# 11 Improving the operation of National Competition Policy

**It is evident that particular NCP-related reforms have adversely affected some country communities. Nonetheless, it is also apparent that NCP has become a 'scapegoat' for the deleterious economic and social effects arising from a range of other factors. This reflects a lack of understanding about the aims, mechanisms and boundaries of NCP and how it interacts with other government policies — which can be traced to inadequate information strategies and, in some instances, political expediency. There is scope to improve awareness about, and the operation of, NCP.**

## 11.1 Introduction

NCP is not well understood in many sections of the community. This reflects inadequacies in communicating the nature of NCP in an environment where many areas of country Australia are feeling the effects of pressures for change (see part A). These pressures include long-term demographic trends, falling commodity prices, the effects of technological progress and changes in government policies, including NCP reforms.

This chapter aims to improve community understanding of areas of NCP which attracted considerable comment from participants, by:

- clarifying what NCP does *not* require and the extent to which it encroaches on the sovereignty of State and Territory Governments; and
- providing some guidance on the practical application of the 'public interest' provisions of NCP.

The chapter also discusses some operational issues raised by participants, including:

- calling a halt to NCP;
- NCP implementation timetables;
- competition policy regulation; and
- the role of the National Competition Council (NCC).

For many participants, concerns about NCP relate mainly to the manner in which it has been implemented, rather than with the policy and its principles. For example, the South West Development Commission said that:

> Implementation of the Policy, particularly misunderstandings and interpretation difficulties, rather than the Policy itself, appears to be the problem … (sub. 31, p. 2)

However, it is evident that for a great many people in country Australia, NCP is a catchcry for an outbreak of 'economic rationalism' which is seen to threaten their way of life — the Watering Australia Foundation (WAF) entitled its presentation at the draft report hearings as 'National Competition Policy: a fiendishly complicated and unworkable mechanism' (sub. D245). NCP is widely perceived as being responsible for the withdrawal of government services, the closure of country bank branches, the demise of local businesses and sporting teams and population decline. It has also been linked to higher rates of crime, drug abuse and suicide.

The Commission has been made aware of concerns about these broad economic and social circumstances during its extensive visits and consultation program, and from submissions and public hearings. These circumstances also have been brought to the attention of members of Commonwealth and State parliaments, some of whom appeared before the Commission to relay these concerns, and their views on other issues, at the draft report hearings.[1]

It is widely believed that the perceived negative impacts of NCP will continue:

> Twenty years from now, I believe the activities of the NCC will be fully accepted for what they are: a regrettable social disaster, that has through the application of blinkered and outmoded economic rationalist theories, proved to be catastrophic (Tasmanian Independent Wholesalers, sub. D254, p. 1)

Assessing the veracity of these types of claims requires an understanding of NCP principles (chapter 4), its effects (chapters 5–10), an appreciation of what NCP does not require (sec. 11.3–11.4) and of the role of the 'public interest' test (sec. 11.5).

## 11.2 Why is improved understanding of NCP important?

NCP has been associated with many changes which are beyond the capacity of governments to affect (eg world commodity prices). This confusion is perhaps understandable because, as Associate Professor Sorensen has noted, it is difficult:

[1] For example, Ernie Bridge, MLA (trans., pp. 216–315, pp. 737–72); Dick Adams, MP (pp. 396–414); Lawrence Springborg, MLA and Russell Cooper, MLA (pp. 603-26); Mike Horan, MLA (pp. 696–705); Bob Katter, MP (pp. 810–37); Rob Borbidge, MLA (pp. 961–74); and Heather Hill, from the One Nation party (pp. 1013–31).

> … to attempt to separate out the effects of Competition Policy from a mass of secular trends engulfing Rural Australia. … the enormous and interconnected roles of changing technology (especially transport, telecommunications, farming and mining) international commodity prices, entrepreneurial capacity, demography, and lifestyle preferences in shaping Australia's space economy. Government controls none of these to any significant degree. (sub. 58, p. 2)

In terms of areas within the control of governments, the Regional Development Council of Western Australia stated that:

> Many of the concerns of regional communities stem from the inappropriate implementation of regulatory reform including the rationalisation of government services. … from the perspective of regional customers and stakeholders there is no discernible difference between the impacts of Competition Policy and other regulatory and micro-economic reform processes and trends, such as privatisation and rationalisation of private sector and government services that are currently occurring. (sub. 33, p. 2)

The Commission acknowledges that, for many people, the cause of adjustment pressures matters little. However, establishing cause and effect is vital for effective policy evaluation. Otherwise, there is a risk that NCP could be wrongly condemned (or acclaimed) on the grounds of effects of other government policies with the result that socially beneficial reforms may be derailed without adequate analysis of their benefits and costs. The Tasmanian Government highlighted these risks:

> Of some concern is the tendency for NCP to be 'blamed' for a range of social and economic circumstances that have emerged in recent times, such as reduced services to rural and regional areas, low commodity prices, the sale of government assets and unemployment. Such conclusions tend to be based on misconceptions about NCP which, at the same time, ensure that the important benefits it will provide are often overlooked. (sub. 198, p. 6)

Moreover, failure to identify whether a particular effect derives from NCP reforms or from other policies has ramifications for the capacity of those affected to target calls for remedial action. In the absence of clear information about the underlying cause of a particular adverse outcome, blame can be shifted across jurisdictions and institutions so that the pleas of those adversely affected can be easily ignored and action to overcome the problem could be ineffective or might even exacerbate it.

**FINDING 11.1**

*Many people have a poor understanding of NCP and its effects. As a consequence, it has been blamed for adverse social and economic impacts resulting from a range of sources. This state of poor knowledge involves a risk that worthwhile reforms may be forgone and actions to overcome problems may be misdirected and ineffective.*

In this context, it is useful to set out what NCP does not require.

## 11.3 What NCP does not require

Judging by inputs into this inquiry, in many cases, the demarcation between NCP reforms and other government polices is not widely understood. For example, the Australian Catholic Social Welfare Commission (ACSWC) captured the essence of the views of many participants in submitting that:

> The community has witnessed the products of the NCP in negative terms including, but not limited to: public assets placed on the market and disposed of; deregulation of the financial sector … which has resulted in increased bank fees; the decentralisation of industrial relations … increased downsizing and privatisation of the public sector and, welfare services have been subject to strategies of fiscal restraint through targeting of assistance and resources and the contracting-out of services … (sub. 160, p. 19)

In fact, NCP does not require these actions — see box 11.1.

**Box 11.1 What NCP does not require:**

- asset sales and privatisation;
- compulsory competitive tendering;
- contracting-out;
- financial market deregulation;
- industrial relation reforms;
- reductions in the size of the public sector;
- council amalgamations;
- reductions in welfare and social services; or
- removal of community service obligations (CSOs).

