

TasCOSS Submission to Productivity Commission Review of National Competition Policy Reforms:

Comments on Oct 2004 Discussion Draft

1. Introduction

The Tasmanian Council of Social Service welcomes the opportunity to participate in this critically important review process. National Competition Policy is a significant structural element in the overall framework of public policy in Australia, and we commend the Productivity Commission for adopting an open and transparent review process.

In this submission we focus on three main issues:

- The need for a public interest test applicable to National Competition Policy that
 - Is better understood within the Australian community and applied more consistently than at present;
 - Is sensitive to the impacts of competition – and competition policy – on small, isolated jurisdictions/markets such as Tasmania; and
 - Places the onus of proof back on proponents of marketisation where there are clear intersections between competition policy and social policy.
- The relationships between competition policy and the human services sector and the significant levels of sensitivity required in linking complex social policy objectives with the marketisation tool; and
- The impacts of competition policy on the retail energy market.

Consistent with our organisational mission, we will be concentrating on the actual and potential impacts of competition policy on low-income and other disadvantaged consumers. Where possible, we seek to offer a perspective that highlights the ‘Tasmanian-ness’ of these issues, as we contend that there are considerable dangers inherent in the application of a one-size-fits-all approach to the development of competitive national markets. We also offer comments and recommendations on the relationship between NCP and the health and transport sectors.

TasCOSS seeks to provide a voice for Tasmanians affected by poverty and inequality and acts as a peak council for the community service organisations (CSOs) that serve, support and work for them. Our work with the CSO sector and with a range of government agencies has given us a high level of understanding of the human services industry and the ways in which public policy changes impact on service consumers.

In recent years, TasCOSS has acquired considerable expertise on a range of consumer issues, especially as they relate to low income and disadvantaged Tasmanians. We continue to play a role at a national level (as the Tasmanian and COSS-network representative on the ACCC Consumer Consultative Committee), and at a state level (on the Customer Consultative Committee of the Office of the Tasmanian Energy Regulator), and in responding to consultations initiated by governments at both levels on consumer issues. We have been active across a range of issues such as electricity, housing finance, transport, consumer credit, bank fees and duties, telecommunications, product safety and fuel prices. This involvement has underlined the need for a dedicated, genuinely expert non-government consumer organisation in Tasmania and accordingly we have been active in pursuing funding to establish such an organisation.

2. The NCP Public Interest Test

2.1 The role of the Public Interest Test

TasCOSS contends that more emphasis should be placed on the content and application of the Public Interest Test as a fundamental pre-condition to the implementation of further competition policy measures. We are concerned that assessment of the public interest is currently merely an option rather than a requirement under NCP.

The Discussion Draft recognises that the Public Interest Test process ‘has not been effectively promoted and, that insufficient attention – particularly in the earlier years of NCP – has been given to ensuring that it is appropriately applied’ (p128). This no doubt stems from the unquestioned principle underlying NCP: ‘A core principle of NCP is a presumption in favour of competition, notwithstanding that competition is seen as a means to an end rather than an end in itself’ (p123). In order to position the Public Interest Test more effectively in the NCP process, it seems to us that that principle must be challenged and reforms embarked upon from a more open standpoint.

We welcome the recognition in the Discussion Draft that the presumption in favour of competition should not apply in all cases: that for ‘regulatory restrictions on competition in product or factor markets, where there is minimal social and environmental policy content, the onus of proof in NCP seems appropriate. However, where regulation has important social policy or environmental objectives the traditional onus of proof may be preferable.’ (p124) TasCOSS contends that there are in fact very few major market segments where important social or environmental objectives do not apply. The arenas discussed in this submission – human services, retail energy, health and transport – are all prime examples of markets that require coherent social policy approaches. Other markets not examined in this submission, such as housing, education and financial services, would surely also require an approach where the onus of proof was on those seeking to extend the reach of market forces.

Public Interest Tests must be comprehensive, rigorous, transparent and meaningful, as well as being well-advertised and open to public comment. In addition, Public Interest Tests should not simply quantify potential ‘winners’ and ‘losers’, but must also determine and assess the nature and degree of loss to the ‘losers’.

