NATIONAL COMPETITION POLICY

GUIDELINES FOR CONSIDERING THE PUBLIC BENEFIT UNDER THE NATIONAL COMPETITION POLICY

DEPARTMENT OF TREASURY AND FINANCE

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1 Introduction

This document is designed to:

- assist agencies and authorities to understand what is meant by the term 'public benefit' in the context of the National Competition Policy (NCP); and
- provide agencies and authorities with a broad set of guidelines for assessing the public benefit in relation to:
  - the NCP Legislation Review Program (LRP);
  - exemptions under Section 51(1) from the provisions of the *Trade Practices Act 1974* (TPA) and the Competition Code; and
  - the application of the NCP competitive neutrality principles.

In the context of NCP, the factors which may constitute the public benefit will vary from case to case. Consequently, the guidelines are broad in nature, highlighting the range of different factors which may be considered when undertaking public benefit assessments.

- The adoption of five key competition principles relating to:
  - the structural reform of public monopolies;
  - competitive neutrality between public and private sector businesses;
  - prices oversight of utilities and other business activities with significant monopoly power;
  - a regime to provide third parties with a legislative right of access to the services provided by significant infrastructure facilities; and
  - a program for the review of legislation restricting competition.
- The application of all the NCP principles to local government.
- A number of sector specific reforms covering transport, water, gas and electricity.
- The Commonwealth to share with the States and Territories the financial benefits flowing from the implementation of NCP.

A key feature of the NCP Agreements is that they are essentially about reform processes. That is, they commit governments to following a set of guiding principles when reviewing the current manner in which the public sector conducts its activities. Significantly, the NCP Agreements do not require governments to pursue 'competition for competition's sake'. Rather, they guide governments to implement competition reforms where it is in the **'public benefit'** to do so.

Further details on NCP can be obtained from a number of other papers published by the Department of Treasury and Finance which are listed on page 26.

2.1 The Benefits of National Competition Policy

Underlying the signing of the NCP Agreements is a recognition that the Australian economy is characterised by its free market, private enterprise based nature. However, Australian Governments also recognised that growth in some sectors of the economy is being unnecessarily hampered due to a lack of competition arising from legislative restrictions on competition, anti-competitive practices or institutional arrangements that limit competitive behaviour. Against this background, the general aim of the National Competition Policy is to promote free and open competition where it is in the public benefit, which in turn increases efficiency and productivity throughout the economy.

The benefits of greater competition extend to all participants in the economy:

- to consumers - through lower prices, more product choice and better service;
- to business - through cheaper inputs, easier access to markets and industries, better service from input suppliers, greater choice of suppliers and access to improved technology, all of which lead to greater competitiveness;
- to government - through increased revenue from an expanding economy, lower expenditure and improvements in government services; and
- to the economy as a whole - through lower inflation, increased growth, greater investment, a greater choice of jobs and improved standards of living.

3 Definition of 'Public Benefit'

The NCP Agreements do not contain a precise definition of the term 'public benefit'. Instead, the Agreements detail a number of issues that governments must take into account when considering public benefit issues and leave the actual definition of what constitutes the public benefit to the discretion of each jurisdiction.

> In general, an activity or action can be defined as having a public benefit if, on the whole, it can be demonstrated that the benefits it provides to society outweigh the cost of the activity or action to society.

Clearly, this definition is a net concept - that is, there is a need to determine whether the total benefits of some action/activity outweigh the total costs. **Public benefit should not be taken to simply mean that some benefit will accrue to some parties as a result of the action or activity.**

It is important to note that the term public benefit implies that there is an overall benefit to society. **It must not be confused with 'private benefit'** - that is, instances where an activity or action produces a benefit to a specific sector or sub-group of society but, overall, may be detrimental to the whole of society.

In the application of NCP principles in Tasmania, the onus is on agencies, authorities and particular industry sectors which benefit, for example, from legislative restrictions on competition to demonstrate that anti-competitive arrangements are justified as being in the public benefit. Nevertheless, it is important to bear in mind that the State Government is the final arbiter in determining what is in the public benefit.

