



**AgEcon** SEARCH  
RESEARCH IN AGRICULTURAL & APPLIED ECONOMICS

*The World's Largest Open Access Agricultural & Applied Economics Digital Library*

**This document is discoverable and free to researchers across the globe due to the work of AgEcon Search.**

**Help ensure our sustainability.**

Give to AgEcon Search

AgEcon Search  
<http://ageconsearch.umn.edu>  
[aesearch@umn.edu](mailto:aesearch@umn.edu)

*Papers downloaded from **AgEcon Search** may be used for non-commercial purposes and personal study only. No other use, including posting to another Internet site, is permitted without permission from the copyright owner (not AgEcon Search), or as allowed under the provisions of Fair Use, U.S. Copyright Act, Title 17 U.S.C.*

# Some Issues in the Application of Competition Policy to Agriculture

*Jennifer Nash, Margot Fagan and Scott Davenport<sup>1</sup>*

The Office of Rural Communities  
NSW Agriculture  
Orange, NSW

Contributed paper to the 41st Annual Conference of the Australian Agricultural  
and Resource Economics Society  
Gold Coast, QLD  
22-24 January 1996

## **Abstract**

National Competition Policy aims to further micro-economic reform by creating a more competitive environment for both industry and government activity. In 1995 Australian Governments agreed to the National Competition Policy package, which included the Competition Principles Agreement. To meet its commitments, the NSW Government has actively applied the principles of the agreement to its various portfolios, including agriculture.

In this paper, comments are provided on process issues associated with implementation of the Competition Principles Agreement that have influenced reform outcomes. Comments are then provided on several specific issues arising from the application of the agreement to agriculture, including the identification and measurement of public benefits and costs.

**Keywords:** National Competition Policy, Competition Principles Agreement, agricultural legislation, public benefit, public cost.

---

1. The views expressed in this paper are those of the authors, rather than those of NSW Agriculture or the NSW Government.

---

## 1. INTRODUCTION

When the Council of Australian Governments formally adopted the National Competition Policy in April 1995, federal, state and territory government agencies implemented a program of competition reform in compliance with the principles. National Competition Policy aims to create a more competitive environment for both industry and government activity by promoting reform which is in the public interest.

One aspect of National Competition Policy is an agreement to review all legislation which restricts competition. NSW Agriculture has completed formal legislative reviews of 3 of its 57 Acts, whilst others are currently in progress, and the remainder will be reviewed over the next 3 years.

In Part 3 of the paper, a series of "process" issues which are potential impediments to the effective implementation of competition policy reforms are discussed.

With the competition policy reform process driven by governments with discretion to determine the legislative reviews they will undertake and their timetable of reform, the nature and rate of reforms is unlikely to meet initial expectations.

This situation has been compounded by the National Competition Council and the Australian Competition and Consumer Commission having not effectively promoted National Competition Policy causing misconceptions among the public and a reluctance on behalf of governments to carry out reforms. Furthermore, it is disappointing that the NCC have not been more proactive in identifying key areas of agricultural policy where reform would deliver significant benefits.

In Part 4 of the paper, a number of issues are discussed relating to the application of competition principles to agricultural legislation. The first of these issues involves distinguishing between industry and public benefit arrangements and associated pricing considerations. Also discussed are the difficulties of defining and measuring public costs or benefits, onus of proof issues and issues associated with the effectiveness of the Trade Practices Act in dealing with anti-competitive behaviour in agricultural markets.

## 2. BACKGROUND TO THE NATIONAL COMPETITION POLICY AGREEMENTS

### 2.1 Introduction

In 1992, Professor Fred Hilmer was appointed by Prime Minister Hawke to chair a review of national competition policy. The Hilmer Report, as the review findings have become known, have had far reaching and significant impacts for all Australian government jurisdictions. The Council of Australian Governments (COAG) adopted the National Competition Policy (NCP) in April 1995.

---

## **2.2 The National Competition Policy Package**

The National Competition Policy package consists of four components, including three intergovernmental agreements and amendments to the Commonwealth Trade Practices Act.

### **(A) Competition Principles Agreement**

The Competition Principles Agreement (CPA) establishes principles on structural reform of public monopolies, competitive neutrality between the public and private sectors, prices oversight of utilities, an access regime to essential facilities and a program of review of legislation which restricts competition.

### **(B) National Competition Policy and Related Reforms Agreement**

The Competition Policy Reform (NSW) Bill was passed in Parliament on 6 June 1995. It operates to apply Part IV of the Trade Practices Act to NSW government agencies and businesses from 21 July 1996.

The National Competition Policy and Related Reforms Agreement provides for financial assistance to the States and Territories in the form of competition payments by the Commonwealth. It is estimated that the initial gains from competition reforms will accrue to the Commonwealth at an initial cost to the States. These payments represent compensation to the states for compliance. The Competition Payments will be provided in three tranches, starting in July 1997, which are dependent on the States meeting agreed reform objectives as assessed by the National Competition Council (NCC).