2.2 Picking losers: The effects on low income households of National Competition Policy

By its own admission, the Productivity Commission acknowledges that the benefits of NCP have been uneven, and that Australian businesses have enjoyed price benefits from NCP above those experienced by households. In fact, it states that ‘average real prices paid by households for services such as electricity, water and urban transport have in fact risen over the last decade or so ...’ (xix)¹. It should be noted that these services are not discretionary and are fundamental to health, well-being and access to employment and services.

Although the Productivity Commission maintains that ‘the benefits of NCP and related reforms have been spread across the community’ (xxi), figures demonstrating growing inequities in income (some cited at p82) and access to goods and services (p10) belie this. The Commission suggests that ‘specific compensation measures for low income households will have lessened the impacts for those least able to cope with these increases’ (xx). It is our contention that a system that is designed to benefit only some sectors of society while others are compensated is necessarily flawed.

We are surely past the time when we could get away with sweeping statements like ‘competition benefits consumers’ without accompanying caveats and qualifications. Our understanding of public policy is now sufficiently sophisticated to transcend the notion that any major social or economic trend or policy stance will benefit (or indeed harm) all stakeholders. Taxation reform doesn’t benefit all. Housing booms don’t benefit all. Welfare reform inevitably has beneficiaries as well as casualties. Not only is this also true of competition, but it is true in similar ways. That is, when we look across the array of those who consistently ‘lose’ in the winners-and-losers outcomes of public policy, the same groups consistently emerge.

We note the comments by Mr John Feil, Executive Director of the National Competition Council, in his testimony at the recent Melbourne hearing of this Inquiry. Mr Feil spoke of the conclusion in the Discussion Draft that there had been losers as well as winners from the NCP process to date. He raised the ‘interesting question as to whether that looking forward would mean that you would need to be more refined about where reform was required or whether you address those so-called losers through adjustment processes. I think the council's view would be that it's impossible to identify potential losers before reform proceeds, but there's nothing inside the NCP process that prevents governments from addressing particular problem areas through adjustments, either by allowing time or through financial payments. One of the things that I think has limited our ability in encouraging governments to do some of the adjustment processes on a more targeted and considered basis has been that there was a limited role in assessing adjustment processes; they were very much seen as a separate arrangement from the reforms themselves. I think with the benefit of hindsight there are a number of places where governments did initiate adjustment processes and payments, but sometimes did it in a way that actually reinforced inappropriate behaviour, where there clearly wasn't a need for adjustment in a sector.’

¹ All page references are to the Productivity Commission Discussion Draft, Oct 2004 unless otherwise specified.

To be fair to Mr Feil, his reference to ‘losers as well as winners’ was almost certainly to industry sectors, not population groups. Nonetheless, TasCOSS asserts that we can, indeed must, be ‘more refined’ in anticipating the likelihood (even inevitability, in some instances) that some population groups will be substantially disadvantaged by a marketisation of some industry sectors.

Here we refer to the important message offered by ACCC Deputy Chair Louise Sylvan that ‘making markets work is a public policy task requiring attention to the *availability* of consumer choice (i.e. competition) as well as to the *conditions for effective exercise* of that choice (i.e. consumer empowerment), coupled with a commitment to achieving social goals in an economically efficient way.’² Sylvan points out the problems that arise when these three dimensions are dealt with separately, as ends in themselves.

When those ‘conditions for effective exercise’ of consumer choice are given appropriate prominence, the focus shifts to those population groups known to struggle with the operation of markets – groups that consistently show up as being disempowered rather than empowered by the presence of vigorous competition.

We are here talking about low income households, generally with low levels of educational attainment. Frequently, those households will also be characterised by high levels of social and/or geographical isolation, denying them access to informal sources of information and advice about their roles as consumers. Those same households will typically lack the skills and resources needed to assert any consumer rights they may notionally possess. Within this broad group, specific sub-groups will be readily identifiable as having additional vulnerability in the face of market processes: those with language or literacy challenges; those with disability or mental health issues; and those whose responsibilities as carers constrains their access to information, support and formal dispute resolution mechanisms.