4 Public Benefit and the Principles of NCP

Special care was taken when drafting the NCP Agreements to ensure that they are generally not prescriptive about the reform outcomes that must be achieved by governments. Specifically, Subclause 1(3) of the Competition Principles Agreement (CPA) requires governments, when applying the principles outlined in the CPA, to:

- balance the benefits of a particular policy or course of action against the costs;
- consider the merits or appropriateness of a particular policy or course of action; and
- assess the most effective means of achieving a policy outcome.

Subclause 1(3) then lists a range of matters that governments should, where relevant, take into account when considering a particular policy or course of action (see Box 1).

Box 1

Matters to be Considered When Applying the Public Benefit Test

The following matters are listed in subclause 1(3) of the CPA as possible issues governments may take into account when assessing whether a course of action is in the public benefit:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

It is important to note that subclause 1(3) is not an exhaustive list of relevant issues and other matters may be considered in the application of the public benefit test. Other factors that could be taken into account when

considering public benefit issues are detailed in Box 2.

Box 2

Criteria Used by the Australian Competition and Consumer Commission for Assessing the Public Benefit

Agencies and Authorities may find it useful, when applying the public benefit test, to have regard to the criteria that is used by the Australian Competition and Consumer Commission (ACCC) in the assessment of applications for authorisations under section 88 of the TPA. Such applications request the Commission to "authorise" certain activities that would otherwise be held to be in breach of the restrictive trade practices provisions of the TPA.

The ACCC assesses the public benefit by determining whether the restriction:

- promotes competition in an industry;
- assists economic development (for example, in natural resources through the encouragement of exploration, research and capital investment);
- fosters business efficiency, especially where this results in improved international competitiveness;
- encourages industry rationalisation, resulting in a more efficient allocation of resources and lower, or contained, unit production costs;
- expands employment growth or prevents unemployment in efficient industries and employment growth in particular regions;
- fosters industry harmony;
- assists efficiency in small business (for example, by providing guidance on costing and pricing or marketing initiatives which promote competitiveness);
- improves the quality and safety of goods and services and expands consumer choice;
- supplies better information to consumers and business, thereby permitting more informed choices in their dealings at a lower cost;
- promotes equitable dealings in the market;
- promotes industry cost savings, resulting in contained or lower prices at all levels of the supply chain;
- encourages the development of import replacements;
- encourages growth in export markets;
- implements desirable community standards with a minimum impact on competition in the marketplace; or
- implements steps to protect the environment.

Clearly, when applying the public benefit test in relation to specific anti-competitive arrangements, it will not be necessary in all instances to

address all of the issues detailed in Boxes 1 and 2, as not all of them will be relevant.

When applying the public benefit test agencies and authorities must clearly identify who is affected by the anti-competitive arrangement and explain what the benefits and costs to the public are and who will receive or bear them. By clearly presenting this information, the State Government will then be in a position to determine if there is a public benefit to society in retaining an existing legislative restriction on competition or proceeding with a proposed policy or course of action.

The remainder of this paper provides an overview of how to apply the public benefit test when implementing the NCP principles, particularly those relating to:

- Legislation Review;
- Exemptions from the provisions of Part IV of the TPA; and
- Competitive Neutrality.

4.1 Legislation Review

In the area of legislation review, the CPA requires each participating government to review and, where appropriate, reform all legislation restricting competition by the year 2000. The guiding principle in this reform area is that legislation (both primary and subordinate) should not restrict competition unless it can be demonstrated that:

(a) the benefits of the restriction to the community as a whole outweigh the costs; and

(b) the objectives of the legislation can only be achieved by restricting competition.

This principle must be applied to both existing anti-competitive legislation and new legislative proposals that will impose a restriction on competition.

To meet Tasmania's legislation review obligations under the CPA, the Government developed a Legislation Review Program (LRP), which was approved in June 1996.

When reviewing existing legislation or assessing new legislation under the LRP, the Government has the discretion to approve new legislation, or retain existing legislation, that restricts competition if it deems that the restrictions are in the public benefit.

Under the LRP, reviews or assessments of restrictions on competition that are of a major nature require the preparation of a Regulatory Impact

Statement, which will necessarily involve the estimation of those costs and benefits that are quantifiable, using cost-benefit analysis. Reviews or assessments of restrictions on competition of a minor nature, whilst not requiring a full cost-benefit analysis, require the preparation of a minor review or assessment statement that must identify the nature of the costs and benefits involved. In both cases, the aim of the LRP is to ensure that the Government is provided with appropriate information on which it can then determine whether the existing or proposed restrictions on competition are in the public benefit.