The first round of Competition Payments is due to be paid to the states in 1997-98. This payment requires the parties to have met the following requirements:

- giving effect to the Competition Policy Intergovernmental Agreements, in particular meeting the deadlines set out on the review of regulations and competitive neutrality;
- effective implementation of the COAG agreements on electricity and gas; and
- effective observance of road transport reforms.

### **(C) The Conduct Code Agreement**

The Conduct Code Agreement sets out the basis for the extension of Part IV of the Trade Practices Act and appointments to the Australian Competition and Consumer Commission (ACCC) (replacing the Trade Practices Commission).

---

## **2.3 The Competition Principles Agreement and Legislation Review**

One of the three Agreements signed was the Competition Principles Agreement. This Agreement is one of the key components of the National Competition Policy package. The principles contained in this Agreement focus on exposing government institutions and trading enterprises, industries or private businesses protected by government legislation to competitive processes.

The Competition Principles Agreement has a number of specific components, one of which is the requirements for legislation review, where the guiding principle of the agreement is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.

Under Section 5 of the Competition Principles Agreement, States are obligated to assess the impact of all anti-competitive legislative regimes. This includes regimes that fall outside the reach of the extended Trade Practices Act, but nevertheless have anti-competitive implications. Primarily this refers to schemes endorsed and protected by State legislation.

In endorsing the Agreement, governments agreed that:

- the objectives of legislation will be clarified;
- the nature of the restriction will be identified;
- the likely effects of the restriction on competition and the economy generally will be analysed;
- the costs and benefits of the restriction will be assessed and balanced;
- alternative means for achieving the same result will be considered;
- any new anti-competitive legislation must conform to the net public benefit principle; and
- retained anti-competitive legislation must be reviewed at least once every ten years to determine if it is still required.

## **2.4 What Legislation Should be Reviewed ?**

To meet its commitments the NSW Government has implemented a broad and extensive legislation review program. The Competition Principles Agreement is not prescriptive in determining what should be reviewed and what constitutes an adequate review process. Each State is free to determine its own review agenda and associated review processes, however the CPA required a review timetable be prepared by June 1996, and where appropriate, that all anti-competitive legislation be reviewed by 2000. The NSW Government has been actively involved in applying the principles of the agreement to its various portfolios, including agriculture.

---

The NSW Government has determined that reviews should be conducted of legislation which:

- establishes statutory marketing bodies;
- restricts market entry/exit, through, for example, occupational and professional regimes or other licensing regimes;
- creates competitive advantages or disadvantages for privately or publicly owned enterprises;
- establishes planning, land use and building approval systems that lead to excessive delays or unnecessary complexity; and
- reduces market contestability (including the imposition of significant costs) or inhibits business innovation.

Consistent with the requirements of Agreements, the NSW Government in June 1996 published statements on its legislation review timetable, competitive neutrality policies and application of the NCP to local government.

## **2.5 The NSW Government's Approach to The Review of Legislation**

### **The Nature of Competition Restricting Legislation in Agriculture**

Much of the legislation in the agricultural portfolio falls within the broad definition of 'legislation which restricts competition' adopted by the NSW Government. It stands to reason that most legislation is designed to influence investment behaviour and hence, influence competition. Agricultural marketing legislation was typically introduced in the 1930s and 40s and was designed to increase producer returns, often unintentionally, at the expense of domestic consumers.

Other legislation typically targets spill-over issues in agriculture, in areas such as disease, pest and weed control and by correcting problems and over and under-investment generates broader public benefits. The issue in this latter area is generally redefining such arrangements so that they more effectively address the spill-overs in question.

### **The Review Process Adopted By NSW Agriculture**

NSW Agriculture conducts the reviews of legislation for which it is administratively responsible.

A Legislation Review Group has been formed within NSW Agriculture to oversee and manage the legislation review process. This group has been involved in:

- developing a timetable in conjunction with The Cabinet Office for review of NSW Agriculture's legislation; and
- developing terms of reference for each review and categories of review process, which are dependant on the extent to which legislation restricts competition and the degree of public consultation required.

---

Category One reviews involve inter-agency and industry representation on the Review Group and an extensive public consultation process involving the release of an Issues Paper, and call for public submissions. Category One reviews apply to reviews of statutory marketing arrangements, and similarly significant competition restricting legislation. A Category Two review is similar to a Category One review, except public consultation is less extensive and industry is not represented on the Review Group. Meetings are held with key stakeholders. These reviews are generally undertaken for non-marketing legislation which is significantly competition restricting.

Category Three reviews are, in the first instance, internal to the agency responsible for the legislation. Subsequent inter-agency consultation may occur. The Review Group is internal to the agency, but usually across disciplines with an internal discussion paper prepared. Public consultation would involve meetings with key stakeholders once potential reforms are developed and possibly the release of a public discussion paper. Category Four reviews are for the purpose of repealing legislation where there is widespread acceptance that the legislation is no longer relevant.

