context of the transition of an industry moving towards the end objectives of NCP, is further justification for such a requirement:

AFFA believes that transitional arrangements would facilitate the speedy adoption of reforms without undue cost. Structural adjustment assistance would be useful in this regard. The competition payments to the States and Territories provide an incentive to undertake reforms and should be used to provide structural adjustment assistance.¹³

Recommendation

27. *That the issue of the lack of data and information on the impacts of NCP be addressed in two ways:*

- Governments should ensure information is gathered about structural adjustment needs in various sectors. Governments could commission specific studies or obtain this information from the NCC's tranche payment assessment process from the States and Territories and on advice from the States and Territories. Local Government should be encouraged to feed into this process with its own statistical information. Governments should commission studies where appropriate.
- Where necessary, the Productivity Commission, under reference from the Commonwealth Treasurer should be directed to undertake specific studies where major impacts are envisaged and transitional arrangements/structural adjustment may be desirable: eg, a major agricultural industry.

The dual role for the NCC - overseeing the States' reviews and recommending tranche payments

6.26 Under the Agreement to Implement the National Competition Policy and Related Reforms, the NCC is to assess whether the conditions for the payments to the states and territories of the tranche payments have been met.

6.27 Concern has been expressed about the dual role of advice and assessment held by the NCC. In its submission to the Committee, the South Australian Government noted:

The NCC has several roles conferred on it by the agreements and related legislation. Most emphasis to date has been placed on the assessment role, and in discharging that function the NCC has also sought to provide advice to jurisdictions on NCP issues, and

13 Department of Agriculture, Fisheries and Forestry – Australia, Submission No 190, p29.

increasingly to become an active and vocal participant in the policy development process.

Care needs to be taken to ensure that conflicts do not emerge between these various roles of the NCC, and that the NCC observes protocol in its dealings with policy development bodies such as Ministerial Councils. The June 1997 report of the House of Representatives Standing Committee on Financial Institutions and Public Administration ('Cultivating Competition') recommended that CoAG should evaluate the dual advisory and assessment roles of the NCC to determine if both roles are appropriate.¹⁴

6.28 The Queensland Parliament has also registered its concern over the dual role of the NCC and expressed its unanimous view on 11 November 1998, when the House agreed to the following motion:

This House supports the Beattie government's commitment to apply a rigorous Public Benefit Test in any application of the National Competition Policy in Queensland.

This House considers that this test must give full weight to issues including jobs and job security, social welfare and equity considerations, health and safety and regional development as well as the interests of consumers.

Further, the House supports the use of Community Service Payments to ensure the maintenance of quality services to people in regional areas and the right of the State Government to identify and determine such Community Service Obligations.

Further, the House condemns the views emanating from the National Competition Council and calls on the Federal Government to constrain the powers of this unelected body in order that it not be able to slash millions of dollars from State Government Budgets with potentially devastating effects on employment and services particularly in rural and regional areas and calls upon the Government to negotiate changes to the National Competition Policy to take into greater account the adverse social implications of these policies and that furthermore, responsibility for the administration of the National Competition Policy be transferred from the National Competition Council to the Council of Australian Governments.¹⁵

14 Submission No 211, South Australian Government, p 3.

15 Queensland Government Hansard, 11 November 1998, p 3025.

6.29 The Productivity Commission also received concerns from the community about the dual role of the NCC.

6.30 Many participants were unaware that the NCC is an advisory body. Rather, it was commonly perceived to be undermining the sovereign rights of individual jurisdictions, holding the 'purse strings' and deducting payments from State governments based on its own ideological predilections.

6.31 The Committee accepts these concerns and, to some degree, does share them. However, there does not seem to be a ready solution to the concerns raised about the functions of the NCC. To remove the functions of assessing the reform progress and recommending on the tranche payments, would, in the Committee's view, emasculate the Council and leave it 'toothless' and without major focus. However, the Committee agrees with the Productivity Commission that the NCC should no longer be required to conduct legislation reviews.