In this respect, when advising the Government on whether anti-competitive legislation has a public benefit, consideration should be given to the matters listed in Boxes 1 and 2. If it is considered that the existing or proposed legislation enhances any of these matters and the benefits to the public of retaining or introducing the legislation outweigh the costs, then a clear argument justifying the legislative restriction should be developed which outlines those benefits and costs in some detail.

The justification should detail, as precisely as possible, the benefits and costs of implementing or retaining the anti-competitive legislation and an assessment of whether the perceived benefits are considered to outweigh the expected costs. Wherever possible, costs and benefits should be quantified. Again, it is emphasised that the public benefit can involve issues that are not detailed in Boxes 1 and 2. Agencies and authorities should feel free to consider other issues if they will assist the Government in determining if there is a public benefit.

To illustrate the application of the public benefit test, Box 3 briefly outlines a hypothetical case involving the costs and benefits of the existing legislative monopoly that lawyers have on conveyancing services. It is stressed that this example is a guide only, as different restrictions on competition will require different considerations.

Appendix A contains two further examples of issues involved in the assessment of the public benefit. These examples are based on the ACCC's assessment of applications for authorisations under section 88 of the TPA.

Box 3

Conveyancing

Conveyancing is the process of transferring an interest in land and property. Under Tasmanian law, the business of transferring interests in land for reward is reserved exclusively for lawyers. However, there is no prohibition on citizens undertaking their own conveyancing.

Under NCP, when the relevant legislation is reviewed under the LRP, the Government will need to be convinced that the monopoly that lawyers hold on conveyancing is properly justified if it is to remain. The following summarises the main public costs and benefits of maintaining the lawyer monopoly on conveyancing.

Public Costs Associated with Maintaining the Monopoly:

The monopoly may:

- mean that the cost of conveyance transactions are artificially high due to the lack of competition;
- decrease consumer freedom of choice in deciding who they wish to perform conveyance services;
- force people who live in remote areas where there are no lawyers to travel to urban areas to obtain this service;
- decrease the efficiency of conveyance transactions, given that lawyers are often required to divide their time amongst a range of different activities;
- inhibit innovation in the provision of conveyancing services;
- result in the over-regulation of the industry, given the fact that individuals are able to perform their own conveyance services. This suggests that there is no reason to prevent non-lawyers from performing this service; and
- distort the market for legal services by making lawyers more dependant on income from conveyancing than may otherwise be the case.

Public Benefits Associated with Maintaining the Monopoly:

The monopoly may:

- protect the public by ensuring that conveyancing services are of a high standard, given that lawyers are required to possess certain qualifications and adhere to a stringent set of controls and ethical standards;
- increase the efficiency of conveyance transactions, given that a lawyer can perform other legal matters that are associated with more complex conveyancing transactions; and
- provide a consistent source of income for lawyers.

It is important to bear in mind that a decision on whether the conveyancing monopoly is in the public benefit requires each issue to be considered individually and an implicit weighting to be assigned as to its importance.

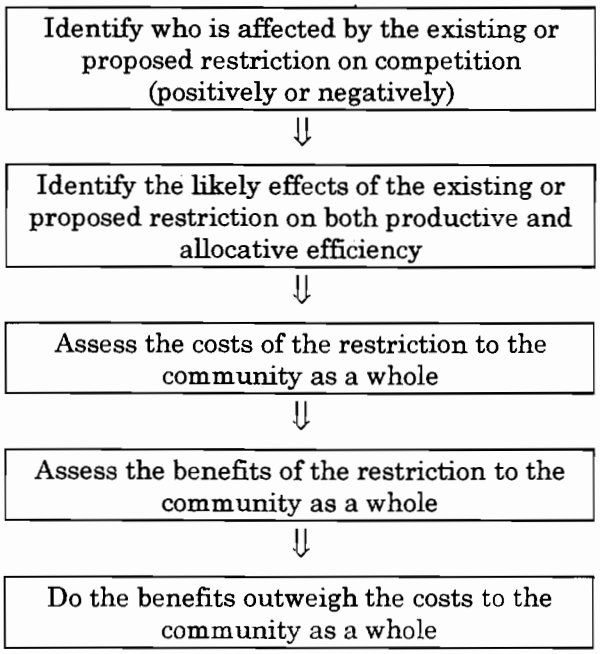
4.1.1 Step-by-Step Guide for Assessing the Costs and Benefits to the Community from a Legislative Restriction on Competition