### Reviews Undertaken

A review of the NSW Rice Marketing Board was undertaken in 1995. The Board has vesting powers over rice produced in NSW which effectively provides the Ricegrowers Cooperative, as the Board's sole authorised buyer, with single-desk exporting power. The Cooperative is also the sole supplier of Australian rice to the domestic market and consequently has a monopoly position in terms of price setting for Australian rice on the domestic market. The Board also supplies services to rice growers. Costs for these services, storage, transport, milling, operation and maintenance of marketing services, is pooled amongst growers and deducted from returns.

A review of the Meat Industry Act which constitutes the Meat Industry Authority commenced in March 1996. The Authority is fully industry funded. The Authority has the role of ensuring food safety in the meat industry and has applied minimum operating standards to facilities and licensed operators. It also supplies services to producers of meat animals, funded by a compulsory levy. There are also powers to establish a price stabilisation scheme and to restrict the building or commissioning of new processing facilities.

A review of the MIA Wine Grapes Marketing Board commenced in February 1996. The Board has vesting powers over wine grapes produced in the MIA, which enables it to set negotiated minimum prices and terms and conditions of payment. The Board also provides industry services funded by a compulsory levy.

A review of the Banana Industry Act which constitutes the Banana Industry Committee commenced in June 1996. This Committee is funded by compulsory producer levies and has the power to impose charges in relation to the marketing and transportation of bananas, fruit quality control, promotion, pest and disease control, research and education, market development, crop forecasting and insurance.



---

A review of the MIA Citrus Fruit Promotion Committee commenced in August 1996. This Committee has the power to raise a levy from growers in the region which is used to fund other organisations involved in promotion and research and development. Specific issues considered in establishing the public benefits and costs of the Committee's industry service functions were the provision of market information, industry representation, contribution to a fruit fly control program, research and extension, encouraging a quality management approach and domestic and regional promotion.

The NSW Dairy Industry Act will be reviewed in 1997. The Dairy Industry Act has controls on farm gate pricing, supply controls and food safety objectives.

Other significant legislation that will be reviewed in 1996-97 includes plant and animal disease legislation, legislation regulating veterinary surgeons, legislation regulating the horticultural stock and nurseries industry and chemical residue management legislation.

### **3. "PROCESS" ISSUES ASSOCIATED WITH IMPLEMENTATION OF THE NCP**

#### **3.1 Introduction**

In his report, Hilmer considered ad-hoc sectoral reform and regulatory inconsistencies which enforce rather than break down state and territory differences as considerable constraints on Australian economic growth as it operates in a global economy.

In this section of the paper, the discussion focuses on several issues which may potentially reduce the effectiveness of the NCP. In particular, the approach of the NCP implementation arrangements and the strategy in relation to legislation to be reviewed, the timing of reviews and processes by which they are reviewed.

#### **3.2 Discretion on What Should Be Reviewed**

As well as timing matters, each jurisdiction has discretion to determine what is and what is not anti-competitive legislation, and therefore, what must be reviewed.

Under the Competition Principles Agreement, all anti-competitive legalisation must be reviewed by the year 2000 and as part of their reporting commitments, all jurisdictions were required to submit lists of anti-competitive legislation to be reviewed and review timetables to the NCC by June 1996.

While all jurisdictions submitted such a report, the NCC states in its Annual Report that there were substantial differences in the level of anti-competitiveness in legislation nominated by the different Governments (NCC 1996). For example, the Victorian Government nominated 400 statutes as being anti-competitive and therefore up for review under the CPA (BRW, 23 Dec 1996), while the NSW Government nominated



---

198 and the Commonwealth Government nominated less than 100.

As well as across jurisdictional issues, there is the potential for inconsistencies across portfolios within jurisdictions. Where portfolios are sectorally based, for example, minerals and energy, and agriculture, there is likely to be greater scope for reform and hence more resistance to it. This raises an issue that is not specifically addressed by Competition Policy, the issue being the structural characteristics of government that may impede the reform process.

### 3.3 Timing Issues

The CPA required each jurisdiction, by June 1996, to publish a timetable of reviews of anti-competitive legislation. All reviews must be completed by the year 2000. Notably, there is no consistency between timetabled reviews of complimentary or similar legislation. Notable also is that there have been no jointly conducted reviews to date.

The CPA is not prescriptive about timing of the reform process. Where it is considered that a piece of legislation has a national dimension, it has been left to the individual jurisdiction to determine an appropriate process. Section 5(7) of the CPA states:

*"Where a review has a national dimension or effect on competition (or both), the Party responsible for the review will consider whether the review should be a national review. If the Party determines a national review is appropriate, before determining the terms of reference for, and the appropriate body to conduct the national review, it will consult parties that may have an interest in those matters".*

A specific example of agricultural legislation which has a national focus is dairy legislation. This was initially nominated as a potential national review but this process has broken down and the review process has reverted to individual state-based reviews. The Commonwealth Government has scheduled its package of dairy industry legislation for review in the year 2000, the NSW Government is undertaking its review in 1996/97, with all other jurisdictions between.