The very welcome initiative of the Australian Competition and Consumer Commission to focus resources and attention on disadvantaged and vulnerable consumers is a recognition that the ‘losers’ in competitive markets can be delineated and must be afforded additional protection.

TasCOSS acknowledges that protection can in some instances take the form of the ‘adjustment processes’ referred to by Mr Feil. That is, there will be variations on the safety net approach that can assist disadvantaged and vulnerable consumers who would otherwise be significant ‘losers’ from market reform. Tariff concessions and exemptions from late-payment fees might be one example of this approach in utility markets. However, we contend that if we follow Sylvan’s urging that we integrate competition policy, consumer protection policy and social policy, then consideration of disadvantaged consumers must impact directly on decisions about the extent of competition, not simply on remediation of unintended impacts. Put another way, the prevalence of safety net responses can be seen as an indication of system failure rather than as a necessary and standard feature of an essentially unfair system. The Discussion Draft is peppered with terms such as ‘the need for re-balancing’, ‘adjustment pressures’, and

² Sylvan, Louise (2004) ‘Activating competition: The consumer-competition interface’ *Competition and Consumer Law Journal* 12(2), p206.

‘transitional costs’, and we fear that these are euphemisms for the inequitable results of NCP on marginalised households and communities. These might as well be labelled with that chilling tag, ‘collateral damage’.

Our contention is that the NCP Public Interest Test must embrace the key elements of consumer protection policy. In this context we support a broad national review of consumer protection policy and administration as recommended in the Discussion Draft (p218). Such a review must examine the vital role of consumer advocacy in the context of NCP, as well as the role of consumer protection regulation in Australia. The review must also consider the effects in competitive markets of information asymmetry between suppliers and consumers, and identify various appropriate avenues through which that asymmetry can be addressed.

We question the conclusion offered under the heading, ‘The benefits and costs of consumer protection regulation’ in Box 9.3 in the Discussion Draft, that states ‘standards and other forms of consumer regulation must be considered on a case by case basis’ (p217). We believe that certain principles can be applied to most market transactions that will ensure high product and/or service standards as well as consumer protection. These include the provision of full and accurate product/service information, access to avenues of effective redress, equitable and fair contract terms, as well as the existence of effective regulatory regimes.

2.3 Size matters: Assessment of market-scale within the NCP public interest test

Tasmania is small and isolated. Each of these characteristics imposes limitations on the benefits likely to derive from the operation of competitive markets. In combination, our small scale and distance from other markets represent a significant barrier for consumers.

Accordingly, Tasmanian consumers have not fared well, compared to their interstate counterparts, on the dimensions of choice, cost or quality of goods and services on offer. We pay more for our groceries, our petrol, our electrical and white goods, our vehicles and for a whole range of professional services. In part, this is explained by the freight costs incurred when major manufacturing and distribution nodes are located interstate. A significant component of these additional costs, however, stems from the small number of providers of these goods and services and the lower levels of competition that result.

This phenomenon has been acknowledged by successive Tasmanian governments, with regular – but largely unsuccessful – attempts being made to attract additional ‘players’ in key markets such as grocery and petrol retailing.

Similarly, the current Tasmanian Government is struggling to attract and retain professionals in a wide range of health sectors. The ‘buying power’ of the Tasmanian community – not only small but dispersed across Australia’s least urbanised jurisdiction – is proving to be insufficient in competition with larger states.

TasCOSS contends that an appropriate public interest test to apply to decisions about the extension of competition to areas not currently covered by NCP must include consideration of whether the proposed target market is large enough. That is, whether that market has, or is

likely to have in the foreseeable future, sufficient consumer purchasing power and sufficient providers of the goods or services in question. In the case of Tasmania, we pose the question of whether a population of less than half a million people, spread across a network of mostly-small urban centres and cut off from most suppliers by Bass Strait, can be expected to develop and sustain genuinely competitive market mechanisms.