This section provides a step by step guide for assessing the costs and benefits to the community associated with a particular legislative restriction on competition. The first two steps involve identifying who is affected by the restriction on competition and then evaluating the effect the restriction will have on both productive and allocative efficiency[1]. Steps 3 and 4 entail identifying the costs and benefits of the restriction to the community as a whole and the last step involves the application of the public benefit test by evaluating whether the benefits outweigh the costs.

The five step process is graphically depicted in Diagram 1 and then outlined in greater detail.

Diagram 1

Steps for Assessing the Costs and Benefits of Restrictions on Competition



[1] Productive efficiency is achieved when a given level of goods or services is produced at the lowest per unit cost with the current resources available for production. Allocative efficiency is achieved where the resources available for production are allocated to their most productive uses.

STEP 1: Identify who is affected by the existing or proposed restriction on competition (positively or negatively).

- Identify the classes of market participant affected either directly or indirectly by the restriction.
- Identify other sectors of the community affected directly or indirectly by the restriction.

STEP 2: Identify the likely effects of the existing or proposed restriction on both productive and allocative efficiency.

Has or will the restriction:

- Increase/reduce the unit cost of producing the good or service?
- Affect the cost of inputs to the production process, limit the type or quantity of inputs that can be used, inhibit the capacity of producers to achieve scale economies or discourage the development of more efficient forms of business structures?
- Generate distortions in competitive markets - for example, by imposing conditions on one group of market participants that do not apply to actual or potential competitors?
- Affect incentives to increase or reduce production levels, costs or product quality?
- Enable producers to maintain prices above marginal costs?

Would customers:

- Be willing to purchase alternative, lower priced or lower quality goods or services, if available?
- Be willing to purchase more of the product than will be produced as a consequence of the proposal?

STEP 3: Assess the costs of the restriction to the community as a whole.

- Quantify or otherwise assess the costs imposed on consumers, industry, government and the community generally, including administrative and enforcement costs.

In assessing the costs of the restriction, determine whether:

- The legislation results in a lessening of competition relative to what would otherwise have occurred.
- Firms are more likely to work together to produce outcomes favourable to themselves.
- Economic rents[2] accrue to producers due to entry restrictions.
- Unintended income transfers result.
- Consumers have less choice among suppliers, reduced choices at lower price/quality combinations, less information on available alternatives than they otherwise would have, or are denied 'no frills' options.
- Some consumers will drop out of the market because their preferred price/quality combination is no longer available.
- Administrative costs are met by those whom the legislative restriction is designed to benefit or by the general taxpayer.

STEP 4: Assess the benefits of the restriction to the community as a whole[3]

- Quantify or otherwise assess the benefits deriving to consumers, industry, government and the community generally.

In assessing the benefits of the restriction, determine whether:

- The quality of the good or service affects third parties.
- Safety considerations are involved.
- Consumers are able to make more informed choices as a result of the legislation.
- The legislation removes the risk of very poor quality goods or services being available on the market.

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[2] Economic rents is a general term used to describe the surplus of revenues over 'normal' profits (which are those profits which are normally required to attract firms into an industry).

[3] Tangible benefits need to be shown to result from the restriction. For example, although occupational certification requirements may guarantee that entrants have undertaken the necessary training to carry out tasks associated with the particular occupation, it does not guarantee the subsequent standard of service provision.

- The risk of illness or injury from unsafe products or practices is significantly reduced.
- There are environmental spillovers involved.
- The legislation prevents the over-exploitation of a natural resource.
- The legislation improves the operation of markets - for example, through the creation of property rights that ensure that all benefits and costs accrue to the owner.
- The legislation results in the provision of a public good which would not otherwise be provided.

STEP 5: Do the benefits outweigh the costs to the community as a whole?