Another specific example is the poultry meat legislation regulating growing contracts and establishing a price negotiation mechanism in the broiler industry. The Western Australia Government has already completed a review, NSW has nominated its legislation for review in 1996/97 and the Victorian and Queensland Governments have nominated 1997/98. The South Australian Government is already in the process of repealing their legislation.

The Agricultural and Resources Management Council of Australia and New Zealand (ARMCANZ), the peak body of agricultural and natural resource Ministers recognised the problem of co-ordination and process and set-up a committee to address these issues. The result was a NCP Contact Group, set up under the auspices of SCARM (the Standing Committee on Agricultural and Resource Management).

---

While this group may have facilitated information flows on review timings, review processes and outcomes between Governments, it has not been successful in co-ordinating national or inter-state reviews.

### **3.4 Different Review Processes**

The Hilmer report suggested that in the case of legislation review, the agency administering competition restricting legislation should not be charged with reviewing it, but rather independent review processes should be adopted.

This requirement was not incorporated into the Agreements as a principle, however some Governments have adopted this approach. In Victoria for example, consultants are engaged to deliver independent reviews. The NSW Government has not followed this approach and usually the administering agency is charged with delivering the review, with input by the central agencies.

Process differences of this nature have severely reduced the potential for co-operative effort.

### **3.5 The Limited Coordination of Review Processes**

Agricultural legislation is typically similar between states in terms of objectives, functions and powers. The review of agricultural legislation, including major pieces of marketing legislation with significant *prime facie* anti-competitive elements such as the dairy industry legislation, chicken meat legislation, the grain marketing and levy raising powers, is however, likely to continue to be on a state by state basis.

Individual Governments have placed little importance on initiating broader review processes even where there are compelling reasons for undertaking cross-jurisdictional or national reviews. The explanation would appear to lie in the discretion each jurisdiction has in relation to timing and process, which has resulted in political imperatives holding sway over other considerations.

The result is reform on a sector by sector basis and fragmented state-based legislation and differences in regulations between Government jurisdictions. This can add unnecessarily to the costs of business which is not the intent or in the spirit of the National Competition Policy.

### **3.6 The National Competition Council - Its Role in Determining Process Issues**

#### **The National Competition Council**

The National Competition Council (NCC) is one of the two peak competition agencies across Government. The NCC is established by the Trade Practices Act (TPA). It was created on 6 November 1995 to support the Australian Governments National Competition Policy agenda. The NCC is an independent review and advisory body,

---

while competition regulatory functions fall to its closely linked body, the Australian Competition and Consumer Commission (ACCC). The NCC oversees issues of National Competition Policy compliance across all Governments and has its work program agreed to by COAG annually.

The Council's current program objectives are:

- ◊ to promote micro-economic reform within the community, including by undertaking research and providing advice to governments on competition policy matters;
- ◊ to recommend to relevant Commonwealth, State and Territory Ministers on applications for declaration of access to services provided by nationally significant infrastructure and the certification of access regimes under Part IIIA of the TPA;
- ◊ to assess progress with agreed competition policy reforms, and to recommend to the Commonwealth prior to July 1997, July 1999 and July 2001 whether the conditions for National Competition Policy payments to the States and Territories have been met; and
- ◊ to recommend on whether State and Territory government businesses should be declared for prices surveillance by the Australian Competition and Consumer Commission, and to report on costs and benefits of legislation reliant on section 51 of the TPA.

The NCC may also become involved in conducting reviews and providing advice to the Commonwealth, State and Territory Governments covering the review of restrictive legislation, the structural reform of public monopolies, prices oversight and competitive neutrality arising out of the competition policy agreements, and any other projects as agreed by the majority of Governments.

(NCC Annual Report 1995-96)

### What Role Is The NCC Playing ?

The NCC has not yet been involved in the legislation review process or competitive neutrality reforms, but has concentrated on applications made under the national access regime. While its main role is as an oversighting and advisory agency, the NCC has not taken a proactive role in identifying key areas for reform and associated processes.

The NCC acknowledges in its Annual Report (1995/96) that while some jurisdictions did not nominate essential legislation, a case in point being their Audit Acts, they are under no obligation to review them.

However, it is recognised that there are a number of factors which have impacted on the performance of the NCC. First, the NCC has only been operating for a year and second, it is a small agency. The Council comprises five part-time councillors, a research secretariat of 13 staff and has an annual budget of approximately \$2 million.

While the NCC is a small agency, perhaps the single most important impediment to it fully achieving its objectives is that it was established after the agreements were signed

---

and major processes determined.

### **3.7 Compliance Processes - Is there an Incentive To Comply ?**

In the Agreements, it was not made clear what process would be adopted by the NCC in assessing the adequacy of legislation reviews in terms of review processes, and review outcomes. For example, would compensation payments be reduced on the basis of assessed review losses or would the entire payment not be made.

In fact, it seems as though neither are the case. For example, a review was completed of the legislation establishing the Rice Marketing Board in NSW which found that the Boards activities resulted in anti-competitive effects, and some aspects of its functions which were possible to reform, did not yield net public benefits. Despite this, the NSW Government has largely elected to maintain the status-quo.