In response to the draft report, the ACSWC contended that the Commission had met the concerns of participants with the following three responses:

> That NCP is a discrete set of policies limited to the three NCP Commonwealth/State agreements; that NCP reforms are separate from other competition-based reform policies; and, that the impact of NCP is divorced from many discretionary policy choices of governments to downsize and withdraw public infrastructure and services, to contract out public works, to reduce industry assistance, regional development and other forms of structural adjustment assistance etc – Clearly, the ASWC along with the community argue that these decisions <u>are</u> informed by and premised on NCP. (sub. D292, p. 2)

NCP, and consequently the purview of the NCC, relates only to the three intergovernmental agreements (see chapter 4) entered into by the Commonwealth

and all State and Territory governments. NCP competition payments are therefore unrelated to decisions to 'downsize and withdraw public infrastructure and services', 'to contract out public works', or 'to reduce industry assistance, regional development and other forms of structural adjustment assistance'.

However, as the ACSWC has identified, many policies reflect the *discretionary* choices of governments. The Commission also concurs with the view that NCP is consistent with a broad suite of other microeconomic reforms. Reforms such as competitive tendering for government services share a similar underlying premise that greater competition will enhance economic efficiency and improve overall living standards. Furthermore, it is also correct to presume that after instituting improved financial and accounting practices to meet, say, competitive neutrality objectives, some governments might opt to contract out, or even privatise, some of their activities. As the Townsville City council said:

> … if you introduce competitive neutrality into your business operation and then three years down the track you find that business operation cannot survive under competitive neutrality, the policy–making body may then turn around and say, 'We've got to sell the assets, We've got to have industrial relations reform. We've got to … downgrade' … (trans., p. 778)

Similarly, the increased transparency that can come from NCP reforms may also lead governments to look closely at the cross-subsidisation of certain services or to elect to change, for example, the level of or manner in which community service obligations (CSOs) are delivered.

The provision of CSOs is discussed in chapter 12. In this context, it is important to note that, in relation to social goals, as the NCC has stated:

> … it is entirely consistent with competition policy for governments to increase spending on welfare, to increase the level of government funded or subsidised social services, to retain businesses in public ownership and so on. (NCC 1998a, p. 48)

**While NCP can be seen as a recent addition to a range of microeconomic reforms, it is critical (for the reasons outlined in the previous section) to distinguish the *requirements* of NCP from the use of *discretionary* policy. In some instances, the obfuscation of policy choices — for example, claims that NCP has forced certain reforms — is deliberate.**

## 11.4 NCP and State and Territory governments

When the national approach to competition policy for Australia was formulated, the general principles behind the NCP proved to be unexceptionable and all nine signatory governments committed themselves to the reforms and associated grants.

Recently, however, NCP has been questioned by some of these jurisdictions. Several politicians have portrayed NCP as an ideological crusade by the NCC which is usurping the power of parliaments by dictating to the States and Territories on matters such as how many casinos they need. Others have wrongly attributed certain policy reforms to NCP. For example, it has been claimed that the privatisation of government utilities and compulsory competitive tendering are necessary to meet NCP commitments.

In November 1998, the Queensland Parliament passed a motion condemning NCP:

> It is about time National Competition Policy was changed because of the damage it has wreaked by destroying jobs throughout rural and regional Queensland. (Beattie 1998)

Adverse reaction to NCP from some of its signatories has centred on claims of a loss of State sovereignty. However, perusal of the intergovernmental agreements indicates that the State and Territory governments:

- can implement their own prices oversight for government businesses — some jurisdictions have opted to establish their own mechanisms, others have not;
- are free to determine their agendas for meeting competitive neutrality (CN) principles — there are marked differences between States' CN policies;
- are free to determine how to reform their public monopolies — significantly different approaches have been adopted by jurisdictions and some have gone further than required under NCP by privatising businesses;
- can determine how competition principles will be applied to local government — each jurisdiction's approach properly reflects its circumstances; for example, Queensland has many local governments which provide large-scale infrastructures, whereas other jurisdictions do not;
- can institute their own effective access regimes, rather than adhere to the national regime — some governments have their own access regimes dealing with specific infrastructure (eg gas pipelines, shipping channels and rail networks);
- can continue to deliver CSOs — for example, the water reform agreements specify that a water service can be delivered at less than full cost, provided that the subsidy is disclosed and, ideally, paid to the provider as a CSO;
- can institute their own legislation reviews — State and Territory governments have completed or are presently conducting around 1800 reviews; and
- have recourse to 'public interest' criteria to allow consideration of non-economic factors — for example, a South Australian review found that, although aspects of its Water Resources Act are restrictive, it provides a net public benefit by reducing environmental damage and therefore should be retained.

The area where NCP is perceived to exert a stronger influence on State sovereignty is through the CoAG water agreement. Water reform is a point of contention in Queensland as the Commonwealth Government has decided to suspend part of Queensland's competition payment for non-compliance in this area — in particular, Queensland's decision to proceed with a dam which the NCC claims does not come out favourably on benefit-cost or environmental grounds (see chapter 4). Some consider the requirement for new water infrastructure to meet a rate of return as inimical to national development (Hon. Rob Borbidge, MLA, trans., p. 970).[2] The Queensland Government questioned the 'NCC's technical capacity to assess the merits of this scheme or to "second guess" the legitimate decision making role of the Queensland Government on matters of public interest' (sub. D302, p. 3). It argued that, because conventional economic analysis tools fail to provide a useful basis for judgement in such cases, it has a role in making a value judgement.

Indeed, there is an 'exceptional circumstances' clause in the water agreement that provides for a relaxation of the criteria where there is a demonstrable community benefit. Moreover, a State can build any dam it sees fit. Under NCP, if a State or Territory considers that an agreed reform is not worth pursuing, or wishes to undertake an action that is contrary to its NCP agreements, it is free to do so. However, if that action cannot be justified on 'public interest' grounds, the Commonwealth Government can reduce that State's competition payment.

In sum, the agreed NCP commitments provide a high degree of flexibility for the States. This is acknowledged by some jurisdictions. For example, the Tasmanian Government submitted that:

> … the NCP agreements do not, in general, compel governments to introduce specific reforms. For example, they do not require privatisation of government business or contracting out and do not expect that deregulation will be the outcome of an independent review. In fact, NCP provides governments with flexibility to deal with circumstances where competition might be inconsistent with particular objectives that are valued by the community. For example, under NCP, there is no restriction on governments subsidising social services to rural and regional Australia. (sub. 198, p. 6)

The Western Australian Treasury said that:

> The impacts of NCP are to a large extent within the hands of Western Australians, since there is considerable flexibility in interpreting the agreements and scope to consider more than purely economic or commercial considerations in choosing to what extent and by what mechanisms to implement the reforms. (Western Australian Treasury 1998, p. 4)

[2] As noted in chapter 5, new water infrastructure is not required to generate an operating profit from day one — no new dam would be likely to meet such a criterion.