Our general concern is that while the NCP concept of a single integrated national market is supportable as an organising framework for policy – as a general goal of NCP – it is unlikely that any one strategy in pursuit of that goal will apply equally successfully across different jurisdictions, different regions. Tasmania, like other remote and sparsely-populated regions, is different. It is doubtful that the conditions will ever arise where Tasmania is characterised as a market with low barriers to entry, with a plethora of rival providers of goods and services, and with rapid rates of entry and exit for those providers. In the area of human services – the focus of Section 3 of this submission – it is even harder to anticipate that sort of future, even if it was desirable.

TasCOSS has concluded that, in many instances, Tasmanian consumers are likely to be better off with well-regulated monopoly services such as currently applies to electricity supply. Imposition of competition for competition's sake is both wasteful and unhelpful. It is imperative that every implementation stage of NCP should be preceded by a comprehensive, rigorous and meaningful public interest test process. It should be noted that the 'innovative product and service options' of retail competition in energy markets listed in Box 4.5 (p67) all are (or shortly will be) available under Tasmania's regulated retail energy market.

3. Competition policy and human services

TasCOSS supports the approach taken in the Discussion Draft for a case-by-case examination of the scope for market reform in human services, rather than a national framework. Existing levels of competition in human services have not been fully evaluated, but it is clear that the social policy objectives inherent in the human services arena do not easily mesh with the broader goals of competition policy.

3.1 Human services *are* different

In Section 2 above, we welcomed the acknowledgement in the Discussion Draft that for 'regulatory restrictions on competition in product or factor markets, where there is minimal social and environmental policy content, the onus of proof in NCP seems appropriate. However, where regulation has important social policy or environmental objectives the traditional onus of proof may be preferable.' (p124)

TasCOSS asserts that the entire human services sector must be recognised as a sphere uniformly characterised by crucially important social policy objectives, and that it is consequently appropriate that compelling arguments be made *for* the application of competitive market principles and processes before further marketisation is promoted.

We stress again that a vigorous and rigorous debate about the merits of competition in the human services sector should be welcomed by existing organisational ‘players’. Such a debate is an important element in a wider process of self-examination – a regular questioning of the approaches that will allow us to achieve our social policy goals. TasCOSS is committed to encouraging and assisting its member organisations to actively participate in that debate. However, embracing the need for such a debate need not oblige the participants to accept that moving to develop heightened competitiveness is an inherently good thing.

One recent, and very valuable, contribution to the national dialogue about competition policy has been Michael Keating, in his measured assessment of the ways in which governments and markets can intersect.³ Keating is clearly a proponent of the role of markets. His mission is to reassure us that there are various ways in which markets can assist in our pursuit of social policy objectives, and that governments need not abandon their essential governance roles just because markets are given more prominence.

While Keating clearly supports the role of markets within the human services sector, he is rather more circumspect about the outcomes of existing initiatives: ‘There has been no comprehensive assessment of the impacts of markets on the delivery of human services that provides hard evidence of its benefits and costs.’ (p95) Keating referred to the 1996 Industry Commission review of competitive tendering and contracting of government services and the 1998 House of Representatives Committee examination of competitive tendering of welfare services and concluded that while both inquiries drew generally positive conclusions about ‘marketisation’, their evidence was far from definitive.

TasCOSS endorses the need for great care prior to any further marketisation of human services in Australia. We agree wholeheartedly with the sentiment expressed in the Discussion Draft that ‘human services are different’: that ‘many human services are not “normal” marketable products. They are multi-dimensional in character, with the capacity to contribute to the physical, emotional, social and intellectual wellbeing of individuals, families and communities.’ (p246)

We wish to stress here the crucially important link between the nature of human services, on the one hand, and the need to integrate competition policy with consumer protection policy. Human services, by their very nature, are frequently designed for and directed at disadvantaged and vulnerable individuals, households and communities. Those same individuals, households and communities are recognised as being least well placed to make appropriate ‘purchasing decisions’. The impacts of ‘getting it wrong’ in the human services arena are far more important than in other sectors.