NCP review costs

6.32 The issue of costs has been raised in two contexts. First, the costs of seeking exemptions for conduct under the TP Act. Officers of the NSW Department of Agriculture have stated:

...during reviews of SMAs (Statutory Marketing Authorities) undertaken in NSW, the assertion that the Trade Practices Act is the appropriate regulatory mechanism for anti-competitive market behaviour has been vigorously disputed by agricultural producers and producer groups. The basis for these assertions is that recourse to trade practices legislation to deal with anti-competitive behaviour by buyers is effectively not available to small business operators, such as most agricultural producers. They consider that access to the legislation is denied through:

- high costs associated with bringing a case;
- a lack of skills to bring about a case, prepare submissions and present evidence; and
- most significantly, potential retaliatory action by buyers if a case is brought, whereby those producers bringing the action will be 'frozen' out of the market altogether.¹⁶

16 Jennifer Nash, Margot Fagan and Scott Davenport, the Office of Rural Communities, NSW Agriculture, Orange, NSW, Some Issues in the Application of Competition Policy to Agriculture, paper contributed to the 41st Annual Conference of the Australian Agricultural and Resource Economics Society, Gold Coast, QLD, 22-24 January 1996, p18-19.

6.33 The costs associated with applying to the ACCC for exemption under the Act are considerable and beyond most individuals and small business operators. In its submission to the Committee, the Australian Doctors' Fund points out the powerlessness of small organisations and individuals in the scheme of things:

When confronted with the anomalies and imbalanced power relationships fostered by National Competition Policy the ACCC's defence is to point to the ability of all players to seek an exemption under the Act.

In reality the exemption process is costly. There are legal costs associated with the preparation of a case plus thousands of dollars worth of application fees not to mention the time required to have the application assessed. Hence the exemption process throws up substantial barriers for smaller independent players whilst large corporations with substantial legal arsenals have no such difficulties.¹⁷

6.34 Secondly, the approach taken by all governments in undertaking NCP reviews is that the party receiving the benefits of the exception from the full application of the Trade Practices Act, meets its own costs for the review. Under present arrangements the onus for demonstrating the public interest flowing from an exception is on the industry or party. The Committee has been repeatedly informed of the high cost associated with reviews under the NCP process. Mr Leutton of the Queensland Dairy Farmers Organisation explained the concerns his industry body had:

We have proven we have a public benefit. We were able to demonstrate in Queensland that \$65 million was the benefit to our regional communities by maintaining a farm gate price structure. In New South Wales, I think they demonstrated about \$75 million benefit. So, Senator Margetts, that is really where we are. We have been through that process. We have spent that money and we have had our 'win'—I might say—by maintaining those farmgate prices and supply management.

.....

I cannot give you the exact figures right now, but about \$75,000 was our component of that. You match that with the New South Wales component and they were slightly higher because they did some earlier research. I think we are looking at about \$200,000 from two organisations.

.....

17 Australian Doctors' Fund, Submission No 67, p 4-5.

That took a period of about 14 to 15 months for Queensland. We were about three to four months behind New South Wales in the sequencing of things. They took about the same time down there. It took a team of about a dozen people all up from both sides of the border. To answer Senator McGauran: that was for the organisation; it was not per farmer. It cost us a total of \$200,000 in total for the two organisations.¹⁸

6.35 Industry groups have incurred these costs as demonstrated by the evidence of WA local government representatives. The comments of Mr Fisher of the Shire of York were representative of views:

The compensation payments we got this year were about \$3,500, which was nice but would in no way address the sort of work that is needed to realistically tackle national competition policy in the local council.¹⁹

6.36 Queensland stands out as having made significant attempts to redress the costs of NCP on local government. The approach (noted earlier) of the Queensland Government was explained by Mr McCallum of Queensland Treasury:

The Queensland government has agreed to provide \$150 million over five years, commencing in 1997-98, to assist local governments to meet the costs of NCP reviews and to provide local governments with an incentive to adopt reforms, especially competitive neutrality measures. That money is sourced from the competition payments or the \$750 million component of the payments that Queensland receives from the Commonwealth government.²⁰

6.37 The Committee accepts that where benefits flow to a particular group under “excepted” marketing or regulatory arrangements the onus is on the groups to justify why the arrangements ought to stay in place on public interest grounds. However, consideration could be given to the cost of proving that public interest, where it is proven, being contributed to by the public because of the value realised from the arrangement.

6.38 Where industry and community groups fail to demonstrate any ongoing public interest for the excepted conduct or arrangements there may be less argument for assistance in meeting the costs. Conversely, however, the fact that the conduct or arrangements were originally undertaken with government backing and that the

18 Mr R Leutton, Chief Executive Officer, Queensland Dairyfarmers Organisation and New South Wales Dairy Farmers Association, Committee Hansard, 7 April 1999, p 224.