- Determine if data is available to quantify costs and benefits and undertake a full cost-benefit analysis, encompassing all costs and benefits (including social, environmental and public safety as well as economic and allocative efficiency).
- If a full formal cost- benefit analysis is impractical, assess the risks presented by the problem which the legislation is intended to address. Determine if the risks to individual consumers or to public health and safety are sufficient to outweigh the costs of the restriction.
- Determine whether the legislation ensures that external costs are internalised.
- Consider if the legislation is the most effective available to deal with the risk.
- Determine if there is an alternative use of available resources which would result in greater overall benefit to the community.

The following points should be taken into consideration when completing Step 5:

- While ideally quantitative estimates of the costs and benefits should be provided, this will often be difficult, if not impossible in practice. Accordingly, a more practical approach may be to assess the risks to the exposed population in the absence of the legislation. If the risks are deemed unacceptable, then the judgment may be that the benefits of the legislation outweigh the costs. The focus should then be on the most cost-effective/least cost means of dealing with the identified problem.

- In calculating a dollar benefit, cost savings should where possible be estimated. For example, a restriction may be shown directly to reduce workplace accidents in a particular industry by 50%. If accidents cost the industry $xx per year in lost time, insurance etc, then the dollar benefit generated will equal 50% of $xx.
- Where it is not feasible to place a dollar value on social benefits (for example, a greater sense of community safety due to the legislation of the sale of particular items (guns, narcotic substances etc.), or the value of national parks - ie. individuals place an intrinsic value on knowing that the parks exist), indicate the general *order of magnitude* of these benefits. If possible, refer to sources (for example, community surveys) which demonstrate the weight placed on these values by the community.
- From an efficiency perspective, the relevant public benefit test is the net balance of costs and benefits. However, it is appropriate to identify distributional consequences as well. As far as practicable, costs and benefits should be assessed in relation to:
  - "winners" and "losers" from the legislative restriction;
  - the inter-generational impact of benefits and costs; and
  - income effects - for example, an increase in energy costs to households and non-metropolitan users as energy prices become more cost-reflective in a deregulated environment.
- Those who bear the costs of a restriction on competition may differ from those who benefit. Consequently, the costs and benefits must be examined from the perspective of the wider community. In assessing private benefits, it is necessary to distinguish benefits resulting from enhanced efficiencies and those accruing to individuals through increased market power as a result of reduced competition. The former will generate benefits for the wider community while the latter will not. Examine the effects on other markets (for example, the labour market) and community welfare, as well as the more direct changes in administration costs, compliance costs, changes in service standards etc.

4.2 Exemptions from the Provisions of Part IV of the Trade Practices Act

The restrictive trade practices provisions of Part IV of the TPA were extended to cover all businesses, regardless of their ownership, by virtue of the Commonwealth's *Competition Policy Reform Act 1995* (CPRA) and the State Government's *Competition Policy Reform (Tasmania) Act 1996*. This latter Act extended the coverage of Part IV of the TPA to all businesses in Tasmania from 21 July 1996, whether they are incorporated or unincorporated or publicly or privately owned.

In the past, governments have been able to use the 'Shield of the Crown' exemption previously provided for in section 2A of the TPA to protect State-owned businesses from the application of Part IV of the TPA. They have also been able to pass legislation (under section 51(1) of the TPA) exempting restrictive arrangements in certain industries or professions. The CPRA removed the Shield of the Crown protection and placed greater restrictions on States and Territories making arrangements for exemptions for anti-competitive behaviour under section 51 of the TPA.

Prior to the commencement of the CPRA, section 51(1) of the TPA contained a general power which allowed State governments to authorise (by legislation) conduct that would otherwise be in breach of Part IV of the TPA.

Under the CPRA, section 51(1) of the TPA was amended so that State governments may only authorise anti-competitive conduct through legislation if the following requirements are satisfied:

- the State legislation is very specific in terms of the precise anti-competitive conduct it authorises;
- the authorisation for the anti-competitive activities is contained in primary legislation (although temporary regulations can be made that may only apply for two years);
- the State legislation specifically refers to Part IV of the TPA; and
- the State legislation does not relate to mergers or the acquisition of assets which have the purpose or effect of substantially lessening competition. (The States cannot authorise conduct which would otherwise contravene section 50 or section 50A of the TPA. Only the ACCC can authorise such conduct).

