Beyond the bottom line

Craig Johnston

Pro-competition law reform and consumer welfare.

The Competition Principles Agreement requires review of all Commonwealth and State/Territory legislation by the year 2000, to reform legislation that restricts 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 achieved by restricting competition'.

The Agreement also requires that the principle of competitive neutrality be applied to the business activities of government agencies only 'to the extent that the benefits to be realised from implementation outweigh the costs'.

These requirements bring concepts of public benefit, public interest, and benefit assessment centre stage.

In trade practices legislation the 'public benefit' can be seen, broadly, as 'anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal aims the achievement of the economic goals of efficiency and progress' (*Re QCMA and Defiance Holdings Ltd* (1976) ATPR 40-012 at 17,242).

In practice, however, the matters constituting 'public benefits' that have been recognised in authorisations of anti-competitive conduct by the (former) Trade Practices Commission and in decisions of the (former) Trade Practices Tribunal have not wandered far from matters of economic policy. They include:

- fostering business efficiency, particularly to achieve international competitiveness;
- industry rationalisation providing for more efficient allocation of resources and lower or contained unit production costs;
- the expansion of employment in efficient industries;
- assistance to efficient small business;
- the enhancement of quality and safety of goods and services and the expansion of consumer choice of the range of goods and services that are available;
- the provision of better information to consumers and businesses to enable them to make informed choices in their dealings;
- the promotion of equitable dealings in the market;
- the promotion of cost savings in industry and the consequent containment or reduction of prices at all levels in the supply chain; and

steps to protect the environment.[1]

This list of matters captures the 'public interest' in productive and allocative efficiency and in overcoming key aspects of market failure (concentration of market power, asymmetric information, environmental externalities). It does not, however, address any 'public inter-

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est' in having governments resolve potential conflict between allocatively efficient outcomes and equitable outcomes.

In contrast, the 'public interest' matters listed in s.1(3)(d)-(j) of the Competition Principles Agreement require a broader review of the advantages of competition than is required by s.90 of the *Trade Practices Act 1974* (Cth).

The Competition Principles Agreement specifies a number of matters which 'shall, where relevant, be taken into account' when governments balance costs and benefits of a particular policy or action, determine the merits or appropriateness of a particular policy or action, or assess the most effective means of achieving a policy objective. Those relevant matters are indicated in s.1(3). They are:

- 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 businesses; and

  the efficient allocation of resources.

As a group, they are commonly referred to as the 'public interest tests' of the Agreement.

Why are they significant? The inclusion of the tests in the Agreement followed lobbying by the Australian Council Trade Unions, the Australian Federation of Consumer Organisations (now Consumers Federation of Australia) and others, over the draft Agreement. They met a concern that the policy package (taking its cue from the 1993 Hilmer review whose brief was to consider competition in Australian markets) could focus on moves to promote greater competition as a strategy for more efficient economic outcomes, and in so doing would be unbalanced. Efficiency would be seen as an end not a means, and other important factors relevant to good public policy would be ignored. The tests, therefore, allow an opportunity for consideration of alternatives to pro-competition reform, and give a status to a range of non-economic issues in public policy making that previously appeared to have little.

This paper deals with two of the tests only:

'the interests of consumers generally or of a class of consumers', and

'social welfare and equity considerations, including community service obligations'.

It focuses on how they might be considered in an assessment of the merits of pro-competition policies. It backgrounds similar assessments in environmental impact assessment and regulatory impact assessment. It outlines relevant matters raised during the course of a House of Representatives inquiry into implementation of the policy, in the second half of 1995.

Social impact assessment in environmental impact assessment

Social impact assessment is an integral, if underdeveloped, aspect of environmental impact assessment. Its inclusion in environmental impact assessment flows from definitions of the environment; that in NSW referring to 'all aspects of the surroundings of man whether affecting him as an individual or in his social groupings' (s.4, *Environmental Planning and Assessment Act 1979* (NSW)).

Social impact assessment can be linked to other processes for consideration of social issues in environmental planning, such as planning for social infrastructure and human services, and social needs assessment. Social planning is sometimes used to refer to planning for the provision of social infrastructure and human services and in many cases needs to be linked with land use planning. Social needs assessment is the process of data collection, research and analysis that identifies key social issues and ways of addressing them: the basis for social infrastructure and human service planning. Social impact assessment is a more specific form of social needs assessment that focuses on the changes that are likely to occur as a result of a particular development, event, planning scheme or government policy decision.

