6 May 2008

John Feil,
Executive Director
National Competition Council
GPO Box 250
Melbourne VIC 3001

Dear John,

NATIONAL COMPETITION COUNCIL – GOLDSWORTHY, HAMERSLEY AND ROBE RAILWAY

The Chamber of Commerce and Industry Western Australia (CCI) is pleased to provide the following submission to the National Competition Council on the Goldsworthy Railway, the Hamersley Railway and the Robe Railway.

CCI is the leading business association in Western Australia. It is the second largest organisation of its kind in Australia with a membership of approximately 5,500 organisations in all sectors including manufacturing, resources, agriculture, transport, communications, retailing, hospitality, building and construction, community services and finance.

Most members are private sector businesses but CCI also represents the not-for-profit sector and the government sector. About 80 percent of members are small businesses, and members are located in all geographical regions of WA. Some 100 business associations are affiliated with CCI, expanding the organisation's representative coverage to more than 10,000 enterprises.

The attached *Competition Policy in Western Australia: A Discussion Paper* outlines the principles that the Chamber of Commerce and Industry (CCI) believe should guide the NCC's decision. A summary of CCI's position is that:

> *The monopoly nature of infrastructure makes it an important part of competition policy, particularly in the areas of energy, transport, communications and water supply. Access to such infrastructure and the cost of doing so are also key determinants of the overall efficiency and competitiveness of an economy.*
>
> *Businesses should have legal avenues to pursue the use of nationally significant infrastructure services owned and operated by others on commercially negotiated terms. Where commercially negotiated terms and conditions are not possible, implementing authorities must be sensitive to the implications of their decisions including possible disincentives to future investment that may result from mandated access and it is important that where access is given it is on 'reasonable' terms and conditions and at 'fair' prices.*

In determining appropriate commercial terms it is important that the risky nature of infrastructure development in very different business conditions, and its integration into business activity. This needs to be balanced against the advantages that are available from leveraging off significant infrastructure developments for the purpose of 'opening up' Western Australia's natural resources for further development.

If you require any information, please do not hesitate to contact Nathan Taylor, Senior Economist, on (08) 9365 7508.

Yours sincerely

Nathan Taylor
Senior Economist, CCI Economics

CHAMBER OF COMMERCE
AND INDUSTRY
WESTERN AUSTRALIA

Competition Policy in Western Australia:
A Discussion Paper

Business Leader Series
Prepared by the Chamber of Commerce and Industry of Western Australia

September 2006

Contents

Introduction and Overview

About CCI

The Chamber of Commerce and Industry of Western Australia (CCI) is the leading business association in Western Australia.

It is the second-largest organisation of its kind in Australia, with a membership of 5,000 organisations in all sectors including manufacturing, resources, agriculture, transport, communications, retailing, hospitality, building and construction, community services and finance.

Most members are private businesses, but CCI also has representation in the not-for-profit sector and the government sector. About 80 per cent of members are small businesses, and members are located in all geographical regions of WA.

Context

Competition is the underlying dynamic which drives the market-based commercial and economic system which best serves to create wealth and enhance living standards for the benefit of all.

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In Australia, the push towards increasing competition is mostly embodied within the principles of the National Competition Policy (NCP). According to the NCP, anti-competitive structures and regulation should be reviewed and repealed unless it can be demonstrated to be in the public interest, and payments are made to state governments according to progress in implementing reforms.

The Council of Australian Governments (COAG) agreed to the principles of NCP in 1995 and each State jurisdiction, along with the Federal Government, has since pursued an agenda of competitive reforms. The current NCP reform agenda ended in 2005 with significant benefits having accrued to the national and state economies. In addition, in its February 2005 review of NCP reforms, the Productivity Commission said that reforms taken to date would deliver substantial ongoing benefits to state and national economies. Recognising these benefits, a new *National Reform Agenda* was agreed to by COAG in February 2006.

Pushing on with reform under the new agenda is particularly important for Western Australia as the state has a poor record in implementing competition reform under the NCP. To this extent, the new *National Reform Agenda* provides an opportunity to highlight the importance of competition and reinvigorate the push for competitive reforms in Western Australia.

This paper sets the scene for competition policy in Western Australia. It highlights key competition reform objectives for Western Australia in the areas of legislative and structural reforms, and in the application of competitive neutrality principles by government. Importantly, it also highlights the need for the Government to change the way it manages competition policy to better meet its responsibilities under the new reform agenda.

Executive Summary

Competition policy comprises numerous economic policies and reforms instituted on the assumption that, in general, the performance of an economy and the welfare of citizens will be improved if competition in markets for goods and services is increased.

Competition policy is founded on this critical presumption that, unless there are strong reasons to restrict activity in a market, competition is the most effective means of maximising public benefit. Hence, in the application of competition policy, the burden of proof lies with advocates of regulation or restricted market access to demonstrate both that a competitive market yields fewer community benefits than an uncompetitive one, and that the benefits attributed to regulation or restricted access cannot be achieved in any other way.

For this reason, governments should seek to foster and protect competition within the policy framework. The key principles that underlie this framework are:

- **Competition in the Provision of Public Goods and Services** - harnessing private sector competition in the provision of public goods and services can engender a more efficient delivery of government services and lower the cost of service delivery, which is conducive to economic growth and development.
- **Competitive Neutrality** - public businesses in direct competition with private enterprises in the provision of goods and services should not have an advantage over private sector competitors by way of their public ownership.
- **Structural Separation of Functions** - significant government business enterprises should be subject to appropriate separation of its monopoly, commercial and regulatory functions to ensure that no unfair advantage is construed to the commercial activities of the public entity by way of its monopoly position in the market, nor by way of its dual role as a market participant and market regulator.
- **Access to Infrastructure** - businesses should have legal avenues to pursue the use of nationally significant infrastructure services owned and operated by others on commercially negotiated terms. Where commercially negotiated terms and conditions are not possible, implementing authorities must be sensitive to the implications of their decisions including possible disincentives to future investment that may result from mandated access and it is important that where access is given it is on ‘reasonable’ terms and conditions and at ‘fair’ prices.
- **Public Interest Test** - 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 (including the financial costs of administering regulation).
- **Policy Application** – competition policy should be applied through formal administrative arrangements to ensure that competition reform is implemented in a co-ordinated, consistent and equitable fashion across the policy framework. This would also help to guard against policy inaction due to political sensitivities.
- **Competition in an International Context** - in today’s world where international economies are highly integrated through the globalisation of trade, investment and capital, competition policy needs to also reflect the international environment. Governments should seek to engender and protect competition in the international framework of laws.