19 Mr E Fisher, Chief Executive Officer, Shire of York, Committee Hansard, 18 May 1999, p 447.

20 Mr B McCallum, Director, Economic Performance Division, Committee Hansard, 7 April 1999, p 209.

review has shown the public interest will be served by the application of NCP, there would appear to be a justifiable case for assistance in meeting costs of the review.

Recommendation

28. *That, where a case can be made for assistance in meeting the costs of reviews that community and industry groups are required to meet due to their involvement in prolonged or complicated industry reviews, such organisations should be able to apply to State and Federal NCP Units for financial assistance paid from the tranche funds on a discretionary basis (as determined by the State/Federal NCP Units).*

Time limits in relation to the declaration of access regimes and requirement to conduct public consultation

6.39 The Committee has heard evidence that the NCC has taken considerable time to consider certain proposals for infrastructure access and that public consultation has not taken place:

The operation of national competition policy could be improved ..[by] ..the inclusion of a limit by the NCC to make a recommendation on declaration of a service and certification of an access regime.....Inclusion of a time limit for the Commonwealth minister to make a decision on certification is also desirable...[and] would lead to a more transparent process. This would have avoided the situation where the application by the New South Wales Government for certification of a rail access regime has dragged on for over two years- and still without a decision.

The House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform recommended in the Neville report that if a designated minister does not respond to an NCC recommendation for declaration, the service in question should be considered to be declared rather than not declared as under the current legislation. We support that recommendation....

More specifically in relation to rail, implementation of the other recommendations of the Neville report would greatly enhance the efficiency of the Australian rail industry, which should benefit more remote parts of the country. A requirement for the NCC to conduct a public consultation process on declaration and certification applications is desirable. While it currently does this, it is not obliged to.²¹

6.40 This has not been an issue except in the case of NSW rail access regimes and, the Committee understands there may have been some degree of complexity here. Nevertheless, it has sympathy with the idea of a time limit and is strongly in agreement that public consultation should be held in relation to access to public infrastructure facilities. It is not sufficient to claim that these are matters of commercial confidentiality between the parties concerned.

Recommendations

29. *That the Commonwealth Treasurer have the power to impose a time limit or direct the NCC to complete an access evaluation recommendation within a certain time frame. The Committee believes that to be any more prescriptive would have the potential to hasten what may be a very complicated and delicate investigation.*
30. *That a public consultation process be mandatory in relation to applications for access to major public infrastructure facilities.*

Infrastructure Access, Regulation and Competitive Neutrality Issues

Quality and timely infrastructure is an essential element in modern economic development. The economic jury is still out, however, on the precise links between the level and timing of infrastructure investment and increased economic and social benefits in other sectors. Instead these benefits are assessed more readily from project to project than from sector to sector or jurisdiction to jurisdiction. It is generally regarded, however, that modern, competitively priced infrastructure services underpin economic growth, job creation, basic health and social amenity.²²

6.41 A number of issues concerning infrastructure have been raised in submissions and in hearings including:

- the lack of application of NCP principles to intermodal transport eg road/rail;
- the slowness of the application of NCP principles, particularly to the rail sector;
- inappropriate regulation of infrastructure services which have been corporatised or privatised; and
- unfair competition from public infrastructure bodies or lack of competitive neutrality in certain sectors.

22 Dennis O'Neill, AusCID, Infrastructure, The Challenge, in a paper to the Regional Australia Summit, 27-29 October 1999, Parliament House, Canberra, p 1.

Intermodal transport

6.42 Professor Laird of Wollongong University has highlighted a gap in the operation of NCP in that it appears to fail to recognise intermodal competition in transport infrastructure. He cites the ACCC's submission to the House Of Representatives Standing Committee on Communication, Transport, and Microeconomic Reform 1997-98 Inquiry:

Lack of competitive neutrality between rail and other transport modes, particularly roads, may be inhibiting the role of competition in achieving allocative efficiency among the different transport modes and hence greater integration in their use. To the extent that differences in government funding and user pricing approaches may be contributing to the absence of competitive neutrality, then an appropriate solution would be to tackle these distortions.

... The question the Committee could well ask is who is giving, or going to give, remedial attention to these distortions²³

6.43 Professor Laird is concerned that the NCP Agreements as constructed or administered, are impeding effective competition.