The NCC in its Annual Report criticised the NSW Government for not implementing those reforms and it also criticised other state governments and the Commonwealth Government for not listing all their anti-competitive legislation for review.

However, seemingly regardless of these criticisms, early indications are that the NCC "report cards" on the States may recommend that all Governments receive the first tranche of payments.

### **3.8 Is the National Competition Policy Being Sold To the Community ?**

#### **Common Perceptions**

A fundamental problem with the National Competition Policy is that it was not sold well to the community and the communities elected representatives.

Many sectors of the community and many political representatives have elected to view it simply as either a government cost cutting exercise or the economic rationalists seeking deregulation for the sake of it. The perception is that competition is being promoted at the expense of individuals, where there is no fairness and protection from the State for individuals, which results in socially unjust or undesirable outcomes.

Specifically, common perceptions on the outcome of the NCP and competition reform that continue to arise are:

- the benefits of competition only flow to consumers, and there are equal and opposite costs to those producing the consumable, for instance, primary producers;
- competition policy is about de-regulation;
- it results in Governments walking away from their core responsibilities of protection and providing for the weaker members of society, and selling out instead to large business and multinationals; and
- that benefits in terms of lower prices are not passed on to consumers but are captured by the wholesalers and supermarkets.

---

Generally there is a lack of awareness on what the NCP is and what it can achieve, and concern that the NCP will impose unforeseen costs on the community at large. It seems that there has been no real discussion within the community on the fate of the economy if the level of regulation, and thus business costs, are not reduced. Nor has it been highlighted that greater government and private sector efficiency will maximise the revenue generating capacity of the Australian economy and in so doing, enable Australian Governments to better address fundamental areas of government service provision, such as health, welfare, environment and cultural preservation.

Clearly a better understanding by the community of the long-term benefits is a key to reform and the implementation and maintenance of the National Competition Policy. It is also clearly the responsibility of the major competition agencies, the NCC and the ACCC.

#### **4. APPLICATION ISSUES**

##### **4.1 Introduction**

In this section of the paper, issues that have arisen in the application of competition principles to agricultural legislation are discussed. They include the identification of the public benefits, the measurement and weighing of costs and benefits of regulatory activities, funding of public benefit activities and the application of anti-trust legislation to agricultural markets.

##### **4.2 What is in the "Public Interest" ?**

###### **The Public Interest is Undefined in the Competition Principles Agreement**

The central principle of the National Competition Policy is competition reform in the public interest. In relation to legislation, the CPA states that the guiding principle is that legislation 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 test is obviously intended to incorporate the 'public interest' requirement. However, there is limited further discussion in the CPA on the appropriate identification of 'benefits to the community as a whole' or 'costs'.

In Clause 1(3) it specifies that where the agreements call for:

- (a) the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
- (b) the merits or appropriateness of a particular policy or course of action to be

determined; or

(c) an assessment of the most effective means of achieving a policy objective; the following matters, where appropriate, be taken into account;

- 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 of a class of consumers;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

These principles appear then to be open to considerable interpretation of what is in the 'public interest', and also, what is appropriately identified as benefits and costs to the community. A key issue is whether the issues listed above align with market failure considerations.

### The Trade Practices Act and Public Interest

Further guidance on defining the public interest can be obtained from the Trade Practices Act (TPA). Applications may be made to the ACCC for authorisation of certain anti-competitive behaviour under the TPA. In the case of arrangements which have the effect of substantially lessening competition, the TPA provides that the Commission may grant the authorisation if the applicant satisfies the following tests (found in Sections 90(6) and 90(7) of the Act):

- the provision of the subject arrangements have resulted, or would result or be likely to result, in a benefit to the public; and
- the benefit would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or would result or be likely to result, from the arrangements.

The TPA must balance the two effects to determine which is greater and if the public benefits or expected benefits outweigh the anti-competitive effects, then authorisation may be granted. The TPA does not attempt to define 'public' benefit as such and therefore does not shed much light on what is/can be considered in the public interest. Boston Consulting, in undertaking a review of sugar marketing arrangements in Queensland, compiled and examined a list of what the Commission and Tribunal have recognised as public benefits in past determinations and authorisations.

They came to the conclusion that economic efficiency effects were predominantly, but not exclusively, considered as providing public benefits (The Boston Consulting Group,

---

1996). Their conclusion was that the 'public interest' test in the CPA would be at least as broad, and most likely broader, than that specified in the TPA.

A more recent (draft) determination by the ACCC included reduced transaction costs in their assessment of public benefits. The application was from Inghams Enterprises Pty Ltd to collectively negotiate a standard five year growing agreement with its contract chicken growers. Market exchanges involve transactions costs because people do not have full information and have bounded rationality. Transactions costs arise from processing information on the value of goods and services exchanged and the performance of agents involved in the exchange or the enforcement of agreements.