As the Hon. Rob Borbidge, MLA, Queensland submitted:

> The Commonwealth, the State, and the Territory governments, *not* the National Competition Council, *not* the Productivity Commission, *not* the Australian Competition and Consumer Commission, are the architects and the implementors of NCP.
>
> It is high time all parties to the agreement were up-front in accepting that responsibility. (sub. D279, p. 4)

Given the flexibility available to all jurisdictions, it is likely that criticisms of NCP by governments reflect responses to a range of factors, including:

- *Resistance to economic reform*: Resistance to reform in general has increased as demonstrated by recent electoral support for groups seeking to oppose a continuation of a range of microeconomic reforms;
- *Poor management of reforms*: In many areas, governments have failed to address adequately the social dislocation that can accompany change. Managing reform — including the provision of adjustment assistance — is a legitimate concern for many people in country Australia, as country areas often have borne the brunt of adjustment from, for example, employment losses associated with reform of government electricity and rail businesses, many of which pre-date NCP. (The role of governments in assisting people to cope with change is discussed in chapter 13);
- *Reforms becoming more difficult*: The first tranche of NCP was mainly about processes — for example, putting in place price oversight arrangements — whereas the second and third tranches require progress with 'on the ground reforms' (see chapter 5); and
- *Vested interest lobbying*: NCP challenges the protected status of some groups which have condemned processes which might undermine that position and result in significant changes in the assistance provided to them.

Finally, it is apparent that it is convenient for some politicians to depict NCP (or the NCC) as responsible for reforms which are unpopular with some groups in order to deflect criticism. The State Member for Gippsland West, Susan Davies MP alluded to such possibilities:

> Competition Policy has been used in Victoria to justify the implementation of a very radical and rapid social change agenda. The commitment appears to be more ardent than is apparent in other states, based, I would submit, on ideological fervour rather than actual necessity as per the legislation. (sub. 87, p. 1)

A tendency to attribute inappropriately certain policy actions to NCP was also found by the Senate Select Committee on the Socio-Economic Consequences of NCP:

> At the higher levels of NCP administration there appears to be a good understanding that the policy is a tool that Governments can use to facilitate the efficient use of

resources and to achieve the outcomes — both social and economic — that the community wants. The Committee is aware that NCP has been used as an excuse by some agencies to realise other policy objectives. (Quirke 1999, p. xi)

**FINDING 11.2**

*Without a clear delineation of responsibility for reform initiatives, there is scope for jurisdictions not to take responsibility for potentially unpopular discretionary actions, but rather to imply (explicitly or implicitly) that they are required to do so under NCP.*

## 11.5 Measures to improve understanding of NCP

A prerequisite for improving the operation of NCP — which forms the basis for the rest of this chapter — is to enhance the extent of understanding about it in the community. Better dissemination of accurate information about NCP will:

- assist those charged with implementing reforms in country Australia to understand better what is required under their respective State or Territory NCP agreements and the options to meet these commitments;
- assist those (potentially) affected by NCP reforms to provide informed public input into review processes;
- reduce the possibilities for NCP reforms to be wrongly condemned or applauded for the effects of unrelated sources of change, thereby jeopardising the potential for improvements to its operation; and
- make governments more accountable for policies which they have undertaken that have little to do with commitments entered into under NCP.

RECOMMENDATION 11.1

***All governments should take steps to ensure that the information they provide about their National Competition Policy undertakings is:***

- ***accurate in terms of both its content and relationship to other policies; and***
- ***publicly available in a readily accessible form and is provided to those implementing, and those most likely to be affected by, National Competition Policy reforms.***

The South Australian Government said that it 'already provides this information' (sub. D298, p. 4). The Balanced State Development Working Group (sub. D273) considered that 'publicly available' and 'readily accessible' should include availability of the information in printed and computer form to every shire council and principal library in each shire. The Commission sees merit in this suggestion.

Misgivings about NCP reinforce the need for review processes to be conducted in a way which facilitates public participation and ensures that the reports address all relevant issues. For example, it is important that legislation review reports are: publicly available and accessible; easy to read; demonstrate how the terms of reference have been followed and met; and explain the evidence underpinning decisions. It is also important that, in the case of major reviews, open, transparent and independent comment on review outcomes be encouraged.

Given widespread misunderstandings about NCP in many parts of the community, the Commission considers that it is essential for NCP review processes and reports to adopt a strong educative role.

RECOMMENDATION 11.2

***Governments should require major legislation reviews to go further than simply determining compliance or otherwise with National Competition Policy principles. Reviews should be based on genuine public input, be conducted in a transparent manner, outline the likely distribution of costs and benefits, and inform interested parties why and how reform, or maintenance of the status quo, will lead to superior outcomes and performance than the alternatives.***

## 11.6 Operation of the 'public interest' provisions of NCP

Clause 1(3) of the Competition Principles Agreement (CPA) of NCP provides for wider 'public interest' matters to be considered in weighing up the benefits and costs of reforms relating to competitive neutrality, public monopolies and legislation reviews (see chapter 4). NCP therefore provides a framework for including in decision–making a range of non-economic factors such as those associated with regional development, welfare and equity.

### 'Public interest' — a contextual setting

Some participants sought a very broad interpretation of 'public interest'. Australian Justice For All (AJFA) argued:

> The definition of 'public interest' needs to take on a broader meaning within economic and social impacts; the widening gap between rich and poor; the isolation of rural communities; how living standards and cost benefits equate to competition and how far they can fall without increased productivity. (sub. 102, p. 4)

The comment from AJFA serves to highlight an important point about the role of the 'public interest' provisions of NCP. Some of the economic and social impacts

identified by AJFA, such as income differentials between rich and poor, are better addressed through more direct mechanisms such as the tax-transfer system and the social safety net — a point noted by the Queensland Chamber of Commerce and Industry, South West Regional Council:

> Where governments seek to achieve some social equity or other (re)distributional outcomes on the basis of 'public interest' or 'public benefit', these should be pursued through other policy channels, such as taxation and/or public expenditure. (sub. D225, attach. 2, p. 5)

NCP operates alongside, and in conjunction with, other policies which aim to address directly environmental, regional development and social concerns. Better community outcomes may be achieved by implementing a particular reform and using more specific policies to address social concerns. This *may* be preferable to using the 'public interest' test in a way that results in a reform being stalled or its benefits diminished. As the Commonwealth Treasury has cautioned:

> Governments have means of promoting fairness of income distribution including transfer payments and taxation systems and via programs to provide subsidised goods and services. Competition policy, on the other hand, is a very blunt instrument for achieving fairness of outcomes: if equity considerations were allowed to override … efficiency goals … competition policy could make the community poorer in the aggregate sense. This would act to reduce the level of income available to redress income distribution via transfer payments and the taxation system. (Commonwealth Treasury of Australia 1991, p. 6)

This highlights the importance of using the most appropriate instrument to meet particular objectives. Because reform invariably involves winners (often diffuse) and losers (typically concentrated), a short–term or narrow view of costs and benefits could enable the 'public interest' test to be used to halt or modify beneficial reforms. That said, where proceeding with a policy change would lead to social costs which unequivocally outweigh the community benefits, the appropriate use of the 'public interest' test as part of the benefit–cost assessment of the reform could legitimately tilt the balance in favour of the status quo (or a modified reform) in order to avoid such costs.