National Competition Policy in Australia fails to encourage effective competition between road and rail for general line haul freight. To remedy this situation will require a much more balanced approach to track upgrading and highway upgrading from the Federal Government, and, improved road cost recovery from heavy trucks....

The disparity between Federal funding of the National Highway System from 1974 to 1999 (now nearly \$18 billion in today's terms) and net funding of rail capital works (about \$1 billion as outlays less interest and loan repayments) has severely distorted competitive neutrality between road and rail freight operations.....²⁴

6.44 Professor Laird has pointed to the disparity between the treatment of road and rail infrastructure, particularly in the area of funding and he is concerned that the NCC is constrained by the NCP Agreements in its efforts to bring about competitive neutrality between these modes of transport. He cites in his submission, comment by a former federal treasurer to the House of Representatives Standing Committee on Communication, Transport, and Microeconomic Reform:

"I must say that what has come out of the inquiry to me is just how bad the system {rail} is. I am sort of shocked to realise just what a terrible state the railway system is. It is a national disgrace.

23 ACCC cited in Submission No 25, Prof Phillip Laird, University of Wollongong, p.1

24 Submission No 25, Prof Phillip Laird, University of Wollongong, p.1.

Obviously, if we are to have a viable industry, it needs a hell of an application of effort by government to bring that about, and a lot more than we look on track to be doing at the present time. ²⁵

6.45 Other witnesses have raised concerns about the lack of emphasis on reforming rail or rather a lack of commitment to improving rail infrastructure and its management; and

The failure.....in entering the NCP agreements in 1995, governments did not call up or enter into any new commitments in terms of a rail reform agreement. I think that is the main failure we are seeing here. I do not know that governments have abandoned the notion of a single national operator of the interstate standard gauge system, certainly not the Commonwealth; but I do not think governments have been able to agree on how that sort of objective should be achieved.²⁶

Recommendation

31. *Given the significance of road and rail infrastructure, that transport be a matter for priority consideration by CoAG.*
32. *That the NCC address the issue of road-rail competition for freight as a matter of urgency.*

Regulation impeding competition and preventing upgrading

6.46 The potential for over-regulation to impede competitive systems and prevent for example, the upgrading of facilities, was another major concern of infrastructure providers. This would seem to be an issue for rail and water as well as electricity.

6.47 The common belief is that Competition Policy will bring falls in prices, however, it may be where infrastructure has been run down and requires substantial upgrading, price increases may be necessary to support that work or indeed as with water, provide the correct message to consumers about the true cost of provision of the service.

6.48 Alternatively, some infrastructure providers were concerned that unco-ordinated regulation was a factor in impeding competition. At a public hearing in Perth, representatives of Western Power Corporation drew the Committee's attention to the need for some co-ordination in the regulation of infrastructure service providers. They drew attention to what they believed was the 'silo approach' of government to regulation - different 'stacks' of regulation for different purposes. In response to a

25 Prof Laird, Submission No 25, p 5, quoting the Hon Ralph Willis.

26 Mr Willett, NCC, Committee Hansard, Melbourne, 1 November 1999, p 914.

question from Senator Murray about the support under NCP for consideration of alternative technologies, the Western Power representatives noted:

.....My concerns would be about maybe a silo approach to energy policy by the federal government. Let me explain it in this way. What we have is a very strong economic growth in this country. We are talking about a four per cent increase in economic growth which is going to drive population growth and it is going to drive more use of energy. Also we have put in a national market that has driven down the cost of electricity significantly, and made industry and boards very aware of their bottom line performance about putting more investment into those facilities. That, I think, is a danger.

But the other policy approach the federal government is following is in respect of the environment. It is basically saying, say, in the case of mandated renewables. 'We're going to make these mandatory on industry. We're going to put a surcharge on industry to bring renewables in.' So my concern is that it is the silo effect of policy that is not being integrated across federal government. We can really shoot ourselves in the foot as a country if we are not very careful about some of these taxes and surcharges that we are putting on industry that are going to impact on the competitiveness of the country...²⁷.

6.49 Some infrastructure suppliers have pointed to serious concerns about the regulation of 'unbundled' or privatised services in general:

Our concern is that the economic and social benefits from national competition policy, both those already achieved and those in prospect, are being jeopardised by the command and control regulatory regimes now being implemented and proposed in various jurisdictions. While we focus here on electricity, the issue is much the same for other regulated industries such as gas.