Instituted in 1995 by the COAG, the NCP is the main vehicle by which competition reform has been brought about in Australia and WA over the past decade. The underlying aim of this framework is contained in the *Competition Principles Agreement* which was signed by all Australian governments at the time and re-committed to in February 2006.

The Agreement essentially aims to improve the competitive nature of the national economy by requiring governments to undertake structural reform of public monopolies, review and repeal anti-competitive legislation if it is found not be in the public interest, and apply competitive neutrality principles to public businesses.

The NCP agenda agreed to in 1995 drew to an end in 2005. In its February 2005 review of NCP reforms, the Productivity Commission said that NCP reforms taken to date would deliver substantial ongoing benefits to state and national economies. The Commission estimates that Australia's GDP is currently about 2.5 per cent (or $20 billion) higher than it would otherwise have been, and that Australian households' average annual income is around $7,000 higher[1] as result of competition policy reforms.

The COAG reviewed the NCP agenda in February 2006 and agreed to a new *National Reform Agenda* to continue the competition reform process in Australia.

Importantly, the COAG reviewed the NCP agenda in February 2006 and agreed to a new *National Reform Agenda* to continue the competition reform process in Australia. The new COAG agenda is split into three streams - human capital, competition and regulatory reform. The latter two are the focus of this paper.

The competition stream of the new agenda aims to further boost competition, productivity and the efficient functioning of markets through further reform and initiatives in the areas of transport, energy, infrastructure regulation and planning and climate change. This agenda follows the formula of national competition policy reforms, with governments working together to identify reform opportunities and agreeing on a process for delivering them.

Importantly, as part of this new national agenda all governments re-committed to the principles contained in the *Competition Principles Agreement*. Jurisdictions have also agreed to continue and strengthen gate-keeping arrangements established under the NCP to prevent the introduction of unwarranted restrictions on competition in new and amended regulations. It was also agreed that all outstanding priority legislation reviews from the NCP review program would be completed.

The regulatory reform stream of the new agenda focuses on reducing the regulatory burden imposed by the three levels of government. Specifically, the agreement aims to establish robust gate-keeping arrangements in each jurisdiction to ensure that new, amended and existing regulations are efficient and do no not entail unnecessary compliance costs and restrictions on competition.

The re-commitment to the principles of competition by all Australian Governments is particularly important for Western Australia. Disappointingly, the Government of Western Australia has a poor record in implementing competition reform under the NCP. The poor progress of competitive reform in Western Australia is primarily due to a lack of political will and leadership.

Both sides of Western Australian politics, when in Government or when in opposition, have failed to pursue competitive reforms. It is also worrying to see the current State Government advocate further inappropriate intervention in markets to the detriment of competition despite having committed to competition principles.

To this extent, the new *National Reform Agenda* provides an opportunity to highlight the importance of competition and reinvigorate the push for competitive reforms in Western Australia. Further competitive reform is essential to the Western Australian economy, not only because it was the worst performing state on National Competition Reform, but also because the WA economy is far more externally focussed than other states, opening it to competitive pressures from overseas.

The NCP agenda required governments to reduce structural and legislative impediments to competition and adhere to principles of competitive neutrality. Major NCP reforms in Western Australia centred on structural reforms (particularly in the energy sector), but more can be done in this regard. There is also a significant amount that needs to be done in relation to key legislative reforms and in the application of competitive neutrality in WA.

To this extent, CCI has set an agenda for competitive reform in Western Australia in concert with the new *National Reform Agenda*. The key legislative reforms centre on:

- the need to **liberalise retail trading hours laws** in WA, which currently impede competition by prescribing when shops can trade and by allowing some stores to trade outside of regulated hours as long as they are 'small' and/or located in certain areas;
- **reforming liquor licensing laws**, which restrict competition by requiring license applicants to satisfy a needs test proving that the licence is necessary to provide for the requirements of the public, and by allowing hotel bottle shops to sell liquor on Sundays, when other liquor outlets are prohibited from doing so;
- removing **Western Australia's archaic potato marketing regulations**, which restrict competition by allowing the State Government to restrict the availability of land for growing potatoes for fresh consumption, and an ability to fix the wholesale price of such potatoes, while requiring that they be sold to the Government's statutory marketing authority;
- **liberalising the state's fuel pricing regulations**, which impede competition in petrol retailing by requiring that retailers fix their prices for at least 24 hours and notify these prices to the Government, and the setting of maximum wholesale pricing for fuel; and
- addressing the complex and overlapping inter-jurisdictional regulatory framework that currently prevails in **Australia's food industry**, which leads to differences in the trading environment faced by businesses according to their state of operation. Competition within the current framework is also constrained by the legislative process that must be followed for developing or amending food standards.

The key structural reforms centre on:

- **opening the water industry to greater private sector involvement** by improving pricing transparency, and proving a more co-ordinated and structured approach to planning. More stringent application of competitive neutrality principles in this sector is also vital;
- introducing more efficient pricing of road and rail freight infrastructure, and **reducing inefficiencies in the transport sector** by simplifying regulation and introducing nationally consistent regulations across state jurisdictions;

- **improving competition in the provision of infrastructure** by advocating commercially negotiated access arrangements where possible and developing nationally consistent principles for determining access prices where third-party access regimes are needed. Government should also tighten its application of competitive neutrality to its business enterprises engaged in significant commercial activities in competition with the private sector in the provision of infrastructure;
- where applicable, **pursuing reforms and policies in the energy sector** which are consistent with the goal of achieving a national market for energy; and
- developing a formal, nationally consistent framework for dealing with the issue of **greenhouse gases** (with enough flexibility to accommodate the differing needs of each jurisdiction).

Like NCP, governments at all levels will have a central and continuing role in elaborating and implementing the new *National Reform Agenda*. However, in Western Australia, relying on the government to take responsibility for reforming its own laws has not been successful, primarily due to a lack of political will and a lack of impartiality in reviewing anti-competitive arrangements.

Under the current structure, each government agency is responsible for reviewing anti-competitive legislation which fall under its jurisdiction, while the Department of Treasury and Finance is the gate-keeper for regulation and is also responsible for investigating competitive neutrality complaints.

To date, these arrangements have had at best limited success. The National Competition Council (NCC) assessed Western Australia as not having complied with its reform obligations with regard to competitive neutrality and legislation reviews, and rated the state's regulation gate-keeping arrangements equal lowest of all states (along with New South Wales and the ACT).