Where Tasmania enacts legislation containing provisions which rely upon a section 51(1) exemption, written notice of the new legislation must be sent to the ACCC within 30 days of its enactment. The Commonwealth Government then has up to four months in which to effectively over-ride such an exemption through regulation. If the exemption is not over-ridden in four months, the Commonwealth can only over-ride the exemption if it tables in Commonwealth Parliament a report from the NCC on:

- whether the benefits to the community of the legislative exemption, including the benefits from transitional arrangements, outweigh the costs;
- whether the objectives achieved through the legislative exemption can only be achieved by restricting competition; and
- whether the Commonwealth Government should make over-riding regulations for the purposes of section 51 of the TPA.

Clearly, any proposals for a section 51(1) legislative exemption must be

appropriately justified under the LRP using the public benefit test. This will minimise the possibility of the Commonwealth over-riding a State Government decision to exempt a particular activity from the provisions of Part IV of the TPA.

Rather than seeking a section 51 exemption for anti-competitive activity, it is preferable that State agencies and authorities seek authorisation from the ACCC for any anti-competitive activities. **It is important to note that agencies and authorities must, when seeking such authorisations from the ACCC, progress the application through the Department of Treasury and Finance.**

4.3 Competitive Neutrality

Clause 3 of the CPA outlines the competitive neutrality principles which governments have agreed to apply to significant Government Business Enterprises (GBEs) and other Government business activities.

As stated in the CPA, the objective of the competitive neutrality principles is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities.

Where appropriate, governments are to meet their competitive neutrality obligations by corporatising GBEs and other significant business activities. Where corporatisation is not considered practicable, the CPA proposes costing reforms such that the costs of goods and services reflect the full attribution of production costs, including taxes and charges.

The *Government Business Enterprises Act 1995* (GBE Act) assists the State in meeting its NCP obligations relating to competitive neutrality. The GBE Act, which commenced on 1 July 1995, provides a generic legislative framework for the full corporatisation of Tasmanian GBEs. The application of the corporatisation model is compulsory for all GBEs in Tasmania.

In relation to Government agencies which carry out business activities, the competitive neutrality principles will only apply to those business activities which are regarded as 'significant'. The Government will also be guided by a public benefit assessment to determine where the application of the competitive neutrality principles is 'appropriate' for such activities.

In general, the application of the competitive neutrality principles is most appropriate where there is a strong and mature market. However, even in a non-contested market, the application of the principles can improve the allocation of resources. Issues that must be considered when determining whether the application of the competitive neutrality principles is appropriate include:

- the accessibility of consumers to the services provided by the business activity;
- the state of the private market;
- the view of key stakeholders, which may include the Commonwealth, other States, unions, consumers and competitors;
- whether the Government, as owner, expects the activity to have a predominantly profit making focus;
- the size of the activity;
- the extent to which the activity should be commercialised for reasons other than competitive neutrality; and
- the net public cost of adopting either the corporatisation model or the full cost attribution model.

As with the LRP, the decision to proceed with individual competitive neutrality reforms depends on the Government's assessment of the relevant benefits and costs. Accordingly, assessments for introducing competitive neutrality reforms should be made along similar lines to LRP assessments, having regard to the range of issues listed in Boxes 1 and 2.

An example of the application of the public benefit test when considering applying the competitive neutrality principles is detailed in Box 4. Again, this case study is only a hypothetical guide to applying the public benefit test, as the circumstances for the application of the competitive neutrality principles may differ.

Box 4

Applying Competitive Neutrality Principles to the Office of the Valuer-General

Section 46 of the *Land Valuation Act 1971* requires Local Government to use valuations supplied by the Office of the Valuer-General (OVG) for rating purposes. The OVG is a business unit within the Department of Environment and Land Management and operates on a cost recovery basis.

Assuming the provision of valuation services is a significant business activity, a competitive neutrality issue is whether the full cost attribution principle should be applied to the OVG's property valuation services.