The NSW Department of Planning describes environmental impact assessment as a process comprising:

- identification of issues,
- analysis of the extent of impacts,
- analysis of the nature of impacts, and
- evaluation of the likely environmental significance of impacts.

The Department's guidelines provide for explicit consideration of 'community impacts'.[2]

These guidelines were prepared for proponents of major developments. Over the last two years there has also been encouragement of better consideration of social impacts in the development assessment process, including in the local government sphere.

Social costs and benefits in regulatory impact assessment

New South Wales

The *Subordinate Legislation Act 1989* (NSW) requires that, before a regulation is made, there be an evaluation of the costs and benefits expected to arise from alternative options to it, compared with the 'costs and benefits (direct and indirect, and tangible and intangible) expected to arise' from the regulation. Implementation of a regulation should not normally be undertaken unless the anticipated benefits outweigh anticipated costs to the community, 'bearing in mind the impact of the proposal on the economy and on consumers, members of the public, relevant interest groups, and any sector of industry and commerce, that may be affected' (Schedule 1, para.3(b)).

The instrument for impact assessment of regulations is a Regulatory Impact Statement (RIS). The Act specifically provides that this must include an assessment of the costs and benefits relating to 'resource allocation, administration and compliance', and more generally, that 'economic and social costs and benefits, both direct and indirect, are to be taken into account and given consideration' (Schedule 2, para.2(1)).

It indicates that costs and benefits should be quantified, 'wherever possible', and if this is not possible, that the anticipated impacts of the proposed action and of each alternative should be stated and presented so that costs and benefits can be compared.

The *Regulation Review Act 1987* (NSW) provides for a Regulation Review Committee of Parliament. Its functions are to consider regulations that are subject to disallowance by Parliament, and to consider whether Parliament's attention should be drawn to a number of factors, one of which is explicitly a social impact, namely 'that the regulation trespasses unduly on personal rights and liberties' (s.9(1)(b)(i)).

The Committee undertook a review of the first three years of the operation of RISs. Out of the 80 RISs received by the Committee during 1991, 1992 and 1993, only four were found to fully comply with the RIS requirements in Schedule 2 of the *Subordinate Legislation Act.* (These requirements primarily indicate how net cost benefit analysis should be done.) It concluded that the majority of the regulatory proposals in those years went ahead 'without any satisfactory evidence that they would produce a net benefit to the community'.[3]

The Commonwealth

Similar mechanisms for regulatory review exist in the Commonwealth sphere. Guidelines for Regulation Impact Statements issued in August 1995 require a Commonwealth RIS to consider, among other things:

> the impact of legislation/regulation on 'groups with different age, language, physical, cultural, gender, family or income/wealth characteristics'; and
>
> the impact of legislation/regulation on 'within the consumer category, groups with different levels of information and/or abilities to process information'.

As with the NSW approach, the guidelines suggest impact analysis should not be restricted to tangible or monetary items, but also include non-monetary outcomes (for example, environmental amenity, health and safety outcomes). They also suggest separate identification of groups and sub-groups likely to be significantly affected, for example, consumers, groups in different geographical areas, or groups with different age, language, physical, cultural, gender, family or income/wealth characteristics.

The Industry Commission has indicated that it will use RISs to provide a framework for assessing legislation and regulation to fulfil the Commonwealth's obligations under the Competition Principles Agreement.[4]

The House of Representatives inquiry

An Inquiry into Aspects of the National Competition Policy Reform Package was begun by the Standing Committee on Banking, Finance and Public Administration of the House of Representatives in June 1995. Its role was to consider the appropriate means for applying the public interest tests of the Competition Principles Agreement, and the impact of competition policy reforms on the efficient delivery of community service obligations (CSOs) and the efficient delivery of local government services. Submissions were invited in July and at least 58 were received between then and November 1995.

The Committee was put on hold and the Inquiry is currently in limbo because of the federal election and change of government. The fate of the inquiry will depend on whether it is given a new reference by the Treasurer.

The work of the Inquiry might be considered, therefore, as part of the ancient history of competition policy reform in Australia. Nevertheless the Inquiry was significant at least for the reason that it gave a formal opportunity to 'the public' to present views about competition policy and its implementation. This opportunity seemed to be particularly important for local governments, who were not a formal party to the Competition Principles Agreement and contributed, as a group, the single biggest number of submissions.