Effective administrative arrangements form a critical part of any competition policy agenda.

Effective administrative arrangements therefore form a critical part of any competition policy agenda. In order to achieve this, CCI recommends that the responsibility for carrying out reviews of legislation under the agreements of the new *National Reform Agenda* be transferred to the Economic Regulation Authority (ERA).

These include the responsibility for reviewing anti-competitive regulation and structure, 'gate-keeping' responsibilities, and the responsibility for administering the government's competitive neutrality policy.

As the independent economic regulator for Western Australia, the ERA currently oversees regulation and licensing for the gas, electricity, water and rail industries. Synergies already exist between the functions of the ERA and the objectives of competition policy. Indeed, the *Economic Regulation Authority Act 2003* allows for the State Treasurer to refer any matter related to a regulated industry to the Authority for the purposes of an inquiry[2].

The likelihood for more independent and robust review of regulation and competitive neutrality issues would be significantly enhanced under this proposed structure, and would place Western Australia in a similar position to other states that have established independent public bodies to provide advice on broad issues of competition and reform.

Principles of Competition Policy

Key Principles

Competition is the underlying dynamic that drives the market-based commercial and economic system and is vital to the growth and development of an economy. Competition gives businesses the incentive to ensure that goods and services are delivered as efficiently as possible, to improve the quality, quantity and efficiency of their operations and to innovate.

In general, competitive market arrangements lead to an optimal outcome for both consumers and businesses. Competition encourages the efficient production of goods and services as well as an efficient allocation of resources between firms and across industries. Competition also fosters dynamic efficiency within an economy as firms undertake process and product innovation in the perpetual search for a competitive edge.

Conversely, impediments to competition slow the pace of economic development. Governments often intervene in markets to impede competition in pursuit of political or social objectives. However, such actions often impose greater costs than benefits upon the economy and often disadvantage those groups they purport to help.

Western Australia's retail trading restrictions, which allow some shops to open for longer hours based on their size or location, are a prime example. Advocates of the restrictions claim it helps small retailers and those in tourism precincts by protecting them from competition. However, given their privileged market position, the protected parties have little incentive to grow and develop, while consumers are disadvantaged by the lack of choice and convenience of having only some shops open at particular times.

This does not imply that governments should not regulate markets altogether. Public interest theory has long argued that there are circumstances in which government regulation can act to constrain the operation of markets in ways that improve the welfare of the community. In general, these circumstances comprise instances of what economists call "market failure". Markets will fail under a range of circumstances:

- where there is a monopoly or natural monopoly or some lesser degree of monopoly power;
- in the provision of public goods;
- where there is imperfect or asymmetrical information;
- where there are harmful or beneficial externalities.

Market failure is often misunderstood to indicate the failure of markets to deliver what governments, regulators or others think they should deliver, or a failure to provide goods because it is not profitable. In this context, governments often intervene in markets deeming it to be appropriate and in the community interest, although the issue they seek to address is not really market failure. Rather, intervention is often motivated by social aims which are intended to distribute benefits to certain groups, even if this imposes greater costs on others.

For economists, market failure refers to a situation in which economic efficiency has not been achieved through market mechanisms. Its result is the failure of a market to produce goods for which there is effective demand, or a sub-optimal distribution of resources which could be improved in such a way that some consumers could be made better off without making others worse off.

Most often, it is only in the instance of demonstrable market failures that government intervention can be justified. Furthermore, even the evidence of market failure does not necessarily justify government intervention. In intervening in markets, governments must ensure that the benefits to the economy of intervention outweigh the net financial costs of doing so.

Other things being equal, the best solution to market failures is to remove their causes - breaking up monopolies and eliminating legislative sources of monopoly power, for example.

However, in some cases, the scope for such solutions is limited, and this is where more extensive regulation is appropriate. However, such interventions should be applied to the market failure they address. For example, if the problem is information asymmetry, the government can redress the balance by providing information itself or compelling market players to do so.

While the market failure exceptions to a general preference for competition are important, they remain exceptions. By and large, consumers and businesses are better off if markets are left unregulated.

Competition policy is founded on this critical presumption that, unless there are strong reasons to restrict activity in a market, competition is the most effective means of maximising public benefit.

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Hence, in the application of competition policy, the burden of proof lies with advocates of regulation or restricted market access to demonstrate both that a competitive market yields fewer community benefits than an uncompetitive one, and that the benefits attributed to regulation or restricted access cannot be achieved in any other way.

Policy Framework

Governments should seek to foster and protect competition within a defined framework. The key principles that underlie this framework are discussed below.

Competition in the Provision of Public Goods and Services

Governments should seek to foster competition in the provision of public goods and services where practicable. Increased competition in delivering public goods and services is often achieved though the contracting out of government services via competitive tendering processes, and by opening commercial areas previously dominated by, or reserved for government operators, to competition from the private sector. Opposition to private sector involvement in delivering government goods and services on purely ideological grounds is out of step with a modern economy.

The nature of public service delivery has changed significantly over time, with less importance now placed on governments' role as providers of 'public goods' and more value placed on efficiency and cost of service delivery. These changing values are highlighted by the increasing trend towards corporatising government business enterprises and privatising government assets.

Harnessing private sector competition in the provision of public goods and services can engender a more efficient delivery of government services and lower the cost of service delivery, which is conducive to economic growth and development.

An important distinction must be made between privatisation and corporatisation. The latter involves the adoption of more commercial governance models by public businesses, but government still retains majority ownership, unlike a privatised entity.

Some government businesses would, if privatised, be natural monopolies which in turn would require oversight by a regulatory body. No government is likely to allow a water or power authority operating in the absence of competition to independently determine its tariffs. Such monopolies would be unacceptable unless regulated and economic theory suggests that a private, regulated monopoly might not be any improvement over a public monopoly.

Hence, market structure rather than ownership is the key to improving efficiency in most markets and is quite rightly the focus of competition policy reforms. Nonetheless, privatisation can deliver administrative and other benefits which may mean that privatised agencies will tend to be more efficient that government-owned ones within any given market structure.

Competitive Neutrality

Competitive neutrality refers to the need for a level playing field in instances where public businesses are in direct competition with private enterprises in the provision of goods and services.

Government businesses should not have an advantage over private sector competitors by way of their public ownership. Such advantages have traditionally included tax exemptions or concessions, easier access to finance or less stringent corporate compliance or reporting obligations. Generally, this can be achieved by requiring significant government enterprises to adopt corporatised governance models, which ensure that such enterprises are subjected to similar commercial and regulatory obligations to those faced by private sector businesses.