Potential benefits to the public arising from this action may include:

- State and local governments being made aware of the full cost of providing the valuation service;
- the potential for the further development of a private sector valuations industry in the State;
- ring fencing of the Valuer-General's service delivery responsibilities from the 'core' role of regulating the standards and practices of the valuation systems for rating and land tax purposes across the whole State;
- an increase in the transparency of valuation pricing policies;
- the potential for savings from contracting out valuation services;
- increased accountability regarding the timeliness of valuations; and
- greater efficiency in conducting evaluations as the full cost of the valuation service becomes apparent.

Potential costs from applying full cost attribution may include:

- a possible loss of jobs in the OVG in the longer term if the transparency of full cost attribution leads to contracting out of valuation services; and
- a potential negative impact on the Consolidated Fund if the tied arrangements with local government were to be removed and the valuations conducted by private valuers were not recorded in a centralised valuation database. If this was to occur, the Government would need to undertake a second valuation for State Government purposes.

5 Conclusion

It is important to keep in mind that NCP is about boosting the competitiveness and growth prospects of the national economy into the future. The three NCP Agreements do not compel governments to introduce specific reforms and are not about 'competition for competition's sake'. This aspect is reflected in the fact that the Agreements provide a consistent requirement for 'public benefit' tests to guide the policy decisions taken by governments under the NCP umbrella.

These tests list economic efficiency considerations as only one element of the broader public policy context, which also includes other policy objectives which governments must balance in making policy decisions (such as ecologically sustainable development, social welfare and equity considerations, community service obligations and the interests of consumers in general).

Different mechanisms are available for providing exemptions for anti-competitive arrangements and behaviour under the different principles. However, the issues upon which a decision is made as to whether the activity or action constitutes a public benefit are broadly similar.

It is important to note that the State Government is the final arbiter in determining what is in the public benefit. However, in reaching this decision, the Government will rely heavily on the outcome of public benefit tests undertaken by agencies or authorities which make use of the guidelines contained in this paper.

APPENDIX A

ACCC Authorisations and Notifications

A public benefit test is used by the ACCC when assessing applications for authorisations or notifications for anti-competitive behaviour that would otherwise breach Part IV of the TPA. The current authorisation scheme permits the ACCC to 'authorise' certain voluntary conduct where it assesses that the public benefit from the conduct in question exceeds the anti-competitive detriment.

Notification provides protection from action by the Commission or any other party for potential breaches of the exclusive dealing provisions of the TPA. It differs from the authorisation process in that parties do not have to await a Commission decision. The immunity given by notification operates from the date of lodgement (or soon after in the case of third line forcing) and remains unless revoked by the Commission.

Determining just what is a benefit to the public is a key issue. Rather than develop a narrow definition of what constitutes the public benefit, the ACCC has listed a wide variety of matters that can be considered when applying the public benefit test (these are detailed in Box 2 on page 7).

The Commission looks at the effect on competition in the market overall, not at the effect on individual competitors. Two examples of applications for authorisations are detailed in the case studies below. The first relates to a case where the ACCC determined a public benefit existed and the second relates to a case where the ACCC determined no public benefit existed.

For further details on how to prepare an application for an ACCC authorisation, authors should refer to the ACCC's *Guide to Authorisations and Notifications* and should also contact the ACCC through officers of the Department of Treasury and Finance. Both Treasury and the ACCC will be happy to give assistance to authors when drafting their applications.

Case Study 1 Successful Application for Authorisation - Dupont Ltd Et.Al

The Application for Authorisation

- DuPont (Australia) Ltd (DuPA) and Ticor Ltd (Ticor) sought authorisation on behalf of their subsidiaries, Howson Algraphy (Australasia) Pty Ltd (Howson) and Ticor Chemical Company Pty Ltd (TCC), for a proposed joint venture for the manufacture of sodium cyanide and associated exclusive marketing arrangements.
- TCC is a Ticor subsidiary which operates a sodium cyanide plant in Queensland.
- DuPA markets all TCC's output through an exclusive marketing agreement which was notified to the ACCC in 1993.
- Howson and TCC were proposing to form an unincorporated joint venture to manufacture sodium cyanide at the Queensland plant.
- DuPA wished to secure the exclusive right to sell all product manufactured by the joint venture for a period of ten years.

Benefits Identified by the Applicants

The parties identified a number of public benefits which they claimed would flow from the joint venture, including:

- capital investment in the industry;
- provision of technology to improve environmental standards in sodium cyanide manufacture;
- improvement in plant efficiency;
- an increase in the value of exports;
- import substitution;
- benefits to the economy, both local and national; and
- enhancement of the ability of the joint venture parties to compete in the market.