Professor Quiggin (sub. D215) considered that the Commission may subscribe to the view that non-economic (ie 'public interest') criteria should be discarded in all cases in favour of pure efficiency criteria. In fact, the Commission considers that it is proper to consider both economic and non-economic criteria when assessing the benefits and costs of particular reform initiatives.

Moreover, the 'public interest' test was agreed upon by nine sovereign governments and would be, in all likelihood, difficult to renegotiate. Thus, the key issue is not the merits or otherwise of the test, but its appropriate application. The issue occupying

the minds of many participants is what constitutes 'appropriate' application. To date, there has been little in the public domain to inform this debate. This issue is taken up next.

## Poor understanding of the 'public interest' test

During the course of the inquiry it became apparent that, given the scope for NCP reforms to affect communities in country Australia, many participants were poorly informed about the 'public interest' test. For example, the Shire of Dandaragan, like many local government authorities, considered that:

> Local government is not receiving sufficient guidance from government on such issues as defining public interest. (sub. 50, p. 2)

The lack of familiarity with NCP in general, and the 'public interest' test in particular, was reflected in many incorrect comments such as the following from the Shire of Jerramungup.

> Competitive Neutrality does not accept the governments' obligations to provide universal access to essential services and provide certain customer service obligations on the basis of equity. (sub. 1, p. 3)

The lack of awareness of the existence, scope and practical operation of 'public interest' highlights a failure in the provision of information. Whereas officials in the capital cities tend to have a sound appreciation of the 'public interest' test, many of those charged with implementing NCP-related reforms in country Australia are poorly informed. Governments are trying to rectify these problems — for example, Queensland has instituted training for local governments to explain the practicalities of public interest assessments (NCC 1999a, p. 98).

**FINDING 11.3**

*The manner by which restrictions on competition may be considered under NCP is not well understood by many people. This is consistent with a wider lack of effective communication about, and hence appreciation of, what constitutes NCP and how it is implemented.*

## Practical application of the 'public interest' test

Apart from problems associated with a lack of understanding about the 'public interest' test, a key issue raised by participants revolves around its *application*. For instance, the National Farmers' Federation noted:

> Matters that need to be considered in the public benefit test are diverse and frequently in conflict. For example, satisfying equity and social welfare criteria are frequently antagonistic to efficient allocation of resources. (sub. 144, p. 24)

The Senate Select Committee on the Socio-Economic Consequences of the NCP also reported general confusion over what constitutes 'public interest'. It considered that 'this confusion then translates into confusion on how to apply the "public interest" test' (Quirke 1999, p. xii). Its views are summarised in box 11.2.

**Box 11.2 Senate Select Committee views on the 'public interest' test**

On the 'public interest' test, the Commission's and the Committee's inquiries found that understanding of the 'public interest' test is poor and that reviews need to be transparent and better explained. Both inquiries raised concerns about different approaches to 'public interest' across jurisdictions and noted that problems stem from the *application* of the 'public interest' test.

On the confusion about the 'public interest' test, the Committee stated that it is:

> … concerned that this confusion when combined with the administrative ease of simply seeking to measure outcomes in terms of price changes, risks an administrative response of application of a narrow, restrictive, 'public interest' test rather than one which takes account of the wider social impacts …
>
> Responsibility for administration/implementation of the NCP has, in all jurisdictions, been placed in Treasury or Premiers portfolios … In the Committee's view this has led to a predominantly economic rather than multi-disciplinary approach involved in the implementation of NCP and in particular the 'public interest' test … (p. xii).

The Commission has difficulties with inferences which could be drawn from this view.

- *The ease of simply measuring outcomes in terms of price changes*. It would be incorrect to infer that NCP-related assessments are conducted simply on the basis of price changes. Such an approach would indicate only the extent of income transfers and could not lead to an informed judgement about efficiency or net community benefits or costs;
- *Implementation of NCP rests with State Treasuries and Premiers' Departments which have an economic, rather than multi-disciplinary, approach.* It is proper that this role rest with the coordinating agencies of government which have an over-arching State-wide (or economy-wide) view which accounts for the interests of producers, users and consumers. This does not preclude participation of agencies with a 'client-oriented' focus — independent review panels can be, and are, drawn from outside of central agencies. A transparent review process, taking submissions from all interested parties, should adopt a 'multi-disciplinary' approach.

*Source:* Quirke (1999, p. xii and pp. 101–7).

Professor Quiggin considered that public interest matters are being ignored, particularly in relation to requirements for compulsory competitive tendering in

Victoria and for commercialisation of local government services in other jurisdictions:

> ... local governments are effectively prohibited from favouring local contractors, even if the closure of those businesses would lead to the contraction in the local economy ... (sub. 12, p. 25)

In terms of NCP *principles*, this statement is incorrect. It could, however, reflect practices in some jurisdictions. Indeed, Professor Quiggin acknowledges that governments could have done things differently — that is, competitive tendering is not required under NCP — but considers that 'this does not help local governments much' (sub. D215, p. 1).

The Commission has been made aware of cases where local governments have used 'public interest' considerations to retain local employment. For example, Canegrowers Burdekin noted that Burdekin Shire Council's decision to maintain local employment, rather than contract out its services, had come at a cost to ratepayers (chapter 8).

Glenelg Shire Council (sub. D253) provided a similar example based on a study of the impact of NCP on three local councils.

> $500 000 road works contract: competition from a number of large metro-based firms, one of whom submitted a tender $30 000 lower than the in-house team, yet the contract was awarded to the in-house team … The reasons for awarding the contract to the in-house team (a decision made by Council against the recommendation of the tender evaluation panel) were: (i) the retention of local expertise and resources, (ii) the maintenance of a competitive situation (ie concern about possible private monopoly in the future with the loss of in-house capacity and benchmark), and (iii) the retention of economic activity within the local community. (Ernst and O'Toole 1999, p. 8)

The study also flagged concerns by senior management that this decision could send a signal to private bidders to stay away, with adverse outcomes for ratepayers.