Another significance was in the opportunity to advance the conceptualisation and application of social impact assessment techniques in a microeconomic reform context, and to consider how promotion of competition fits with other public interest agendas.

A profile of submissions by agency type shows that local governments and business interests submitted the most: combined, they submitted half of them. In contrast only two were from consumer interests (one household, one commercial), three from welfare organisations, and one from an environmental organisation (the Australian Conservation Foundation — included in 'others' in the following table).

Profile of submitting agencies to the Inquiry

Local governments and peak bodies	17
State governments (Tasmania, Victoria)	2
Commonwealth government agencies	9
Businesses (including GTEs) and industry bodies	12
Unions and peak body (ACTU)	6
Consumer organisations (PIAC/CFA, Victorian Gas Users Group)	2
Welfare organisations	3
Others	7
	58

What did they say about social welfare and equity and consumer interests, and how to trade off or balance competition and other public interest matters?

Social welfare and equity

Equitable access to government services and 'essential services' was raised in many submissions, including those from local governments, especially in rural Australia. (The only metropolitan government to submit was Brisbane.) A common concern was that commercialised management of government agencies and corporatisation of government trading enterprises (GTEs) could involve reduced access (vertical, horizontal). Impacts on service delivery to particular subpopulations were raised in relation to older people and Aboriginal and Torres Strait Islander communities in rural and remote locations

While the term 'community service obligations' has been used by 'insiders' to refer specifically to social programs provided by GTEs, its unqualified mention in the Inquiry's terms of reference helped to give a twist to the way that some submissions used the term: they understood it to be that 'government has an obligation to provide services to the community', without any necessary reference to GTEs. Thus the Community and Public Service Union referred to public

sector services — including by budget sector agencies — as CSOs. A number of local governments also used the term in this way. Others used it in the more common sense of social programs delivered by GTEs (for example, Brisbane City Council, PIAC and Consumers Federation of Australia).

Otherwise the discussion was on the merit of identification and costing of CSOs (for example, Australian Local Government Association) and the appropriate means of costing (for example, Australian Chamber of Commerce and Industry, Department of Communications and the Arts). None of this discussion was new compared with that in 'orthodox' texts, or canvassed matters not canvassed in previous Commonwealth parliamentary inquiries.

Consumer interests

The submissions that addressed consumer protection matters were those from the Federal Bureau of Consumer Affairs and a number of consumer affairs/fair trading ministers. The latter stressed the importance of consideration to demand side issues for consumers, especially regulation of quality standards, pricing and CSOs, information, and redress mechanisms.

The PIAC/Consumers Federation of Australia submission focused on consumer protection and consumer welfare issues in utility reform, in the areas of cost-reflective pricing and cross subsidies, equity implications of market failure, and the need for special-purpose protection of household consumers in monopolistic and oligopolistic markets.

Approaches to the 'public interest tests'

Comments on the public interest tests related to the content of issues to be considered and the processes with which to do this.

A key dilemma was how much emphasis should be put on each of the various factors, especially in efficiency and equity trade-offs.

The National Farmers Federation suggested the Inquiry establish a number of broad framework principles within which the public interest tests be addressed, on the basis these would assist in balancing the competing interests and simplify the fundamental nature of the test. It recommended those framework principles be:

1. A public interest test should always support outcomes which give Australian consumers more choice rather than less and which achieve an output with fewer resources and inputs rather than more.
2. A public interest test should be based on productivity and economic efficiency and should not be influenced by equity or distributional outcomes which may be addressed by other policy actions.
3. A public interest test should give equal weight to all Australian individuals or market participants.
4. A public interest test should be based on long-term assessments of costs and benefits.[5]

Unions and local governments proposed greater emphasis on consideration of social equity issues, however.

One submission noted that, 'An overall social cost-benefit analysis of such competition-driven changes, taking account of secondary and externality effects, could well indicate a net negative income'.[6]

The ACTU argued that some legislation 'which is in the public interest, in such areas as environmental protection, industrial relations, health and safety, equal employment opportunity and consumer affairs' be exempt from review altogether.

Telstra proposed a broad approach to assessing the public interest, based on three principles:

- consideration of net benefit: this would involve a reasonable assessment of economic costs and benefits. In relation to social impacts, notwithstanding quantification difficulties, for example, positive externalities, Telstra suggested it is possible to identify the goals of a policy, the beneficiaries, and the incidence of associated costs;
- explicit processes to evaluate policy: this would involve consideration of goals, underlying policy rationale, funding and implementation responsibilities;
- consideration of alternative policies.[7]

A number of submissions suggested the processes of applying public interest tests be open and participatory (for example, Brisbane City Council, National Tertiary Education Industry Union, Community and Public Sector Union PSU Group, PIAC and Consumers Federation of Australia).