Formulating and adhering to competitive neutrality must however, also be coupled with the establishment of independent and transparent mechanisms for dealing with complaints that the requirements of competitive neutrality have been breached.

Structural Separation of Functions

Government can also foster competition within the regulatory framework by making its significant business enterprises subject to appropriate structural separation - that is, separating the enterprise’s monopoly, commercial and regulatory functions.

The separation of regulatory and commercial functions improves competition by helping to ensure that no unfair advantage is construed to the commercial activities of the public entity by way of its monopoly position in the market. Further separation of contestable commercial elements of the public business into smaller independent businesses should also be explored, especially for large vertically integrated public enterprises.

Separation of the commercial and regulatory functions of public business should also be explored. This ensures that the entity can not confer on itself any competitive advantage by way of its dual role as a market participant and market regulator.

Access to Infrastructure

The monopoly nature of infrastructure makes it an important part of competition policy, particularly in the areas of energy, transport, communications and water supply. Access to such infrastructure and the cost of doing so are also key determinants of the overall efficiency and competitiveness of an economy.

Businesses should have legal avenues to pursue the use of nationally significant infrastructure services owned and operated by others on commercially negotiated terms. Where commercially negotiated terms and conditions are not possible, implementing authorities must be sensitive to the implications of their decisions including possible disincentives to future investment that may result from mandated access and it is important that where access is given it is on 'reasonable' terms and conditions and at 'fair' prices.

The corporatisation of government commercial activity with regard to infrastructure is preferred, however, where monopoly service providers remain (whether they be publicly or privately owned), independent authorities in each jurisdiction should be established to set, administer or oversee prices for such enterprises in a consistent and transparent manner.

Public Interest Test

To encourage competition within the policy framework, 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 (including the financial costs of administering regulation).

To encourage competition within the policy framework, 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.

Governments should implement independent and transparent processes to ensure that anti-competitive legislation that is not found to be in the public interest is repealed or halted (in the case of new Acts or amendments).

Applying Competition Policy

The adoption of competition policy and its principles by governments is alone insufficient, particularly given the political sensitivities around some aspects of competition reform.

Rather, formal administrative arrangements should be implemented to ensure that competition policy is implemented in a co-ordinated, consistent and equitable fashion across the policy framework.

Ideally, governments should give responsibility for competition reform to public institutions independent of political processes and sectoral interests to champion the competition cause and act as a watchdog on competition related issues. These institutions should undertake the competition policy agenda in a transparent and open manner.

Competition in an International Context

Competition policy recognises that while governments can do a lot to promote competition within their own borders, the commitment to and application of the principles of competition in other jurisdictions can also have a significant impact upon domestic firms and consumers, particularly in today's world where international economies are highly integrated through the globalisation of trade, investment and capital.

In this context, governments should also seek to engender and protect competition in the international framework of laws. In this regard, it is positive that the World Trade Organisation and many of its national members have recognised competition issues with regard to international trade. However, wider implementation of competition reforms in the areas of global capital and investment flows should also be pursued by national governments and international bodies.

Competition Policy in Australia

Background

Competition policy comprises numerous economic policies and reforms instituted on the assumption that, in general, the performance of an economy and the welfare of citizens will be improved if competition in markets for goods and services is increased.

Importantly, the central element to such policies is to use competition as a means to an end, rather than viewing competition as an end in itself.

Instituted in 1995, the National Competition Policy (NCP) is the main vehicle by which competition reform has been brought about in Australia and WA over the past decade. The underlying aim of this framework is to improve the competitive nature of the national economy by undertaking structural reform of public monopolies, reviews of anti-competitive legislation and applying competitive neutrality principles to public businesses.

However, the push towards competitive reforms in Australia began much earlier than NCP. For example, reforms such as the floating of the Australian dollar, the deregulation of financial markets and removal of trade barriers all took place in the 1980s. This led to a push for governments at all levels throughout Australia to undertake reforms such as reform of public business enterprises and the introduction of measures to prevent anti-competitive behaviour - all with the explicit intention of improving economic performance and community welfare by enhancing competition.

In Western Australia, competition reform prior to the introduction of NCP centred on structural reform of government business enterprises in the early 1990s, with the State Energy Commission of Western Australia separating into Western Power and AlintaGas, while the Water Authority was also corporatised.

National Competition Policy

The formal push towards a national competition framework in Australia commenced in 1992, when the Commonwealth and State governments established an Independent Committee of Inquiry into a National Competition Policy for Australia.

The committee's recommendations, known as the Hilmer Report, made a vital contribution to the evolution of competition policy in Australia. Its key contributions were to propose a co ordinated, systematic and uniform approach to competition policy across all government jurisdictions, and to recommend mechanisms designed to address the institutional and political factors that can lead governments and regulators to adopt anti-competitive measures that are not in the public interest. In particular, it proposed:

- the establishment of a clear principle that anti-competitive regulation and legislation should be permitted only when it can be demonstrated to be in the interest of the community, and cannot be achieved by other means; and
- the establishment of 'arms-length' bodies to oversee and advise on the general implementation of competition policy (the National Competition Council) and regulate its detailed application (the Australian Competition and Consumer Commission).

On 11 April 1995, the Council of Australian Governments (COAG) agreed to a national competition policy package providing for uniform legislation on the protection of consumer and business rights and increased competition in all jurisdictions. The Prime Minister, Premiers and Chief Ministers signed two inter-governmental agreements to implement the package. COAG reaffirmed its commitment to continuing micro-economic reforms in key industries and this was reflected in a third agreement which provided for financial arrangements, including a series of competition payments to be paid to the State Governments in return for implementing competition policy reforms.

In summary, the three key measures provided:

- a *Conduct Code Agreement* along with *The Competition Policy Reform Act* and various State and Territory legislation, which extended coverage of Part IV of the *Trade Practices Act* to all businesses irrespective of their legal form or ownership;
- a *Competition Principles Agreement*, which set standards on structural reform of public monopolies, reviews of anti-competitive legislation and regulation, prices oversight, access to essential infrastructure, competitive neutrality, and local government; and
- an *Agreement to Implement the National Competition Policy and Related Reforms*, which set out conditions for financial transfers to the States and local government in return for implementing competition reforms.