Thus, some of the concerns expressed to the Commission may highlight policy actions initiated by some governments under the banner of NCP.

These issues aside, there are difficulties associated with the application of the 'public interest' test. There are no defined 'weightings' attached to the 'public interest' criteria. While this can provide the flexibility to take into account the individual circumstances of particular reform initiatives, it means that those conducting reviews do not have recourse to a simple template and must consider all relevant factors in deciding where the 'public interest' lies.

The lack of guidance on interpretation of the criteria may mean that certain matters are overlooked or that benefits or costs are over or understated. It also can create uncertainty because the test can be interpreted differently:

- over time — the relative importance of 'public interest' criteria may change;
- across reviews — the same criteria may be assigned different relative importance across different reviews; and
- between jurisdictions — different governments may place different emphasis on 'public interest' factors leading to varying outcomes for reviews of similar activities.

### *The NCC's guiding principles on the 'public interest' test*

Recognising the difficulties faced by many charged with conducting NCP reviews and implementing reforms, the NCC has recently sought to provide some guidance on how to use the 'public interest' provisions to weigh up the benefits and costs of particular reform initiatives (see box 11.3). The NCC's view that 'all public interest considerations intrinsically carry equal weight' could be misconstrued to convey an impression that, in terms of the matters listed in clause 1(3), a relatively minor negative impact under one criterion could be given equal weighting against a major positive impact under another.

Box 11.3 **Weighing up costs and benefits and the 'public interest'**

The NCC has released a discussion paper which, among other matters, indicates its views on the 'public interest' test:

> 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 … 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* (emphasis added).
>
> For example, a review into the merits of a statutory marketing arrangements 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* ...

*Source:* NCC (1999a, pp. 97–8).

The Commission considers that, as a starting point, all of the criteria have equal *status*. In practical terms, however, they will have differing *relevance* in each particular case. The relevance of each 'public interest' criterion will need to be established, in terms of its contribution to the overall costs and benefits of proceeding, or not proceeding, with the particular reform. That is, once an evaluation is under way, the elements of the public interest criteria should *not necessarily* be afforded equal weight. And, where it is considered that a benefit related to a particular public interest criterion is relevant, it is important to assess whether the objective could be achieved in some other way.

It is incumbent on jurisdictions to provide more guidance on the application of the 'public interest' test. Indeed, the Hawker Committee recommended that the parties to the NCP should coordinate their efforts to achieve a common set of principles to apply the 'public interest' test (Hawker 1997a). In its response, the Commonwealth Government said that:

> Under NCP all jurisdictions retain sovereignty over how to apply competition policy. This discretion is central to implementing competition policy. … Nonetheless, the discretion that all jurisdictions retain has resulted in some inconsistencies between jurisdictions. … the Commonwealth will work with the States and Territories towards the development of a common set of basic principles to apply the public interest test. (HRSCFIPA 1998)

The New South Wales Government (sub. D283) supported the development of national rather than State-based principles as more conducive to consistent application of the 'public interest' test. Until this cooperative venture to develop a common set of principles has come to fruition, all jurisdictions should ensure they make available (interim) guidance on the content and application of the 'public interest' test. While most jurisdictions have published such material, the level of detail varies and the evidence to date indicates clearly that the dissemination of such information often appears to be wanting.

RECOMMENDATION 11.3

***All governments should publish and publicise guidelines which:***

- ***outline the purpose and scope of the 'public interest' provisions of the Competition Principles Agreement; and***
- ***provide guidance on how the provisions should be interpreted and applied.***

***The common set of basic principles for application of the 'public interest' test which is intended to be developed jointly by governments also should be published and disseminated widely.***

The Commission considers that a range of 'scenario' examples, or case studies, may be instructive in demonstrating the operation of the 'public interest' test. For example, the South Australian Government, in conjunction with the Local Government Association of South Australia, has issued guidelines on the application of NCP to local governments (sub. D224). This document provides an 'operational' example of how the 'public interest' test could be applied with respect to a council-run meals-on-wheels activity that could be said to be in competition with a home-delivered fast food operation. It notes that the 'public interest' test would allow non-economic factors (eg food preferences and nutritional needs of consumers and the social benefit from interaction with volunteers) to be factored into the cost-benefit analysis.

### *The boundaries of the 'public interest' test*

Another issue which requires clarification relates to the 'boundary' of the 'public interest' test. Should it be applied at the level of a local community, a State or Territory, or the nation? In some cases, the answer is self-evident — for example, national legislation reviews (eg newsagents) versus local government reviews (eg restrictions on hawkers, or a decision not to contract out a local council's service).

In the latter case, for example, a local community may be prepared to pay higher rates or forgo some other service (or accept a lower standard) in order to maintain local employment. The costs and benefits of the decision will be borne by the local community concerned. This is in contrast to national reviews, where the 'public interest' test is based on a national economy-wide assessment of costs and benefits. A 'grey' area, requiring judgements to be made, lies between these two cases.

It is not clear whether an economy-wide perspective is adopted by all States and Territories for legislation reviews within their jurisdictions which have implications for people outside of their boundaries. Failure to consider broader benefits and costs could mean that a State based review might arrive at a different 'answer' to a review that took a national economy-wide view. It could also set in train some perverse incentives with implications for regional adjustment by allowing anti-competitive restrictions to remain in place, even where the costs clearly outweigh the benefits. For instance, in the case of dairy industry deregulation, the ability of several States to maintain effective farm gate controls on milk depended on the outcome of the Victorian dairy legislation review. This could have provided an incentive for them to maintain the *status quo* for their dairy industries and allow Victorian deregulation to render their farm gate controls relatively ineffective. For States other than Victoria, this:

- avoids the political difficulties associated with 'actively' removing assistance to their dairy farmers; and
- makes it easier for them to avoid considering adjustment measures or compensation — in the event of a Victorian deregulation of farm gate controls, the adverse consequences for other jurisdictions would derive not from their own removal of restrictions, but from 'external' pressures.

The possibility of 'strategic behaviour' by jurisdictions in such situations could be reduced by cooperative reviews, as occurred with the review of barley marketing legislation in Victoria and South Australia, or by independent national reviews. Of course, a genuine economy-wide review, in pursuit of net national gains, would need to ensure that negative impacts upon particular communities were assessed as thoroughly as in a review carried out by an individual State.

The Commission considers that, for important legislation reviews where the impacts of reform are likely to extend beyond the jurisdiction conducting the review, the costs and benefits should be weighed in terms of the national interest — even to the extent that reforms may lead to adjustment costs in the 'home' State, but greater overall benefits in other States (implying an overall national benefit).