In relation to development and application of appropriate methodologies — a key rationale for the Inquiry, the submissions were not very helpful to the Inquiry.

Some stressed the difficulty of doing this in relation to nonmarket impacts. The Federal Bureau of Consumer Affairs suggested:

> Just how the public interest is weighed against the objective of removing anti-competitive measures or implementing major structural reforms to public utilities remains unavoidably problematic. The simple reason for this is that the decision of whether or not to allow an anti-competitive measure to remain in the public interest, even after a rigorous and thorough assessment of what the 'public interest' represents, is at the end of the day, largely a matter of judgment to be based on perceptions of prevailing community values ... In most cases, it is not possible to accurately quantify in dollar terms the 'cost' of the public or consumer interest.[8]

The Victorian Government indicated it was 'yet to formulate explicit criteria for applying a public benefit test, and the methodology that would be used to establish relative costs and benefits.'

The Industry Commission advised that application of public interest tests to review Commonwealth legislation would be done in a manner consistent with guidelines for regulation impact statements. It indicated this process required consideration of the impact of legislation on 'groups with different age, language, physical, cultural, gender, family or income/wealth characteristics', which it suggested corresponded to the Competition Principles Agreement provision 1(3)(e) — social welfare and equity, and on, 'within the consumer category, groups with different levels of information and/or abilities to process information', which it suggested corresponded to the Agreement's provision 1(3)(h) — the interests of consumers or a class of consumers.

PIAC and the Consumers Federation of Australia suggested that identifying and measuring social benefits was a 'risky enterprise', because there are some things that have existence values or intrinsic values (the measurement of which, in dollar terms at least, offended the community values of Australians), and because appropriate and agreed methodologies were lacking. They recommended that the Inquiry acknowledge the need for testing of various techniques for valuation of non-market costs and benefits, and that the Inquiry propose that Commonwealth and State agen-

cies undertake a series of pilot studies to review the techniques in practice.

Comment

The first major piece of legislation to be reviewed in NSW within a Competition Principles Agreement framework was that establishing the Rice Marketing Authority — statutory marketing authorities being one of the key areas identified for review of anti-competitive arrangements by the 1993 Hilmer report. The review considered whether the statutory powers of the Board should be extended beyond January 1999.[9] It found that current arrangements result in a total loss in *consumer surplus* of about $6 million, including a transfer of wealth from consumers to producers ('producer transfer') of about $5 million a year. It considered the benefits from the central aspect of the arrangements, that is, single desk export selling, to be in the range of $26-32 million (in 1996-1997), compared with costs from this and other aspects of the arrangements in the $2-12 million range. It concluded there was a net public benefit: the benefits from the export arrangements significantly exceeded the costs borne by domestic consumers and the economy. It recommended maintenance of some form of regulation, to maintain single desk export selling, but deregulation of the domestic market to provide an opportunity for competition in provision of rice storage, transport, processing and further value adding activities.

The Minister for Agriculture rejected the latter recommendation, including because deregulation of rice marketing would provide no significant public benefit and because the rice industry needed stability to continue its market development programs in Australia and overseas.[10] The premier was quoted in the media as saying, 'The message I've got for rice farmers in NSW is we're not going to subject them to an ideologically driven experiment in deregulation'.[11] Of the more than 250 submissions received by the review, 95% were from rice growers, a big majority of them supporting current arrangements.

In general, a reading of the rice review points to three main aspects of pro-competitive reviews:

- there will potentially be a number of diverse costs and benefits across the range of public interest tests, and the benefits from restricting competition might be concentrated (for example, among organised producers) and the costs diffused (for example, among indifferent consumers);

  the conclusions will not always be clear cut;

  the choice of public policy option will be discretionary and depend on values.