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The co-ordination and structure of Australia's NCP program (and prior reforms) has been recognised as being exceptional among the international community. According to the OECD:

> "In the last decade of the 20th century, Australia became a model for other OECD countries in two respects: first, the tenacity and thoroughness with which deep structural reforms were proposed, discussed, legislated, implemented and followed-up in virtually all markets, creating a deep-seated 'competition culture'…"[3]

The specific program of reform established under NCP ended in 2005. However, the initial NCP agreements provided for a review and consideration of another agenda towards the end of the initial agreement period.

That review process commenced in April 2004, with the Commonwealth Treasurer requesting that the Productivity Commission undertake a Review of National Competition Policy Reforms. Drawing on that study, as well as recommendations from COAG senior officials, the COAG agreed in February 2006 to a new national reform agenda.

The Economic Impact of Reforms

Removing anti-competitive regulation inevitably exerts some costs on parties who previously benefited from having those protections in place. On some households and communities (e.g. in the dairy sector and in infrastructure and utilities), these transitional costs have been large. It is also likely that in some cases, the administrative costs of reviewing and implementing some regulations may be large compared to the benefits of implementing the reform.

Measuring the effects of NCP is difficult because they must be separated out from a range of other demographic, government and market factors that affect economic and social conditions. While these difficulties must be acknowledged, the wider balance of evidence suggests that the economic effects of NCP have been positive.

For example, Australia has enjoyed 14 years of uninterrupted economic growth, and over the past decade since the NCP process was instituted, productivity[4] has increased at a faster pace (2.5 per cent per annum) than in the previous ten year period (1.8 per cent per annum).

Nationally, the unemployment rate has been driven down to its lowest level since the early 1970's while the level of participation in the labour force has recently reached record high levels. According to OECD data, the average compensation of private sector employees in Australia has grown by an average of four per cent per annum over the past ten years, compared to an average growth rate of 2.7 per cent among the G7 economies.

The Productivity Commission has provided more specific estimates on the direct economic impact of NCP reforms. It estimates that Australia's GDP is currently about 2.5 per cent (or $20 billion) higher than it would otherwise have been, and that Australian households' average annual income is around $7,000 higher[5] as a result of competition policy reforms.

Importantly, the Productivity Commission points out that its modelling of the economic benefits of reform does not capture the dynamic benefits of more competitive markets (e.g. the perpetual incentive and pressure on producers to innovate and improve quality and productivity to gain an advantage in competitive markets). By including such effects, the impact of competitive reforms on the Australian economy could be larger than this estimate.

Indeed, the importance of Australia's competitive reforms was highlighted by the OECD in its 2004 *Economic Survey of Australia*. In its report, the OECD mentioned that Australia's robust growth in the face of external shocks - such as the 1997-98 East Asian crisis and the global economic slowdown in 2001-02 - was due to a combination of sound macro-economic policies and structural reforms.

Overall, it can be said that competition policy reforms have led to improved productivity through greater domestic competition and the incentives this provides to adopt better work and management practices, including in resource use.

Technological change and education and training are important factors in determining productivity growth. However, without the spur of competition encouraging efficient businesses (and discouraging inefficient ones), it is doubtful that the Australian economy would have had the capacity to grow as fast and respond as flexibly as it has done in recent years.

Although no studies have been completed on the impact of reforms in WA, the State has particularly benefited from a broad range of structural reform initiatives in the energy sector. The competition and low prices that have resulted from reforms in the gas industry have no doubt helped to underpin industrial development and economic growth in WA over the past decade.

Recent reforms to the electricity sector are also expected to yield significant economic benefits for WA. The final report by the WA Government's Electricity Reform Task Force found that electricity reform could yield benefits up to $300 million per annum to the Western Australian economy by 2010, rising to $590 million by 2020[6].

A New National Reform Agenda

The COAG agreed to a *National Reform Agenda* on 10 February 2006. The agenda includes a new wave of collaborative reforms which build on the success of the NCP and previous economic and social policy reforms.

The COAG agenda is split into three streams - human capital, competition and regulatory reform. The latter two are the focus of this paper.

The competition stream of the new agenda aims to further boost competition, productivity and the efficient functioning of markets through further reform and initiatives in the areas of transport, energy, infrastructure regulation and planning and climate change. This agenda follows the formula of national competition policy reforms, with governments working together to identify reform opportunities, and agreeing on a process for delivering them.

Importantly, all governments have recommitted to the principles contained in the National Competition Principles Agreement, which was established under the NCP. Jurisdictions have also agreed to continue and strengthen gate-keeping arrangements established under the NCP to prevent the introduction of unwarranted restrictions on competition in new and amended regulations and all outstanding priority legislation reviews from the NCP review program also need to be completed.

The specific competition reform objectives of the new agenda and how they relate to Western Australia are discussed in section titled *The Reform Agenda for Western Australia*.

The regulatory reform stream of the new agenda focuses on reducing the regulatory burden imposed by the three levels of government. The measures proposed in the agenda aim to ensure that markets operate efficiently and fairly, in balance with other social and economic objectives (that is, that consumers and the environment are suitably protected and that the benefits from regulation do not outweigh their compliance and implementation costs).

The regulatory reform stream of the new agenda focuses on reducing the regulatory burden imposed by the three levels of government.

It is expected that further action to address burdensome regulation and red tape will be taken as the Commonwealth implements the recommendations from the report of the *Taskforce on Reducing the Regulatory Burden on Business*, which was released in August 2006 making some 178 recommendations. In its response to the report the Commonwealth has agreed to support 158 of the recommendations.

COAG has agreed in principle to establish new intergovernmental arrangements for the governance of the *National Reform Agenda*. Like NCP, it is envisaged that Governments at all levels will have a central role in elaborating and implementing the agenda.

Several steps still need to be taken to advance the new agenda, particularly as to who will administer the new process. COAG has agreed in principle to establish a COAG Reform Council (CRC) to report to COAG annually on progress in implementing the National Reform Agenda. It is envisaged that the CRC will be an independent body that will replace the National Competition Council which currently oversees the NCP process.

The primary role of the CRC would be to report to COAG annually on progress towards the achievement of agreed reform milestones and progress measures across the broad National Reform Agenda.

Western Australian Experience

The NCP agenda requires governments to reduce structural and legislative impediments to competition and adhere to principles of competitive neutrality. Western Australia's progress against these three core reform areas are examined below.

Key Structural Reforms

The State Government has undertaken significant reforms in the electricity sector which will improve competition. The key reforms include:

- the creation of a wholesale market;
- establishment of an independent regulatory system;
- the disaggregation of Western Power Corporation into four new entities;
- formulation of a third party electricity access code which will be monitored by an independent regulator; and
- progressive lowering of retail contestability thresholds with the potential for full retail contestability by 2009.