The Discussion Draft also makes the important point that many people who access (or seek to access) human services do not do so as a ‘choice’. These individuals are less likely to self-identify as consumers, and thus are less likely to pursue the rights and entitlements that (may) apply with respect to other consumer transactions.

³ Keating, Michael (2004) *Who Rules? How government retains control of a privatised economy*. Federation Press, Sydney.

3.2 Non-government organisations and the human services market

The Discussion Draft notes that many important human services are currently provided by not-for-profit non-government organisations, and that the introduction of competition into the non-government sector can create ‘tensions’ (p248). We acknowledge that various ‘tensions’ appear in all industry sectors when competition is introduced, but there are particular challenges in the human services sector.

One of those challenges is the difficulty in providing detailed specification of the ‘product’ and the outcomes sought from the provision of services. The capacity of governments to move from regulated systems of service provision to market-based systems will continue to be limited by this particular challenge. As Keating notes in *Who Rules?*, ‘A key issue is the government’s ability to specify in a contract what is wanted in sufficient detail to ensure that its objectives can be met. Contracting is more likely to be successful when there are clear links between the service delivery and the program outcomes being sought.’ (p102) In many human services areas, these links are still somewhat opaque.

It is important to distinguish between the potential forms of competition that could potentially apply in the human services sector, because there has been a tendency to conflate these forms in some of the discussions to date, including in the Discussion Draft. Three key distinctions are of value:

- Competition between service providers for the ‘custom’ of consumers and competition between providers for contracts/grants that allow them to offer services;
- Competition between providers for contracts on the basis of unit-cost (where minimum quality standards are externally set) versus competition on the basis of service quality (where a maximum unit-cost is externally set); and
- Competition between not-for-profit organisations versus competition between not-for-profits and for-profit organisations.

TasCOSS strongly supports the introduction of service diversity and accessibility such that consumers can be offered genuine choice. However, we do not believe that this will be an outcome – especially in a small market such as Tasmania – of direct competition between non-government organisations for contracts, grants or other resources. We believe it is much more likely that competition between community service organisations will ultimately reduce the diversity of services available.

Similarly, TasCOSS supports contractual processes that encourage prospective service providers to demonstrate that they will be able to offer services of appropriate quality within agreed unit-cost parameters. We are concerned, however, at the prospect of service providers competing on the basis of cost. Our non-government sector is already characterised by low wages and entitlements for its workforce and inadequate provision for workforce development. This is not a sector where unit costs can be driven down further.

TasCOSS is concerned that existing levels of competition between non-government service providers have led to inefficiencies in our sector rather than efficiencies. One of the crucially

important characteristics of the not-for-profit human services sector has traditionally been a preparedness to share resources and knowledge. Strong 'horizontal' networks of mutual support enabled poorly-funded service providers to offer significant levels of high-quality services. The reality of competition (or indeed the prospect of it) has dramatically eroded this feature of our sector. Knowledge is now increasingly 'commercial in confidence'. Innovation is something to be developed within organisational boundaries, not across them. Any consideration of extending competition further into human services must take into account these dynamics. Depleting stores of social capital in order to conform with national models of what markets should look like would be particularly regressive outcome.

Competition between for-profit and not-for-profit entities for contracts in the human services sector already occurs on a limited scale. TasCOSS opposes any extension of this form of competition. This is not an ideological opposition to the involvement of for-profit companies in the provision of human services, although we would argue that the existence of a profit imperative can be inappropriate in some specific human services areas. Rather, our concern is that few not-for-profit organisations will be able to survive in a fully marketised human services sector, and that those who do survive will do so because they already have significant access to capital resources. The potential loss of diversity in human services providers, especially among smaller organisations, is too great a risk to take in the absence of any compelling reasons for extended competition.

4. Energy Market Reform

4.1 National regulation

Although the establishment of a national energy market regulator 'as a positive step towards achieving regulatory harmonisation across jurisdictions' (p167) will obviously benefit energy retailers operating in several jurisdictions, we believe that a national regulator must also ensure that best practice consumer protection measures are in place throughout the National Electricity Market.