The ACCC's Assessment

- The ACCC considered it highly likely that demand for sodium cyanide would increase substantially over the coming years in response to technological advances.

- It was noted by the ACCC that the Australian sodium cyanide market was close to self sufficiency and, hence, imports were not considered likely to exercise a significant restraint on domestic prices. As such, imports were not as likely to play a significant restraining role on domestic producers.
- The ACCC was concerned over:
  - the removal of DuPA as a potential entrant in its own right;
  - the entrenchment of the current industry structure over the longer term; and
  - the opportunity for DuPA's United States parent company to exercise control over the joint venture to limit the strategic and marketing opportunities where they conflicted with its global interests.
- The ACCC accepted that:
  - increased production would satisfy forecast demand, which would likely to be otherwise satisfied by imports, thereby assisting Australia's external trade account over the medium to long term;
  - there were import substitution benefits and that future import replacement was a substantial benefit to the public; and
  - the parties' contentions that the techniques and technology that would be brought to the joint venture by DuPA would have significant potential to improve the efficiency of the existing operations and to do so in such a way as to provide substantial environmental benefits.

Authorisation Decision

On balance, the ACCC concluded that the public benefits outweighed the possible anti-competitive detriment and granted the authorisation requested by the parties.

Case Study 2 Unsuccessful Application for Authorisation - Silver Top Taxis

The Application for Authorisation

- Silver Top Taxi Services Ltd (Silver Top) lodged an application for authorisation to acquire the assets of North Suburban Taxis Ltd (North).
- The assets to be acquired were North's 'taxi booking business' and all of North's shares in Cabcharge Australia Pty Ltd. The taxi booking business consists of goodwill and three radio licences.
- Under the proposed agreement, Silver Top was to provide a new radio and mobile data terminal for each North suburban vehicle which transferred to Silver Top.
- Silver Top operates the largest taxi depot service in the Melbourne metropolitan area, controlling around 41 per cent of the total number of taxis operating in the Melbourne metropolitan area.
- North operates a taxi depot service in the northern suburbs of the Melbourne metropolitan area, representing 8.5 per cent of the total number of taxis operating in that area.

Benefits Identified by the Applicants

- In its application, Silver Top made the following public benefit claims:
  - a constraining effect on fare increases due to lower costs for drivers of depot fees, better access to bid for work through a higher standard of communications equipment, more efficient allocation of jobs and a possible improvement in the rate of individual cab usage;
  - promotion of service differentiation;
  - improved passenger and driver safety, particularly through the use of new communications technology; and
  - likely increased competition between taxi operators, including Silver Top's claims that fares were likely to be deregulated.

The ACCC's Assessment

- Silver Top lodged its application after the Commission decided in November 1994 that Silver Top's proposed acquisition of North was likely to breach section 50 of the TPA. The Commission's assessment was based upon the following factors:
  - the two companies had a combined share of about 48-50 per cent of taxi licences in the Melbourne metropolitan area associated with them;
  - barriers to successful entry, especially for a taxi depot of reasonable size, were significant; and
  - the merger would result in the removal of a competitor, allowing less opportunity for customers to choose between services and less opportunity for taxi operators to choose between depots.

Authorisation Decision

On balance, the Commission concluded that the public benefits did not outweigh the possible anti-competitive detriment and did not grant the authorisation requested by the parties.

NCP INFORMATION PAPERS AVAILABLE:

National Competition Policy - Tasmania's Reform Obligations and the New Financial Arrangements, Department of Treasury and Finance, August 1995

Monopoly Prices Oversight and the Tasmanian Government' Prices Oversight Commission, Department of Treasury and Finance, January 1996

Extension of Part IV of the Trade Practices Act to all Businesses in Tasmania, Department of Treasury and Finance, July 1996

Reviews of Legislation that Restrict Competition, Department of Treasury and Finance, June 1996

The Application of National Competition Policy to Local Government, Department of Treasury and Finance, July 1996

The Application of Competitive Neutrality Principles to the State Government Sector, Department of Treasury and Finance, July1996

For copies of these papers or further information, please contact:

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