Legislation to disaggregate Western Power was assented to in October 2005 and disaggregation occurred on 31 March 2006. A new wholesale electricity market will be established by late September 2006, and power to administer the new wholesale market was passed to an independent market operator on 1 January 2005.

The State Government has also implemented a range of structural reforms in the state's gas industry, which have improved competition in the market. These initiatives include:

- disaggregation of the major domestic gas supply contracts and compulsory third-party access to the transmission and distribution networks (including the adoption of nationally consistent access legislation);
- separation and corporatisation of the former State-owned gas and electricity utilities and structural separation of the gas transmission and distribution functions; and
- the subsequent privatisation of transmission and distribution/retail activities of AlintaGas.

These changes together with the removal of legal and other barriers have helped to achieve full retail contestability in the domestic gas market.

Western Australia has also completed reforms in the road transport sector by adopting a package of road transport reforms agreed to by the Australian Transport Council as required under the NCP. The reforms bring national uniformity in driver and vehicle operations and standards as well as and vehicle weights and dimensions.

Western Australia still has two reforms outstanding under this package (the introduction of the national drivers' licence classifications and the one driver/one licence reforms), although *The Road Traffic Amendment Bill 2005* was introduced to State Parliament in June 2005 to implement these reforms. The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review in September 2005. The Committee reported in November 2005 but in July 2006 the Bill remained in its second reading.

Aside from specific reform initiatives, a key structural change underpinning the reform process was the establishment of the Economic Regulation Authority (ERA) of Western Australia in January 2004. The ERA plays a valuable role as an independent economic regulator for Western Australia and currently oversees regulation and licensing for the gas, electricity, water and rail industries.

Key Legislative Reforms

The WA Government has the worst record of all jurisdictions in implementing priority reforms of anti-competitive legislation under the NCP.

At the end of the NCP process in 2005, Western Australia had completed just over half of its priority legislation review and reform matters as part of the NCP agreements. This compares to an average rate of completion of almost 80 per cent among all other jurisdictions.

The key legislative reforms that have been implemented relate to the statutory marketing of eggs and grains and the removal of anti-competitive aspects of bulk grain handling in WA.

Western Australia's *Grain Marketing Act 1975* prohibited the exporting of barley, canola and lupins other than by the Grain Pool of Western Australia. However, significant reforms have been undertaken, including a sunset clause to remove the state's grain export restrictions on removal of the Commonwealth's wheat export restrictions. All restrictions on the export of barley, canola and lupins in bags and containers have been removed, while an independent authority was set up to license bulk exports by other parties.

Although bulk export restrictions remain in the form of licensing, more transparency has been introduced into the licensing process. The NCC described Western Australia's export licensing arrangements as the most important reform of an export-oriented grain single desk under NCP.

Western Australia's *Marketing of Eggs Act* restricted supply through licences and production quotas, and prohibited supply other than to the Egg Marketing Board. Following much deliberation, the government passed legislation in August 2004 for the dissolution of the board on or before 31 December 2005. The assets of the marketing authority were transferred to a producer owned co-operative company.

Competitive Neutrality

The State Government applies competitive neutrality principles to all significant government businesses. The state has also established a competitive neutrality complaints handling process, which involves complainants initially making contact with the agency alleged not to be complying with neutrality principles in order to discuss and, if possible, resolve the matter.

If resolution cannot be reached, complaints can then be referred to the complaints secretariat located within the Department of Treasury and Finance. Where the secretariat assesses that a complaint warrants further investigation, it seeks authorisation from the Treasurer to pursue any formal investigations into the complaint, with investigations to be undertaken by the secretariat and recommended actions brought to the Expenditure Review Committee of Cabinet for consideration.

Although this complaints mechanism is in accordance with its obligations under NCP, CCI believes that the system could be greatly improved upon. This is discussed further on page 31.

Although WA's competitive neutrality complaints mechanism is in accordance with its obligations under NCP, CCI believes the system could be greatly improved upon.

Unfinished Business

At the end of the NCP process in 2005, the National Competition Council (NCC) assessed Western Australia as not having complied with its reform obligations with regard to road transport, competitive neutrality and legislation review.

Indeed, WA had completed just over half of its priority legislation review and reform matters as part of the NCP agreements. This compares to an average rate of completion of almost 80 per cent among all other jurisdictions.

The NCC also gave Western Australia's regulation gate-keeping arrangements (which aim to review and remove anti-competitive provisions contained within new legislation) a mark of one out of five – equal lowest with New South Wales and the ACT.

The poor progress of competitive reform in Western Australia is primarily due to a lack of political will and leadership. Both sides of Western Australian politics, when in Government or when in opposition, have failed to pursue competitive reforms and give it priority in the political process.

Western Australia looks set to receive a total of $471 million[7] in National Competition Payments from the Commonwealth Government from the nine years in which competition reforms were implemented under the NCP framework (between 1997-98 to 2005-06, although the payments for 2005-06 are yet to be received but a recommendation has been made by the NCC).

However, this only represents approximately 93 per cent of the state's total entitlement under the NCP, as Western Australia has missed out on almost $70 million worth of competition payments for non-compliance against the NCP agenda, which makes is the lowest proportion of all states and territories.

The payment deductions for WA mostly relate to the failure to reform retail trading hours restrictions ($23 million), liquor licensing laws ($11.5 million), statutory marketing of potatoes ($11.5 million) and a raft of other minor legislative restrictions on competition in the state ($19 million).

Nonetheless, the financial incentives provided under NCP are only a small part of the benefits of competition reform, and in are in any event provided as a way to compensate state governments for the short-term costs associated with many reforms. Western Australia will miss out on the more valuable long-term gains that competition reform provides in the form of higher efficiency and economic development.

Of course, the fact that Western Australia has one of the poorest records in implementing reforms under the National Competition Policy means that the state has the most to benefit from continuing the reform agenda. Western Australia's reform agenda is detailed over the page.

The Reform Agenda for Western Australia

Introduction

The specific program of reform established under the National Competition Policy (NCP) ended in 2005. However, the State Government renewed its commitment to competition reform in February 2006, agreeing to the new *National Reform Agenda* at the meeting of the Council of Australian Governments.