The Australian Energy Regulator (AER) will be well placed to assess all existing energy codes for those consumer protection measures that constitute best practice and to apply these nationally through its regulatory mandate.

The current emphasis of the MCE's market reform program on ensuring adequate future investment in energy infrastructure must not come at the expense of consumers, either in relation to protection measures or ongoing affordability.

4.2 Outstanding NCP electricity reforms

As noted in the Discussion Draft, Tasmania has not moved to full retail competition (FRC) in its energy market. The Tasmanian government intends to make the introduction of FRC to residential and small business consumers contingent on the results of a Public Interest Test in 2008. We are concerned that pressure to complete the reforms from both the Productivity

Commission and the National Competition Council could affect the government's application of the Test and its outcome.

If Public Interest Tests are to be effective and not simply window-dressing or after-thoughts in the context of NCP, they must be implemented in an open environment, free from pre-determined outcomes, coercion or constraints.

5. Other important NCP issues

5.1 Passenger Transport

TasCOSS supports the commissioning by CoAG of an independent national review of the passenger transport sector, as recommended by the draft proposal in the Discussion Draft (p192).

Tasmania has very particular passenger transport needs and conditions. A review of these is long overdue and might be particularly illuminating if carried out in the context of a national review that invites comparisons of transport availability and needs. In our recent submission to the Tasmanian Government's consultation on its 2005/06 Budget, we stressed the crucial role of transport in determining the effectiveness and efficiency of a whole range of other human services. Our consultations with community service organisations across Tasmania provided us with a range of testimonials on this issue. Our member and constituent organisations told us, loud and clear, that the inadequacies of our transport network needed to be understood as a significant driver of poverty and disadvantage in Tasmania, and one that is rapidly growing in significance. We were impressed by the range of community service organisations that expressed this view. This was not just the aged sector or the disability sector (though CSOs in those sectors had plenty to contribute on this issue); it was across the whole human services spectrum and across all population groups.

In summary, our member groups were saying that until transport issues are prioritised and addressed, other key service systems will remain ineffective and inefficient. They told us that individuals and families that are isolated because they cannot access appropriate transport are increasingly featuring as clients of 'sharp-end', remedial (and expensive) service systems. They told us that the difference between an individual's capacity to live independently, on the one hand, or to rely on significant levels of acute or residential care, on the other, was often a matter of transport access. They also told us that there are considerable resources that are currently unused – buses, volunteer drivers, auspicing organisations – because of inadequate funding support or inappropriate 'silo' approaches to the targeting of assistance.

Not surprisingly, the further our consultations took us away from Hobart, the more prevalent and vehement were the reports about the importance of transport. We heard frequent stories about people unable to access basic health services unless they were prepared to stay overnight in larger urban centres. People forced to join lengthy waitlists for visiting services like podiatry because they were unable to travel to nearby towns/cities. Young people unable to access educational or employment opportunities because the public transport systems were

deficient or inflexible. People ‘giving in’ and prematurely entering residential care because they could no longer access a few basic personal care or social support services.

For these reasons, we enthusiastically support the proposal for a CoAG auspiced examination of passenger transport. While we are far from convinced that the solutions to Tasmania’s transport problems lie in an extension of competition policy, the process of assessing the current market structures will doubtless provide important impetus for overdue reform in this sector.

5.2 Health Reform

TasCOSS supports the recommendation in the Discussion Draft that an integrated health care reform framework and program be developed under the auspices of CoAG. We offer no specific comment on preferred governance outcomes with respect to health care, but we do endorse the proposed range of policy issues raised in the Discussion Draft (pp267-8).

However, such a review should not focus on an extension of competition, or at least not as a primary outcome. While the role of competition between suppliers/providers in the health sector should of course be recognised as an important policy tool, means and ends should not be conflated in this critically important social policy arena. TasCOSS contends that a comprehensive review of health care systems will identify significant reforms that can be achieved on managerialist dimensions (such as rationalising the current Commonwealth-State overlap of responsibilities) without the need for a further marketisation of this sector.

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