The issue of the public interest and its intent has also been considered closely by consumer and community interest and advocacy groups. In a paper on pro-competition law and consumer welfare, Johnston<sup>1</sup> also examined trade practices legislation and the concept of public benefit. He found that in the legislation 'public benefit' can be seen broadly as 'anything of value to the community generally, any contribution to the aims pursued by society including, as one of its principal aims, the achievement of the economic goals of efficiency and progress'.

However, Johnston went on to say that an examination of matters constituting public benefit recognised in the authorisation of anti-competitive conduct by the former Trade Practices Commission and the Tribunal have not wandered far from matters of economic policy. He further states that:

*"It does not ... address any 'public interest' in having governments resolve potential conflict between allocatively efficient outcomes and equitable outcomes".*

Johnston judges that the 'public interest' matters listed in the CPA, where Governments shall where relevant take into account the factors listed in section 1(3), actually 'require a broader view' of public interests in determining policy outcomes and actions.

### The NCC's Approach to Public Interest

The NCC released a paper '*Public Interest Under the National Competition Policy*' in November 1996. They noted that some members of the community have expressed concerns about possible adverse social consequences arising from pro-competitive reforms, but note also that the central feature of the NCP is its focus on competition reform 'in the public interest'.

The paper highlighted that despite the focus on competition, Governments do have flexibility in dealing with circumstances where competition might be inconsistent with the weighting placed by the community on particular social objectives. In particular they focus on Subclause 1(3) of the CPA.

---

<sup>1</sup> When this paper was written Craig Johnston was a Principal Policy Officer with the Public Interest Advocacy Centre.



---

The NCC feels that, consistent with the Trade Practices approach, Section 1(3) allows anything deemed to be of value to the community to be judged in the public interest, rather than being exclusive or prescriptive with the listing. They consider Section 1(3) is simply a list of indicative factors, which does not exclude any other matters they wish to consider.

### Single Desk Exporter Powers - A Specific Example

A particular example has arisen in relation to statutory marketing arrangements in the NSW rice industry.

In 1995, the NSW Government undertook a competition policy review of the legislation (the Marketing of Primary Products Act 1983) establishing the NSW Rice Marketing Board. The objective of the Act is to 'facilitate the commercial and efficient marketing of agricultural commodities in the best long term interests of producers'.

Single desk selling was a particular issue that arose. It was found that the Board was able to obtain above normal returns from certain overseas markets which were assessed as public benefits. This conclusion could be interpreted to mean that while it is unacceptable to extract above normal returns from domestic consumers it is acceptable to do the same to overseas consumers.

A more difficult issue was establishing, in an ex ante sense, whether proving that single desk selling was superior to a deregulated arrangement. For example the above normal returns from export markets associated with single-desk selling may be offset by the additional revenue generated by a large number of sellers developing an increased range of Australian rice products for overseas consumption.

### Conclusion

In conclusion, the existing public benefit guidelines are broad, providing governments with ample opportunity to interpret them to their own advantage.

The NCC feels that public interest is a broad definition and that the CPA has been deliberately non prescriptive or conclusive to allow governments some freedom. While the approach in Section 1(3) conveys the particular concerns of interest groups it fails to provide an underlying rationale for their acceptance. Greater focus on market failure considerations would provide an on-going rationale for Government intervention.

## 4.3 The Quantification of Costs And Benefits Of Regulatory Controls

### The Assessment of A Net Public Benefit

Under Section 5 of the Competition Principles Agreement, all Governments are obliged to assess the impact of all anti-competitive legislative regimes. This includes regimes that fall outside the reach of the extended Trade Practices Act, but nevertheless have anti-competitive implications. The requirement is that legislation should not restrict

---

competition unless it can be demonstrated that the benefit to the community as a whole outweighs the cost, and that the objectives of legislation can only be achieved by restricting competition.

The NSW experience during current reviews is that considerable emphasis has been put on:

- requiring proof of net costs before legislation is reformed, rather than requiring the proponents of legislation to demonstrate net benefits; and
- requiring quantification of costs and benefits in cases of deregulation relative to regulatory proposals.

### Is the Net Cost Approach Consistent With The CPA ?

The net cost approach appears to be in direct conflict to the requirements of the CPA, which places emphasis on the proponents of legislation demonstrating clear public benefits. However, it is unclear on where the onus of proof lies for the maintenance of existing legislation, beyond that there is a demonstration of net public benefits.

### What Impacts Does This Emphasis Have On The Potential for Reform ?

This emphasis on 'demonstration' can pose difficulties for reform. The benefits of marketing arrangements may often be easier to quantify because they relate to specific economic objectives, such as increasing average producer returns, and they are returned to a discrete and identifiable group, such as producers of a particular commodity. However, costs, because they may often relate to broader economic and public interest issues including consumer welfare impacts, negative effects on investment and innovation, and environmental impacts, may be more difficult to quantify and they are across a much more diverse and diffused sector of the community.

The other challenge is that every situation produces a diverse range of costs and benefits. Where economic techniques, often complex, exist to quantify cost or benefits, the resources needed for this purposes may significantly outweigh the likely gains from the review. Furthermore, general equilibrium models would normally be used to quantify public benefits associated with sectoral reform, they are less suited to the assessment of reforms involving particular sub-sectors of an industry. Consequently the broader efficiency gains associated with reform can be difficult to measure.