The Commission recognises that State sovereignty is a fundamental component of the NCP package. Nonetheless, it is desirable that the national interest should be considered when State and Territories are considering the form of legislation reviews (for example, joint-State reviews).

RECOMMENDATION 11.4

***In the case of reviews of anti-competitive legislation which may have significant impacts extending across jurisdictions, the benefits and costs should be weighed in terms of the interests of Australians as a whole.***

### *Taking account of adjustment costs in the 'public interest' test*

The Centre for International Economics (CIE), has proposed that, in making recommendations and writing up review reports:

> It may be necessary to identify timing considerations in making recommendations and to identify groups likely to gain or lose from the changes proposed. Issues of compensation may need to be dealt with. (CIE 1999, p. 50)

The CIE view carries with it the implication that adjustment issues (whether by way of compensation or other forms of assistance) may need to be 'integrated' into review processes. Indeed, Agriculture, Fisheries and Forestry – Australia (AFFA)

considered that insufficient regard has been paid to adjustment costs in the application of the 'public interest' test:

> … the way in which the test has been applied may not always give sufficient cognisance to adjustment costs and the flow-on impacts of the consequent reforms to other regions and industries.
>
> The public benefit test should explicitly include an assessment of the temporal, spatial and cumulative effects of the reforms. In particular, the adjustment costs and the flow-on impacts of reform in other industries and regions should be clearly highlighted in the public benefit test.
>
> Consultation with rural communities that are likely to be directly affected by particular reforms should be a requirement of the public interest test. (sub. 200, p. 29)

Identifying 'adjustment' costs in the decision-making process is critical if a review is conducted appropriately. However, using the 'public interest' test to *address*, in advance, these costs is another matter. For example, it was noted in chapter 10, that there have been very large job losses in publicly–owned utilities since the mid-1980s. Yet, the growth in private sector employment in those activities has led to a net increase in jobs in these same industries. This would not have been anticipated with any certainty at the time the reform process commenced. In effect, had these reforms been initiated *after* the commencement of NCP, a decision not to proceed with reform may have been made on the basis of unduly large adjustment costs factored into the 'public interest' test. This example highlights the complexities associated with attempting to identify all of the (longer term) winners and losers of reform before the event.

In addition, and taking a pragmatic view, AFFA noted that:

> … it would be inappropriate for review panels to pre-empt government decisions on whether, and what type of, assistance should be provided to regions or sectors significantly disadvantaged by reforms. However, at a minimum the public interest test could inform decision makers on areas potentially facing high costs from reforms. (sub. D301, p. 2)

The issues of reform and adjustment are explored in more detail in chapter 13.

That said, in this report, the Commission has made recommendations which aim to:

- ensure that appropriate mechanisms are in place so that all affected parties — including country communities — are informed about NCP processes; and
- increase the understanding of the application of the 'public interest' test and provide some guidance on its interpretation.

These changes, if implemented, may go some way to obviating the need for adjustment assistance by ensuring that proposals for reform give due regard to, and

proceed in a manner which, takes into account all of the economic and non-economic benefits and costs.

## 11.7 Modifying NCP

Part A of this report documented concerns about the economic and social circumstances of communities in country Australia — circumstances which many participants attribute to NCP. However, some of the staunchest critics of NCP have acknowledged to this inquiry that it simply is not possible for NCP to have created the 'havoc' attributed to it.

For instance, the Queensland Government said that:

> NCP is one of a number of influences currently impacting upon rural communities and it is too early in the implementation phase to make any definitive assessment of the impacts of NCP reforms to date. (sub. 202, p. 12)

Similarly, the Tasmanian Government contended that:

> … it is considered somewhat premature, at this stage, to attempt to provide any comment in relation to the impacts of NCP on rural and regional Australia as they might apply to Tasmania. (sub. 198, p. 5)

And, the ACT Regional Leaders' Forum (in conjunction with the ACT Government) said that:

> Compared to the effect of structural changes to the economy, there appears to be only minor impacts on the region due to competition policy. In addition, competition policy reforms are relatively recent and it is too early to confidently determine its impact. (sub. 192, p. 8)

These views are indicative of those expressed at the Commission's meetings throughout country Australia. Once the elements of NCP had been clarified — which was often significantly different from people's initial perceptions — many felt that it was too early in the implementation phase of NCP to pass judgment on its effects.

As noted in chapter 10, many of the costs associated with implementing NCP are likely to be of limited duration. In contrast, many of the benefits are likely to be ongoing. Based on the evidence provided in part A of this report, the analysis of the long-term sources of change and the limited information available to date about the effects of NCP, the Commission considers that there is no case for calling an across-the-board halt to the NCP program.

## Reviewing NCP

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

As noted in chapter 4, the terms and conditions of the Competition Principles Agreement (signed in April 1995), the Conduct Code Agreement (signed in April 1995) and the operation of the NCC (established in November 1995) will be reviewed after five years.

The Hon. Rob Borbidge, MLA, called for reviews to be brought forward:

> An *immediate* review by the parties on the operation and the terms of NCP would therefore be only slightly ahead of the timetable originally set by the Council of Australian Governments, and holding a review of the role of the NCC would be somewhat earlier than was originally intended, I think it would be commonsensical to deal with that issue simultaneously. (sub. D 279, p. 2)

As noted above, State and Territory governments generally considered this inquiry to be somewhat premature given the difficulties they have encountered in determining the impact of NCP so early in its implementation. Taken with the fact that this report is being forwarded to the Commonwealth Government in late 1999, the Commission considers that bringing forward the CoAG reviews would not be advantageous.

The forthcoming reviews will, however, provide a direct opportunity for the States and Territories to air their concerns about NCP processes, competition payments, definitional and scope issues associated with the intergovernmental agreements and the role of the NCC. The substance of these concerns can be tested in the reviews.

## Extending NCP timeframes

Some State governments contended that the time required to implement NCP reforms has been underestimated. For instance, the South Australian Government reaffirmed its support for NCP, but regarded the timelines set for implementing the package as too ambitious and in need of review. It considered that full implementation of all legislation reviews would be problematic given the need, in some cases, to adopt phasing arrangements.

