Submission to Productivity Commission inquiry into Cost Recovery

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The Commission has made a worthwhile start in analysing difficulties with some simplistic bureaucratic arguments for cost recovery. In particular, it is pleasing that the Commission has accepted the economic efficiency logic of our advocacy of marginal cost pricing as the economic norm where additional services are supplied to the public over and above a legislatively-mandated core function. However, there are some additional points which may be made to ensure a sufficiently rigorous economic and legal analysis of arguments for "cost recovery".

Broadly speaking, where an activity of a government agency is mandated by a public Act of Parliament then there should be no question of cost recovery but the activity should be financed from general taxation through Consolidated Revenue. This is an accord with principles of responsible government whereby the elected representatives of the taxpayers should legislate on the basis that taxpayers will have to fund what is mandated.

It follows that where something is provided to the public on an ancillary basis to a mandated function of government (e.g. copies of Bills of Parliament, Hansard reports, Parliamentary papers) these should be available to the public at marginal cost only. Accountable government requires that information be freely available to electors and a minority of interested electors should not be expected to cross subsidise the costs of running Parliament or government information agencies.

The only rational exception lies in the case of externality where it is reasonable to pursue a beneficiary pays approach (in contrast to a user pays approach). (I note, however, that the Commission has been logically inconsistent in rejecting the externality argument for "beneficiary pays" in the case of public utilities where beneficiary landholders have been relieved of rate obligations by Commission-endorsed policies of "user pays" for water in lieu of former economically efficient rating of beneficiary landholders to cover capital costs.)

Turning to cost recovery by regulatory agencies, any argument for "user pays" or "beneficiary pays" needs to be scrutinised more carefully than appears to have been the case. In particular, a fee for service cannot be charged where the service is not performed and there is no right to sue for the consequences of that failure.

In particular, the performance of the Australian Prudential Regulatory Authority (APRA) and the Australian Securities and Investment Commission (ASIC) need to be examined. The former body is meant to protect the interests of depositors with financial institutions and insurance policyholders while the latter is supposed to enforce the *Corporations Law*, including its provisions against insolvent trading (a doubly pernicious default where funds are being sought from the public, as with insurance, in addition to trade creditors).

On the Commission's figures, these bodies are not only recovering costs but extracting enormous monopoly profits for jobs most negligently done. There is no ability of Australian

consumers to choose alternative regulators (eg to rely on the US Federal Deposit Insurance Corporation for a bank) - for all practical purposes, there is no contestability for the position of regulator (perhaps there should be - through mutual recognition, see Draft Report p 59).

If something is provided as a public service with no care and no responsibility there should be no charge. Far from being entitled to charge anything, APRA and ASIC have been positively mischievous bodies by creating a dangerous illusion of supervision where in fact there has been none. The public would be far better off if warned to keep its eyes wide open in the firm awareness of *caveat emptor* rather than the current situation of being heavily taxed for an illusion of safety. APRA and ASIC, in their current form, are creating negative externalities for the investing public by misleading it and overseas investors that Australian financial markets are properly regulated.

There should be no cost recovery whatsoever for these bodies nor should they be any charge for zero marginal cost online access to information held by them.

While formally APRA does not enjoy the shield of the Crown, its Act provides for immunity from suit for negligent financial supervision: its services as a supervisor are therefore not undertaken on market terms because it cannot be sued by policyholders or bank depositors for any abject failures such as we have seen with HIH insurance.

A fee for service is only justifiable where the service is provided as a matter of contract or quasi-contract and the persons so charged have the legal right to sue for non-performance or negligent performance of the service charged for. Where the legislation establishing a regulatory body confers upon that body some of the immunities of the Crown from suit then it ought to be recognized that the body is performing a public rather than a private service and there is no basis for charging for its services, since the body is exempt from any common law contractual quid pro quo for its charges. "User pays" should mean the "user gets" what he is being made to pay for.

It may also be noted that the suggestion that policyholders and bank depositors are beneficiaries of APRA supervision and should be levied for it ignores the fact that Australian law prohibits Australians from insuring or banking with unlicensed foreign banks or insurers even if they are of superior credit quality to Australian institutions. To charge a fee for a service when one is denied any opportunity of whether not to use the service is to extract a tax. And if the tax is to be justified on the basis of the "benefit" principle, then the "benefit" should be delivered and we should not be subject to the monstrous spectacle of a Commonwealth Government pretending for over two months that it has no moral responsibility for the failure of a Commonwealth licensed insurer - and that Australia's international credit is of no concern.

Turning to ASIC, the ostensible reason for its existence is no doubt to promote informed markets in which people can know with whomever they are dealing. But if one seeks online access to information about a company one has to play a fee to a third party provider for anything but the most basic information. It is hard to see what public benefit is served by compulsory provisions requiring the lodgment of shareholder and director notices in the public interest which are then withheld from the public unless the public is willing to pay a privatized tax over and above the lodgment fees imposed on the incorporated company lodging such

notices.

Incidentally, the legal advice produced by the Australian Government Solicitor to the Commission relating to over recovery of costs by ASIC is dubious. The idea that section 55 of the Constitution can be evaded by resort to the territories power may be strongly debated. However it is not necessary to do this here as it is my understanding that the Commonwealth is now moving to change the form of *Corporations Law* fees to conform to the requirements of section 55, so that they are now officially acknowledged to be the taxes they are - another humorous example of the old bureaucratic game of "deny it, but get the house in order before it falls down".

Some broader questions

Finally, from a philosophical point of view, one may observe that there is some underlying conceptual confusion about the logic of cost recovery and that "what is sauce for the goose is good for the gander".

The Commission has taken it for granted that there should not be cost recovery for health, education and government transfer payments. But there is. Privately insured persons are in effect subject to cost recovery, as are compensation claimants in relation to Medicare and students in respect of HECS liabilities. Yet no cost recovery of pensions is sought from deceased estates or assets-test free homes (as it was in the 1930s). If "beneficiary pays" were logically pursued, those who inherit a home form a pensioner would be required to discharge a pension debt to the Commonwealth (one can be as equally opposed to subsidizing inheritance by beneficiaries as to taxing inheritance). These examples show that the concept of "core functions" of agencies is nothing more than a legacy of decades of electoral bribery, a haphazard mishmash of political expediency hardly deserving of any moral or intellectual respect.

Second, one may note that if one took entirely seriously the logic of cost recovery from beneficiaries of government services, the public would be entitled to take the same approach to government itself. For example, small business would be billing government for collecting its GST and filling in the business activity statement and other statistical forms. Indeed, the parents of a child who turns 18 and enters the workforce would be entitled to demand a cheque from the Treasury for the fiscal benefit conferred upon the Treasury by the creation and development of a taxpayer in an age of demographic implosion.

These broader points are made, not in any hope that they will lead to any beneficial "reform", but merely to scratch below the surface of some hidden assumptions so that people might start to think more deeply on the nature and role of government - which, in a way, is what this inquiry is all about.

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