An argument in support of using economic theory to support likely or probable costs and benefits, rather than quantification, is firstly, that the ACCC (and previously the TPC) has often used non-measurable benefits and costs to support determinations, and secondly, the other factors that can be taken into account under Section 1(3) of the CPA. For example, where equity and social objectives can be taken into account in determining public interest, it was obviously envisaged that these factors would/could only be incorporated on the basis of subjective values.

---

## 4.4 The Trade Practices Act and Its Effectiveness In Agricultural Markets -

### Background

The regulation or otherwise of anti-competitive behaviour in the on-selling of agricultural produce has been a significant issue in the reviews undertaken of marketing legislation.

Statutory marketing arrangements were largely developed to introduce stability and order to marketing arrangements for producers. Common objectives were to stabilise producer prices, to raise producer incomes through discriminatory pricing practices and creating efficiencies in bulk exporting and on-selling, and to provide the large number of small producers which typify many agricultural industries, with countervailing power against the perceived market power of domestic buyers.

When many of the Statutory Marketing Authorities in NSW were first formed, it seems that the case for providing countervailing market power could have been successfully argued on market failure grounds.

In the 1920's and early 1930's, the State Government in NSW was pursuing policies of regional development, such as legislating for the irrigation areas and closer settlement policies through soldier settlement blocks.

The result was a large number of small producers, at that time, separated from the end buyers of their product by considerable distance and with poor communication systems. They were at the mercy of larger city based produce agents and manufacturers, so statutory marketing authorities were formed to, among other things, provide countervailing market power to producers. This was achieved through powers to collectively negotiate sale contracts, set minimum prices and compulsorily vest the product to the board who then acted as a monopoly supplier.

### Legislative Controls on Anti-Competitive Conduct

In 1927 the Marketing of Primary Products Act was introduced in NSW. It provides the machinery for the creation or dissolution of statutory marketing authorities such as marketing boards and committees.

Many commodity based boards were formed under this Act including those for tomatoes, citrus, rice, wine grapes and tobacco. While a number of arrangements have since been dissolved, two marketing boards and three marketing committees still exist under this Act.

As well as marketing arrangements established under the MPP Act in NSW, a number of other industries were successful in being granted stand-alone legislation. The dried fruits, dairy, bananas, and grains legislation in NSW are examples of this. As well as marketing boards a number of arbitration arrangements were established under legislation, with the specific objectives of providing countervailing power in price

---

negotiations and settling price disputes. An existing example in NSW and most other states are the negotiating committees comprising poultry growers and processors in the broiler industry.

### The Trade Practices Act and its Role in Regulating Anti-Competitive Behaviour

In 1974, the Commonwealth *Trade Practices Act* was introduced. It prohibits certain anti-competitive market conduct. The Act has two broad aims, to promote competition in the business sector, and in turn increase business efficiency, and to protect consumers.

Anti-competitive market conduct includes the mis-use of market power by corporations, unconscionable conduct in commercial transactions, misleading and deceptive conduct, resale price maintenance, price agreements and agreements between competitors that substantially lessen competition. Fair Trading legislation enacted by the States extends the concepts of the *Trade Practices Act* to apply to 'persons' rather than just corporations. Therefore, the *NSW Fair Trading Act* enacted in 1987 can be invoked against anti-competitive market behaviour conducted by individuals. Individuals includes sole traders and partnerships.

Statutory marketing arrangements have been targeted as particularly anti-competitive legislation, and have consequently topped the legislation review agenda. In examining possible market failure rationales for their continuation, an issue consistently raised is to provide producers with countervailing market power against buyers, namely produce and export agents, food and beverage processors and supermarkets.

During the course of the reviews conducted so far, it has been argued that the appropriate mechanism for government intervention to prevent anti-competitive practices is specialist legislation such as trade practices and fair trading legislation. It has been considered that the national approach inherent in the *Trade Practices Act* is consistent with the underlying philosophy of the NCP minimising scope for inter-state and intra-industry inconsistencies in the way anti-competitive market conduct is treated.

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

They consider that access to the legislation is denied through:

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

---

In 1996, the House of Representatives Standing Committee on Industry, Science and Technology conducted an Inquiry into Fair Trading. The ACCC said in its submission that complaints received by them so far from small business (primarily lessees in shopping malls) highlight the difficulties encountered by the Commission in bringing an action. The issues are summarised by the ACCC as follows:

*" the reluctance of many complaints to date to provide evidence to the ACCC and to be witnesses in litigation for fear of retaliation by lessors, for example, shopping centre management. This concern would be particularly relevant if the complainant's lease is due for renewal. The Commission has observed the development of a "regulatory paradox" in that the more small businesses are in need of remedies the less likely they are to use them. This can often stem from the captive situation small business may find themselves in, in that staying in a bad business relationship compared with legal action which would certainly finish the relationship is often the lessor of two evils".*

(ACCC 1996)

This situation as it relates to shop lessees can be seen to have several parallels to the experiences claimed by small agricultural producers where there is a highly developed, sophisticated and somewhat concentrated onselling sector, such as in the poultry industry.