We consider that the regimes will have significantly detrimental effects on investment, industry development, economic efficiency and jobs. Many energy using industries will be adversely affected, including those in export industries.

Other stakeholders and interested parties have pointed to other adverse effects. For example, SG Hambros, which is part of the world's fourth largest bank, has concluded that the regime in Victoria jeopardises the potential success of future privatisations in Australia, as well as diminishing the attractiveness of Australia as a place to invest. One lesson from the Hambros analysis is that no regulator is an island and that poor regulation in one state will affect the national picture.

27 Mr Eiszele, Western Power Corporation, Committee Hansard, Perth, Friday, 19 November 1999, p 965-966.

Regional and rural Australia will be especially affected by the regimes. There are a variety of industries and businesses in the bush where the cost and reliability of energy supply is critical not only to their success but also to their survival. Obvious examples are mining, mineral and food processing, and a range of agricultural activities such as dairying.

Much of the electricity infrastructure in rural areas is antiquated and outmoded, a legacy we may say of past government policies and not private enterprises. But that infrastructure will not be expanded and updated with newly emerging technologies under a command and control regime, nor will many of the emerging new services that are increasingly becoming available which are 'hanging off' the poles and wires of businesses, and there will be no other form of dynamic efficiency.

These consequences will not be the result of any perverse or antagonistic attitude by distribution businesses, either privately or publicly owned; it is simply the inevitable outcome from the distortions and perverse incentives inherent in the regulatory regimes themselves. The distribution businesses of which we are aware are very keen to expand the networks and to improve the range and quality of services, but they will not do so if they fear not getting their money back.

There are many people in the bush who are on low incomes or who are low or negative savers. The regimes being implemented automatically provide for significant jumps in prices, which must inevitably occur at some unknown future time under the proposals. Such price shocks cannot be anticipated and, therefore, cannot be avoided by a change of consumption, nor is there any substitute for what is, after all, an essential service. The money would, therefore, have to come directly from savings or by higher debt. Clearly, sudden and substantial price changes to accommodate the accumulated changes that occur in industries over five years is not emulating what happens in any real world market, as required by national competition policy - no market acts like that.

These are strong views and we have hesitated before placing them before this committee. However, we are not alone in having such concerns. This is evident from the submissions that have been made to the various regulatory pricing reviews by consumers, user industries and businesses, and other interested parties. Nor are we isolated in our criticisms of the cost plus/rate of return regulation and the so-called building block approach which is being implemented. Indeed, we consider that we hold the policy high ground and the theoretical and empirical high grounds, and it is the regulators who are isolated.

Our submission refers to a number of regulators and regulatory economists of the highest order who have commented critically on the Australian regulatory regimes, including the former heads of major regulatory bodies overseas and, in Australia, the former head of the BIE, the Deputy Chairman of the TPC, and an Associate Commissioner of the ACCC.

Comments in a similar vein have been made about the type of regulation being adopted here by many other eminent experts, including Professor Beesley, the father of UK incentive regulation, and Professor Sandford Berg and Professor Baumol in the US. Only this week, two professors who have acted as advisers to regulators here have passed comment on the Australian approach as rate of return regulation. I might say that rate of return regulation is something that policy makers here attempted to specifically avoid, given its dismal record in the US.

Even one of the regulators, IPART in New South Wales, supported these points in a staff paper, coming down firmly in favour of first best regulation. Examples of that are total factor productivity regulation or glide path regulation. But this does not appear to have influenced what is being proposed or implemented. I will quote from the IPART staff paper—it is included in the submission, but I would like to repeat it here. It states:

*The history of intrusive cost plus regulation is replete with examples of heavily regulated utilities that exhibit low levels of efficiency, poor investment practices and below average service performance. Both theory and experience indicate that repeated, frequent confiscation of the benefits of efficiency improvements, combined with uncertainty over future regulatory actions, will lead to poor performance and welfare loss.*²⁸

6.50 Whilst the regulation of infrastructure services is outside of the Committee's terms of reference, to the extent that the administration of NCP and the implementation of that policy crosses this field, then the Committee is concerned about co-ordination and the effectiveness of the policy.