The new agenda is separated into three streams - human capital, competition and regulatory reform. The competition stream of the new national reform agenda promises to further boost competition, productivity and the efficient functioning of markets. The agenda focuses on further structural reform in the areas of transport, energy, infrastructure regulation and climate change.

The competition stream of the new national reform agenda promises to further boost competition, productivity and the efficient functioning of markets.

Review of anti-competitive legislation is also a focus of the new reform agenda, with all governments re-committing to the principles contained in the original Competition Principles Agreement. Specifically, this means that each jurisdiction must:

- continue and strengthen gate-keeping arrangements established in the NCP arrangements to prevent the introduction of unwarranted competition restrictions in new and amended legislation and regulations; and
- complete any outstanding priority legislation reviews from the NCP Legislation Review Program in accordance with the NCP public benefit test.

Western Australia's adoption of the *National Reform Agenda,* and particularly its re-commitment to previous NCP undertakings, is important considering the WA Government has the worst record of any of the state and territory governments in implementing competition reform under the NCP.

To this extent, the *National Reform Agenda* provides an opportunity to highlight the importance of competition and reinvigorate the push for competitive reforms in Western Australia. Further competitive reform is essential to the Western Australian economy, not only because it has the most to gain from further competition reform but also because the WA economy is far more externally focussed than other states, opening it to competitive pressures from overseas. Therefore, maintaining a flexible and competitive domestic economy is arguably more salient to Western Australia than other states.

The next section highlights some key competition reform objectives in Western Australia in the areas of legislative and structural reforms. The application of competitive neutrality principles by government and the administrative arrangements in place to implement reforms are also examined.

Legislative Reform

At the completion of the NCP process, Western Australia had numerous pieces of legislation containing anti-competitive provisions that did not meet the requirements of the *Competition Principles Agreement.*

CCI recognises the importance of reviewing each of these anti-competitive restrictions, however, three anti-competitive regimes stand out as being particularly important because they impose the largest costs on the WA economy overall. These include restrictions on retail trading hours, potato marketing and petrol retailing.

Retail Trading Hours

Western Australia's retail trading hours regulation prescribes when shops can trade and allows some businesses to trade outside of regulated hours as long as they fall within the statutory definition of 'small' or are located in certain areas.

The issue of retail trading hours regulation in the Perth metropolitan area was put to referendum in February 2005. On the issue of allowing shops to trade on Sundays, around 61 per cent of voters supported the case against and on the issue of extending weeknight trading some 58 per cent of voters supported the case against.

The State Government has argued that this result demonstrates that it is in the public interest to maintain the regulation of trading hours in Western Australia. However, in its 2005 review of government's progress on implementing NCP reforms, the National Competition Council rejected the State Government's justification.

The NCC said that conducting a referendum did not absolve the government from its NCP legislation review obligations and therefore it considered that WA had not met its NCP commitments with regard to the regulation of retail trading hours.

In explaining its assessment, the National Competition Council stated:

> "…independent, transparent and objective reviews provide the best opportunity to assess all costs and benefits of restrictions on competition. The Council is also mindful of COAG's (2000) directive to consider whether review conclusions are within a range of outcomes that could reasonably be reached based on the information available to a 'properly constituted review process'. Any public interest case for competition restrictions thus needs to be supported by relevant evidence and robust analysis. Where a government introduces or retains competition restrictions, and this action was not reasonably drawn from the recommendations of a review, the Council looks for the government to provide a rigorous supporting case, including a demonstration of flaws in the review's analysis and reasoning."[8]

What is most disappointing is that the government has had a number of opportunities to meet its NCP commitments on this issue, with numerous public inquiries into shop trading hours having been conducted over the years. While each of these inquiries recommended deregulation, past and present WA State Governments have consistently failed to implement promised reforms on this issue due to pressure from vested interest groups.

The fact remains that no justifiable market failure supports the regulation of retail trading hours in Western Australia. Retail trading hours regulation:

- impinges on the rights and freedom of citizens as consumers, and imposes significant costs on the economy; and
- distorts the marketplace by unfairly discriminating between businesses and by inhibiting the growth and development of the retail sector in WA.

Given the referendum results, it is unlikely that the State Government will revisit this issue in the near future. However, it would be appropriate that trading hours restrictions be reviewed again given that Western Australia has not properly analysed the public interest in relation to this issue, and given the State Government's recent renewed commitment to competition policy as part of the new *National Reform Agenda*.

Liquor Licensing

Western Australia's liquor licensing laws contain two significant competition restrictions. Firstly, new licence applicants must satisfy a public needs test proving that the liquor licence is necessary to provide for the requirements of the public in the affected area.

This requirement presents a significant barrier to entry into the industry as it places a difficult onus on licence applicants to demonstrate that the public's requirements for liquor in the affected area cannot be provided for by premises already operating in the area.

Existing licence holders can (and do) exploit this provision and protect market share by objecting to the granting of new licences on the grounds that an additional outlet in their area is unnecessary to provide for the requirements of the public.

Secondly, liquor stores are prohibited from trading on Sundays, when liquor outlets within hotels are permitted to open from 10am to 10pm. This creates a competitive disadvantage to all liquor stores, including independently owned stores, which hold up to 60 per cent of all liquor licences in the Perth metropolitan area.

The State Government has had difficulties progressing reforms in this area. In March 2001, a government review recommended removing these anti-competitive aspects of the legislation. More than two years later, in September 2003, the government announced that a package of reform measures embracing these recommendations would take effect from 1 July 2005.

However, in March 2004 the Government announced that it would not proceed with the proposed reforms primarily due to resistance from the State Opposition.

Instead, an independent review of the legislation was undertaken which concluded in July 2005. The review recommended among other things, that liquor stores be allowed to trade on Sundays (albeit for two hours less than hotels) and that the current 'needs' test for licensing be replaced by a public interest test based on social, community and health considerations.

Taking these recommendations into consideration, the Government announced a proposed package of reforms in late March 2006. The key reforms include:

- setting up a new Liquor Commission to replace the Liquor Licensing Court (which is expected to provide a more streamlined licensing process);
- replacing the 'needs' based test for new licences with a fairer 'public interest' test; and
- allowing metropolitan liquor stores to open on Sundays, in line with hotel bottle shops.

CCI supports the Government's proposed reforms to liquor licensing laws. While it is disappointing that the Government has not adopted all of the recommendations of the independent review committee (notably the decision to confine Sunday trading to the metropolitan area only), the package of proposed reforms is in the public interest as it will considerably reduce the costs on consumers and businesses imposed by the current regime of liquor laws.