Similarly, the Queensland Government said that:

> … the timelines for the conduct and implementation of the reforms emanating from the legislation review timetable needs to be reconsidered. Whilst the reviews may be completed by the year 2000, it may not be practical or possible in some instances to

> implement the reforms by that date … many of the reforms require lead-in or transitional periods to assure that adverse impacts are minimised. (sub. 202, p. 3)

In assessing the merits of such claims, the Commission sought a response from the NCC. The Council forwarded a copy of correspondence sent to jurisdictions which outlines its approach for its 1999 assessment procedures. The Council stated that:

> Where governments consider that phasing of reform is necessary, the Council expects governments to provide a public benefit case where restrictions are retained beyond the CPA target date of the year 2000. (Correspondence supplied to the Commission)

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

The need for extensive consultation(s) is also seen as necessitating an extension of time. The South Australian Government commented that:

> … there has been significant delay arising from the extensive consultative processes required to finalise specific targets and to develop appropriate policy positions and transition strategies, many of which are still not adequately resolved. For example, the start of the national electricity market has been delayed three times in the last twelve months. (sub. 156, p. 9)

The Queensland Farmers' Federation also sought an extension of NCP implementation timeframes where reforms are regionally concentrated and impact adversely on rural communities (sub. D258). This is discussed in chapter 13 which deals with reform implementation and adjustment issues.

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. Full implementation of these agreements has required, and will continue to require, public consultation and discussion in many forums (eg CoAG, Ministerial Councils and meetings between State officials) to finalise the practicalities of converting general principles into action plans. For example, the implementation of water reforms has involved significant consultation among the States and Territories to clarify objectives, processes and timelines.

Thus, where the achievement of original timeframes has proved to be infeasible, CoAG has agreed to new timelines — for example, to provide for full implementation of the national electricity market, and for water, gas and road transport reforms. Also, the NCC has acknowledged that some reviews will not be completed according to legislation review schedules. In addition, the Council has recognised that reform outcomes may need to be phased in beyond 2000. This is consistent with the Commission's assessment in its report on *Regulation and its Review 1997-98* (PC 1999f), that the far-reaching consequences of some legislation

subject to review mean that the quality of review and reform efforts should take precedence over timelines.

**FINDING 11.4**

*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.*

RECOMMENDATION 11.5

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

The South Australian Government (sub. D298, p. 9) disagreed with this recommendation and sought a formal extension of NCP implementation schedules because it considered that it is difficult to modify NCP timetables. It raised particular problems in relation to the water agreement. Yet, the South Australian Government indicated that, although no formal announcement has been made, a 'tripartite' agreement had been struck in February 1999 to extend the timeframe for substantial completion of the water allocation and trading reforms (see chapter 5).

On this issue, the Association of Rural Water Authorities in Victoria considered that any extension to the reform timetable should not disadvantage those jurisdictions which had met their reform commitments:

> … if the extension recommendation is accepted, it is considered that the jurisdictions which have implemented these fundamental reforms within the current timeframes should receive any tranche payment benefits in line with the initial proposals. However, the rewards for other areas where delay has occurred should be deferred until the required reforms are ultimately implemented. (sub. D296, p. 2)

The South Australian Government's rejection of the Commission's recommendation (recommendation 11.5 above) was not supported by other jurisdictions. Moreover, the Commission re-iterates that this recommendation relates to an 'across-the-board' extension of NCP, rather than possible timetable changes for components of a particular inter-governmental agreement.

## Regulatory frameworks

NCP was implemented for many reasons. One was a presumption that regulation and other barriers which impede competition, while advantaging some groups in the community, may be contrary to the interests of Australians as a whole. The move to greater competition in the markets for some infrastructure services has been

accompanied by the creation of new (mainly State-based), and a widening role for existing (eg the ACCC), regulatory and prices oversight agencies. This has occurred in areas where market power is an issue (eg where public monopolies have undergone structural reforms).

The Commission supports a role for 'competition watchdogs' to regulate conduct so as to avoid abuses of market power. Regulatory oversight can help to ensure that the benefits of reform are not captured only by sectional interests. However, it is important that these agencies function efficiently because regulation of the post-reform environment is as important as the process of undertaking those reforms.

The increasing tendency towards managing competitive outcomes was an issue for some inquiry participants. The Public Interest Advocacy Centre made a general point that, from the perspective of consumers:

> Structural changes occurring in the electricity industry are happening against a backdrop of jurisdictional regulatory differences and territoriality which provides no long-term basis for consumers to believe that their interests will be protected. (sub. 127, pp. 8–9)

The National Farmers' Federation submitted that:

> … we do have industry-specific codes with significant variations within a national framework of the National Competition Policy Reform Act. We also have State-based regulation. We have the ACCC involved and, within the electricity reform sector, we also have a number of institutions called the National Electricity Court Administrator which is a quasi–regulator and something called a National Electricity Marketing Company which operates the pool system. So we do have a range or, what one would call, several layers, if you like, of regulation and institutions operating, say, in the energy sector. (trans., p. 845)
>
> … part of the regulatory process has become quite complex — complex in terms of government interference and complex in terms of regulators applying very complex methods of arriving at rates of return. (trans., p. 846)

United Energy cited many instances of what it considered to be inefficient regulatory practices adopted in some jurisdictions. It considered that:

> Where regulation is required, it is intended to stimulate competitive market processes and to be light handed, incentive driven and non-intrusive.
>
> … [current] frameworks are inadequate to the task, allowing regulators to implement regimes which are frustrating rather than fostering the principles and objectives of policy and which are against the long term interests of consumers … (sub. D217, p. 3)

In the gas industry, AGA raised concerns that the regulated rate of return for Victorian gas distributors may adversely affect the industry's incentive to invest and improve service quality (chapter 5).

The most appropriate form of regulation for particular market circumstances is an issue for regulatory agencies around the world. Approaches other than rate of return and price-caps (for example, CPI-X) include price freezes, revenue caps, earnings sharing (where earnings over pre–set levels are shared by the regulated firm and its customers) and hybrid schemes such as price caps coupled with earnings sharing (Sappington & Weisman 1996). United Energy called for a review of current frameworks to test outcomes against policy objectives because it considered that:

> Some regulators have failed to inform themselves of best practice incentive regulation, opting for the illusory comfort of traditional heavy handed cost of service/rate of return regulation which has had such a dismal record in the UK and the US and is now widely derided. (sub. D217, p. 4)

The need for efficient and effective regulatory design is also relevant to access regimes. Apart from the national access regime in Part IIIA of the Trade Practices Act, there are special regimes for telecommunications (Part XIB and C of the Trade Practices Act) and for airports (under a Commonwealth Airports Act). Special rules also apply for gas. As noted earlier, there are separate State-based access regimes (eg rail) as well.

An access regime can, by facilitating competitive market outcomes, provide a significant community benefit in a manner which protects the interests of potential new entrants whilst ensuring also that owners of 'essential facilities' are not disadvantaged (see chapter 4). However, a poorly designed or implemented access regime could result in regulation shifting from a mechanism to improve efficiency to an infringement of property rights, with implications for investment in infrastructure — as alluded to by the South Australian and Northern Territory Governments with respect to the proposed Alice Springs to Darwin rail link (chapter 9). Similar issues emerge with a recent access claim to private mining-related infrastructure in the Pilbara. As at August 1999, that case is before the courts.