Recommendation

33. *That issues relating to the regulation of infrastructure services are of serious concern and should be a matter for priority discussion by CoAG.*

The speed and extent of change

6.51 Evidence was presented that rural Australia is suffering “reform syndrome”. Mr Luetton, of the Queensland dairy industry queried the rate of change and the dairy industry’s capacity to quickly assimilate change:²⁹

..... Our industry has been in a quite significant process of change for a number of years now, and we need to manage that change. The NCC

28 Mr Lee, United Energy Ltd, Committee Hansard, Melbourne, Friday, 16 July 1999, p535-536.

29 Mr B McCallum, Director, Economic Performance Division, Committee Hansard, 7 April 1999, p.222.

does not seem to give recognition of the need to manage change. It is change for change sake, and overnight almost, and as an industry we need to make sure we have time to adjust. Many of our people will crash, and we believe that next year could be quite a significant year for us. That is an issue aside.

6.52 The issue is not confined to any one industry. Professor Brownlea informed the Committee of the results of research he is undertaking in Queensland:

The first one is that competition is not new. But, from our fieldwork this time, it seems to be different. There are five or six dimensions of how that competition is being experienced a little differently in the bush, as we have seen it. They include its intensity, the sense of control over the change process, apparent trade-offs that seem to be taking place within that process, a feeling of policy isolation, false expectations and uncertainty and insecurity. The communities combine all of those dimensions as a sense of unfairness about the way things are happening.³⁰

6.53 Further, Professor Brownlea expressed the view that:

I do not think you can avoid becoming increasingly competitive in today's global world. I think we need policies that support that. They need to be marketed in an appropriate way. They need to be evaluated, because this is a learning experience but is not treated as such.³¹

6.54 Others expressed the view that it is necessary to slow down if only to allow a better assessment of proposals under NCP. Mr Wren of the Western Australia Water Users Coalition advised the Committee of the groups concerns:

This is the concern of our group: we are asking, 'What is the implication of this?' because they are a part of the NCP. We have asked the state government to back off, but they said they cannot because of CoAG. Then we talked to the Productivity Commission, and they said, 'There is no rush—you have until 2001.' Here we are saying, 'Don't rush,' but they are rushing ahead; they want to rush it through. It is not tidy; there are a lot of loose ends. There are loose ends on capital gains; there are loose ends on native title; and there are

30 Professor A A Brownlea, Chair, Strategic Liaison Committee, Queensland Departments of Transport and Main Roads, Committee Hansard, 7 April 1999, p 153.

31 Professor A A Brownlea, Chair, Strategic Liaison Committee, Queensland Departments of Transport and Main Roads, Committee Hansard, 7 April 1999, p 165.

loose ends on how the minister is going to handle what is now currently in the hands of private property and local government.³²

6.55 The Committee was repeatedly told by the NCC, the Productivity Commission and others, that stopping or slowing the rate of change is not seen as being in the best interests of those undergoing the change or the country as a whole. This is because much of the change is being driven by offshore events and Australia itself cannot stand-alone from the international community.

Although a halt to NCP is not warranted, the Commission recognises that NCP is to be reviewed by the relevant parties - the Council of Australian Governments (CoAG) - as early as next year....

And in relation to the reform schedule:

..arrangements extending beyond 2000 can be accommodated within the agreed framework, provided that they can be shown to be in the 'public interest'...

and

The intergovernmental agreements on electricity, gas, water and road transport incorporated in NCP contain sets of principles rather than immutable action plans tied to rigid implementation schedules....³³

6.56 The Commission goes on to conclude that:

Control of NCP rests with governments which have used forums and processes to consider and, where necessary, modify NCP implementation schedules. The evidence suggests that these processes are working....

At this juncture, there should be no across-the-board extension of the National Competition Policy target dates.³⁴

6.57 Whilst the Senate Select Committee agrees with the Commission that NCP should not be halted, it strongly disagrees with the conclusion that current administrative mechanisms are effective and has recommended changes to administrative structures to ensure greater oversight of the management of the policy. The issues of the extension of timeframes should be considered by CoAG.

32 Mr D Wren, Secretary/Treasurer, Western Australia Water Users Coalition, Hansard, 17 May 1999, p 421.

33 Productivity Commission, Impact of Competition Policy and Reforms on Rural and Regional Australia; Inquiry Report No 8, 8 September 1999, p 333-334.

34 Productivity Commission, Impact of Competition Policy and Reforms on Rural and Regional Australia; Inquiry Report No 8, 8 September 1999, p 335.

Recommendation

34. *That there be a review of NCP by CoAG to ensure that its economic and social objectives are being met, and that the policy be subject to ongoing monitoring by CoAG.*

Senator John Quirke
Chairman