### Are Other Factors At Play ?

However, the ACCC also notes that as well as some problems with the TPA, small business has other problems with regard to what they perceive as anti-competitive behaviour.

The ACCC notes that in fact, many of the complaints received by the Commission about anti-competitive behaviour are not actually examples of anti-competitive behaviour as defined under the TPA, but are the result of harsh treatment dealt out by stronger business partners. Many problems relate to an unequal negotiating power that is not actually "market power". For example, when a small business has poorer negotiating skills than a trading partner and less business acumen.

It can also be considered that some complaints about unfair dealings are actually examples of the market working to remove poor operators, and thus increase economic efficiency, rather than the market failing and requiring intervention by the ACCC.

### How Should Government Intervene Then ?

In the face of the perceived restrictions of the TPA in dealing with market power where there is potentially retaliatory action, Governments will continue to be under pressure from industry to retain SMA structures to provide countervailing market power. In the reviews undertaken so far, the boards and committees established under the MPP Act

---

have generally remained strongly supported by producers because of, among other reasons, perceived market power problems.

However, there are alternative mechanisms that may be less competition restricting and distortionary than typical SMA marketing arrangements.

Statutory marketing arrangements typically generate financial rather than economic gains to producers. By increasing average prices to producers, often at the expense of consumers, they go beyond providing countervailing power. Pricing arrangements are in effect, a transfer of income from one sector of the community (the consumers) to another (the producers). They also impose efficiency losses, through resource misallocation costs and provide poor price signals to producers, which result in net public costs.

Typically, SMA's also result in inconsistencies across jurisdictions and across industries in the provision of countervailing market. Statutory marketing arrangements are known for not being responsive to shifts in the market. For example, if the market becomes more competitive and countervailing market power is no longer needed, it is difficult to remove statutory marketing arrangements on the basis of there being no further rationale for their continuation.

The ACCC has identified that typically problems arise from differences in negotiating power, rather than actual abuses of market power. Some of the issues the ACCC has identified as causing unequal negotiating terms are poor business skills and a lack of information on which to base decisions. Therefore, the preferred approach for Government intervention is to provide mechanisms by which producers can overcome information failures and thereby gain an improved negotiating position. In NSW, a legislative framework has been proposed where industry service activities, such as a market reporting service, can be funded by a compulsory industry levy to overcome under-investment problems.

A more interventionist alternative is authorised negotiation arrangements where industry groups receive authorisation under the TPA to engage in collective negotiations with buyers. Because these arrangements are competition restricting, the ACCC must be satisfied that in fact there is a market failure which if corrected would result in a public benefit, which would outweigh the costs resulting from the competition restriction. Negotiation arrangements in the broiler chicken industry are currently the subject of consideration by the ACCC.

One of the benefits of this approach is that all arrangements, nation wide, are subject to a consistent determination process and thus sectoral and jurisdictional inconsistencies should be reduced.

---

## 5. CONCLUSIONS

While the legislation to be reviewed and the timing and associated review processes up to this point has resulted in cross jurisdictional inconsistencies there remains an opportunity for more consistent review processes for some of the major agricultural legislative arrangements, such as the dairy and grains legislation. The NCC still has the scope to become proactive in these reviews and play a key role in developing a consistent review framework and conducting across jurisdictional research on the prime issues of contention.

Clearly an emphasis on benefits being demonstrated by proponents of legislation before it is continued or introduced must be strongly enforced as the only acceptable 'test', as opposed to the alternatives. The NCC again has a role.

The appropriate framework for consideration of the public interest principle as it applies to the NCP is clearly an issue that needs further consideration and discussion. The identification of and measurement of costs and benefits relating to specific restrictive arrangements provides an ongoing challenge to the agricultural economics profession.



---

## References

- Australian Competition and Consumer Commission 1996, *Draft Determination - Application for authorisation, in relation to collective negotiation of chicken growers contracts and a company code of practice*.
- Boston Consulting Group 1996, *Report to the Sugar Industry Review working Group - Main Report*, Sydney.
- Chang, H.J. 1994, *The Political Economy of Industrial Policy*. London St. Martins' Press
- Coase, R.H. 1992. The Institutional Structure of Production, *American Economic Review*, Vol 82(4), pp.713-719.
- Commonwealth Legislation Review Schedule - June 1996.
- Industry Commission 1995, *Regulation and Its Review*, Canberra.
- Johnston, C. 1996, 'Beyond The Bottom Line', *Alternative Law Journal*, Vol 21, No 3, June 1996.
- National Competition Council 1996, *Annual Report - 1995-96*, Melbourne.
- National Competition Council 1996, *Considering the Public Interest under the National Competition Policy*, Melbourne.
- The Conduct Code, The Competition Principles Agreement and The Agreement to Implement The National Competition Policy and Related Reforms.