The national access regime appears to provide access more readily than the model envisaged in the Hilmer report. Similar concerns have been aired by the Industry Commission (IC 1995b, 1997b, 1997c) and others, including the House of Representatives Standing Committee on Communications, Transport and Micro-Economic Reform which reported that:

> ... the main problems of third party access to private infrastructure is one of accommodating the commercial interests and rights of the infrastructure facility owner. In almost all cases, the owner of infrastructure is likely to have made substantial investment, and through that assumed most of the financial risk associated with the facility. Where third party access is deemed appropriate, infrastructure owners would have legitimate grounds to set prices, terms and conditions that cover that risk, plus compensation for revenue loss by competition from new operators (where applicable).

> An imposed access arrangement ... that did not take into account these factors might infringe on the ability of facility owners to exercise basic property rights. (HRSCTCMR 1998, sec. 4.46–7)

Other areas of competition regulation also came under fire from participants. For example, the Southern Riverina Irrigation Districts Council (part of Watering Australia Foundation submission) said that:

> We realise it can take — and nobody will dispute it in the DLWC [New South Wales Department of Land and Water Conservation] — up to seven weeks to transfer water from Murrumbidgee to Murray.
>
> … a lot of things can happen in seven weeks … the price of water can drop from $70 a megalitre to, say, $20 in the space of seven weeks. … it's just not satisfactory whatsoever. We're being required to proceed and it's not proceeding at an institutional level. (trans., pp. 226–7)

The efficiency of regulatory oversight mechanisms across jurisdictions and industry sectors is too broad an issue for this inquiry, but their performance can affect significantly the flow of benefits from NCP and other reforms. In some cases, concerns about various features of regulatory regimes may:

- reflect teething problems as new rules are 'bedded down';
- dissipate as court rulings and 'precedent' help to dispel uncertainty; and
- require governments to consider more closely the aims, objectives and operations of regulatory authorities.

While most jurisdictions systematically review their regulations, the same cannot be said about reviews of the performance of regulatory authorities. For instance, most jurisdictions have regulation review functions within their bureaucracies (eg the Commonwealth Office of Regulation Review) and the legislation review process of NCP also provides a mechanism to assess the efficacy of regulation. In contrast, mechanisms to assess the performance of regulatory agencies — some of which were created relatively recently — are not evident.

The Commission considers that there is a need for governments to ensure that their regulatory agencies are subject to periodic independent scrutiny and review — say, every five years. Such reviews should examine the approach to economic regulation adopted by such agencies with a view to ensuring that they and keep abreast of developments in competition regulation. This could, for example, involve benchmarking their regulatory regimes against best practice.

***All jurisdictions should ensure that their regulatory agencies responsible for the oversight of National Competition Policy-related reforms are subject to periodic independent review to ensure that they are performing appropriately.***

## 11.8 The role of the National Competition Council

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.

Some State governments raised particular concerns about the NCC:

- the Queensland Government sought a diminution of the NCC's role because it considered that the NCC does not pay sufficient regard to the adverse impacts of reform (sub. 202);
- the Tasmanian Government said that the NCC 'tends to bring its own ideological position to the consideration of policy outcomes and dictate those outcomes to governments, outside the [CoAG] agreements' (sub. 198); and
- the South Australian Government said that '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 the final decisions on reform outcomes must rest with elected Governments' (sub. 156).

The South Australian Government (sub. D298, p. 7) claimed that the NCC has attempted to push the boundaries of reform by bringing matters outside the NCP intergovernmental agreements into the competition payment assessment process. It claimed that the NCC has exceeded its brief in areas such as water reforms (by requiring that CSOs be 'well targeted and justifiable') and road transport reforms (by including in tranche assessments timetables that do not give rise to NCP obligations). Some of these claims are based on correspondence between the NCC and State and Territory governments which is not available to the Commission. Others reflect differences in interpretation — for example, the NCC has stated that the changes relating to road transport reforms were endorsed by CoAG as part of the framework for the second tranche assessment (see chapter 5).

The Queensland Government raised similar concerns. For example, it stated that:

> … there is a concern regarding the NCC's role in resolution of disputes about interpretation of the NCP agreements …

> The NCP reform process needs to be refocussed on pragmatic outcomes based on thorough public interest analysis. This will not be achieved while the NCC is in a position to place unilateral interpretations on the meaning of NCP agreements. (sub. D302, p. 2)

The Queensland Government proposed that the NCC no longer be the adviser on NCP but that this role be transferred to a secretariat of the Commonwealth Department of Prime Minister and Cabinet reporting directly to CoAG.

The available evidence, particularly with respect to legislation reviews, however, does not support the contention that the NCC dictates outcomes, but rather that it seeks to be satisfied about the integrity of NCP processes. To date, the NCC has recommended only twice that jurisdictions (New South Wales and Queensland) receive a deduction in competition payments. The New South Wales situation has been resolved with that State now agreeing to implement the recommendations of its independent rice review (see chapter 4). Queensland has until December 1999 to provide an explanation for its failure to comply with reform commitments on water infrastructure (see chapters 4 and 5).

On the other hand, the fact that several State governments raised similar concerns suggests that there may be a problem with the way the NCC and the States work together and/or communicate. The Commission considers that these issues should be raised in the forthcoming review of the role of the NCC.

The South Australian Government also stated that conflicts are inherent in the roles played by the NCC.

> 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 increasingly to become an active participant in the policy development process.
>
> The Government believes that there has been a conflict between the NCC's roles in assessing jurisdictions' implementation of NCP and the NCC's desire to influence jurisdictions' policy decisions. (sub. 156, p. 14)

It would seem appropriate for the NCC to advise jurisdictions on NCP issues, particularly given its 'no surprises' policy — that is, to provide early advice where there may be problems which could affect assessments (and advice on payments). As the 'adviser', it seems sensible for the NCC to offer its interpretation of the 'rules'. Admittedly, this could be perceived as an attempt to influence outcomes.

There also could be some justification for concerns about a conflict between the NCC's role as 'adviser' and its role as a participant in policy development arising from its conduct of Commonwealth legislation reviews (eg its recent report on

Australia Post). This is not to question the competence of the NCC in performing this task, but it does leave it open to criticism that it is both interpreting and making the rules.

Given the importance of the NCC's role in monitoring each jurisdiction's compliance with their NCP commitments and in making recommendations to the Commonwealth Treasurer on competition payments, it may be more appropriate for reviews of Commonwealth legislation (and national legislation reviews) to be conducted by bodies that are seen to be more at 'arms-length' from the NCP assessment processes. Such a change is likely to enhance confidence in the role of the NCC and in the integrity of NCP processes.

RECOMMENDATION 11.7

***The National Competition Council should no longer be asked to conduct legislation reviews.***