The complexity of decision making can follow from a number of aspects of a problem — multiple objectives, intangibles, long-time horizons, many impacted groups, risks and uncertainty, value trade-offs, sequential nature of decisions.[12] As well, many decisions are characterised by:

> high stakes — there are big differences in perceived desirability of alternatives;
>
> complicated structure — it is often difficult to assess alternatives informally in a responsible manner;
>
> there being no overall experts, because of the breadth of concerns; and
>
> a need to justify decisions — including to the public.[13]

Value trade-offs are important when considering achievement of various objectives. Part of the 'solution' might be to acknowledge subjective judgments in the evaluation of alternatives.[14] Neutze argues that:

> It is essentially a moral judgement whether one outcome is more equitable than another. Most modern economists regard themselves as incompetent to judge whether one distribution is better or worse than another, and therefore they ignore the distributional consequences of the policies they advocate. Since all policy changes benefit some people and make others worse off, this implies that no judgements should be made. One possible escape from that dilemma is to use the so-called Paretian criterion to judge the consequences of decisions, under which a policy is desirable if it makes at least one person better off and nobody worse off. That criterion, however, assumes that the existing distribution of income is desirable.[15]

There is nothing particularly novel in this line of argument. It also has resonances in modern business practice. In the measurement of corporate performance a balanced scoreboard approach considers financial measures and non-financial measures of performance. That is, it considers financial measures, such as costs and profits, and non-financial measures, such as customer satisfaction, quality, innovation, and employee development. It focuses the organisation on 'actionable' measures — things that managers can influence directly like yield, reliability and customer satisfaction.[16]

Conclusion

The Competition Principles Agreement and NSW and Commonwealth regulation review instruments require consideration of consumer welfare impacts, as part of a 'balanced scoreboard' approach.

- Where possible consumer welfare impacts should be quantified. But where they do not readily lend themselves to market or neo-market valuation techniques, they should at least be identified and described. Qualitative techniques are absolutely acceptable for this. These might be 'second best' but they are not second rate.
- The purpose of identifying social impacts is to take them into account. Qualitative information can be placed alongside quantitative. Consideration of the information will be more transparent if the values used in decision making are explicit.
- How best to incorporate consumer welfare impacts in microeconomic reform is, and will be, an iterative process and a learning process.

It is a challenge for microeconomic reform, not a nuisance.

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Also, in the High Court decision *Bushell v Repatriation Commission* (1992) 109 ALR 30 at 43, Brennan J made the following observations about the role of the AAT:

> Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the board [Veterans Review Board] and the AAT is an administrative decision maker, under a duty to arrive at the correct or preferable decision in the case according to the material before it. If the material is inadequate, the Commission, the board or the AAT may request or itself compel the production of further material.

On the other hand there are the views of Deane J in the Federal Court in *Sullivan v Department of Transport* (1978) 1 ALD 383 at 402-3. Deane J acknowledged that there are circumstances in which the AAT needs to raise matters that a party does not wish to raise. However, he felt that parties should generally be left to present their cases as they saw fit. Undue interference with the way an unrepresented party conducts a case might lead to a failure to extend to the party an adequate opportunity to present the case.[13]

Another concern that is sometimes raised is that an investigative approach detracts from the perceived impartiality of the Tribunal.[14] Thus, the legal objections to an investigative approach are founded on the principles of procedural fairness. The requirements of procedural fairness of course depend on the circumstances, including the nature of the inquiry, the subject matter and the rules under which the decision maker is acting.[15] The hearing rule generally requires that a party 'is entitled to know the case sought to be made out against him and to be given an opportunity of replying to it'.[16] The rule thus does not automatically require that proceedings take the traditional adversarial form of the courtroom. If as Brennan J sees it, the role of the AAT is in substance inquisitorial, then it is logical that the tribunal should take the lead in identifying and pursuing issues, rather than leaving this to the parties.[17]

CSAT's approach does not mean that the parties are denied a chance to provide evidence, to ask questions and otherwise argue their point of view as allowed by s.59 of the *CAMA Act*. It rather means that the Tribunal generally takes the lead in identifying issues and asking questions, and then the parties are given this opportunity. Often, parties are satisfied with the Tribunal's questioning and have little they wish to add. The above concerns of Deane J frankly assume a quite unrealistic capacity of the average person to present and argue a case to a passive recipient in a forum in which that person will appear probably only once in a lifetime. Many appellants to CSAT would be daunted by being expected to do so.

Nor should an investigative approach, thoughtfully implemented, give rise to a reasonable apprehension of bias. A tribunal can avoid this apprehension by being even handed in its questioning and explaining why it is or is not probing particular issues.

In the circumstances of CSAT, it would seem to the writer that the factors discussed in **Rationale for an investigative approach** (above) are more than sufficient to justify a predominantly investigative approach.

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