Concerns have been raised over the impact that these reforms may have on hotels and smaller liquor outlets in particular, however, evidence from independent analysis as well as the experience of interstate jurisdictions with similar laws, suggests that the potential for adverse consequences of these proposed changes have been overstated.

CCI supports the Government's proposed reforms to liquor licensing laws. The package of proposed reforms is in the public interest as it will considerably reduce the costs on consumers and businesses imposed by the current regime of liquor laws.

For example, opponents of the reforms argue that allowing liquor stores to trade on Sundays would erode the competitiveness and viability of hotels and could force many to close. However, there is little evidence of this occurring in other States.

Moreover, while it is likely that hotels would lose some market share if liquor stores are permitted to trade on Sunday, it is highly unlikely that they would lose all of their sales to liquor stores. Even is this were to occur, it is unlikely to threaten the viability of hotels, with research[9] showing that most hotels would lose only around 10 per cent of their weekly turnover in the unlikely event that they lose all packaged liquor trade on Sundays.

Potato Marketing

Western Australia is the only jurisdiction to regulate potato marketing and has been for a number of years. The anti-competitive aspects of this regulation include:

- the ability to restrict the availability of land for growing potatoes for fresh consumption; and
- the ability to fix the wholesale price of such potatoes and require that they be sold to the Government's statutory marketing authority.

The regulation of potato marketing in WA is archaic. It dates from Australia's National Security Regulations during the Second World War. At that time, the Commonwealth Government introduced legislation aimed at securing the supply and price of potatoes to the domestic population and to the Australian military.

Though a number of reviews of this regulation have been undertaken since that time, WA potato growers have managed to successfully lobby the State Government to keep regulation.

There is clearly no public benefit in regulating the supply of potatoes. Regulation has impeded competition in the WA potato market, leading to higher prices and lower choice for consumers. Producers have fewer incentives to innovate or respond to changes in consumer demand.

Moreover, the legislation is fundamentally flawed in that competition from eastern states producers undermines the system of regulation in WA from time to time.

Following its 2002 review of potato marketing under the requirements of NCP, the Government decided to retain the supply management and price fixing regulation. Shortly afterwards, the Minister established an advisory group to consider the regulatory arrangements and recommend changes to improve their efficiency.

Although the recommended changes have the potential to reduce the cost of regulation on the consumer, the anti-competitive aspects of the legislation remain.

The absurdity of these restrictions was played out publicly when the state's statutory marketing authority effectively put one grower out of business by cancelling its license to grow potatoes following several contraventions of the *WA Marketing of Potatoes Act*. In order to honour pre-existing supply contracts, the grower sought to import potatoes from South Australia, which is legal.

In its 2005 assessment, the NCC found that Western Australia was yet to meet its NCP obligations arising from the *WA Marketing of Potatoes Act*. To meet these obligations, the NCC clearly delineated that the government must remove its potato supply and marketing controls.

Petrol Retailing

Western Australia has a series of fuel pricing regulations that affect petrol retailing. Restrictions include:

- a requirement that retailers fix their prices for at least 24 hours and notify these prices to the Department of Consumer and Employment Protection for publication on its FuelWatch web site; and
- maximum wholesale pricing arrangements.

This regulation has been either ineffective or counterproductive when measured from the presumed objective of delivering benefits for consumers. The 24-hour rule aims to limit price volatility but in the process it eliminates price competition between retailers.

The 24-hour petrol price rule in WA aims to limit price volatility but in the process it eliminates price competition between retailers.

As a result, consumers have not necessarily benefited from the reduced volatility that regulation has brought. In a clear indication of the incongruity of this regulation, a fuel retailer was penalised for breaking the 24-hour rule by selling petrol too cheaply to consumers.

The 24-hour rule eliminates the hour-by-hour changes in prices that characterised Perth's fuel market prior to regulation, especially during the price 'wars' that periodically swept through the metropolitan market.

However, this has not eliminated the regular variability of prices over the course of a week, and prices still often rise at weekends and bottom out mid-week, although the magnitude of these swings may be more muted than it was before regulation. Data shows that the monthly range of retail prices around the average appears little different since regulation than it was before.

Regulation has failed to eliminate sharp swings in the price over periods of days driven by competitive cycles and market conditions, but retailers almost certainly avoid the troughs which once characterised price 'wars', because it would make no sense to lock in a margin of zero or even less for a whole day.

Two reports by the Australian Competition and Consumer Commission (ACCC) on fuel price variability confirmed this. The reports found that the state's legislation had no consistent impact on prices and that the restrictions did not appear to be achieving their objectives - that is, there had been no material change in the variation of price cycles and their duration had increased marginally.

Importantly, the ACCC also recognised that price volatility can enhance consumer welfare by increasing opportunities to bargain hunt. It found evidence that many consumers are price sensitive, buying when prices are at the trough of the discounting cycle.

In light of this, the ACCC concluded that the regulations are likely to have an adverse effect on competition by restricting the ability of independent sellers to adjust their prices.

The State Government has refuted these claims, highlighting that retail prices in Perth have been one of the lowest in the country. The State Government intended to commence an independent review of petrol price regulations in August 2005, but backed away from these plans as it considered that it had provided sufficient evidence to demonstrate the public benefits of the anti-competitive legislation.

CCI believes that the Government needs to institute an independent benchmarking assessment of the effects of its fuel price regulations against clearly stated objectives. The regulations should be subject to a sunset clause and, in the event that they cannot be shown to be achieving their stated objectives, they should be repealed.

Food

The need for competitive reform in the food sector stems from the complex regulatory framework that currently prevails in Australia. Oversight under this framework involves a number of Commonwealth departments and statutory bodies, State and Territory agencies and local governments leading to differences in the trading environment faced by businesses according to their state of operation.

The 1997 Blair Review of Food Regulation, established by the Commonwealth Government, recognised the need for a nationally consistent approach to food regulation. The review recommended that each State and Territory Food Act be reviewed with the aim of developing a set of nationally uniform Food Acts.

Although the States have undertaken such reviews, they were only encouraged to use their best endeavours to adopt the Model Food Act legislation. Consequently, the Australian food industry remains entangled by State legislation with only the core provisions of the Model Food Act having been adopted on a nationally consistent basis.

Some States, such as WA, have yet to enact any provisions of the Model Food Act and remain under legislation from all three levels of government. The State Cabinet approved the drafting of a new Food Bill believed to address the competition restrictions in the area of licensing and registration requirements. The Bill was expected to be introduced to and passed through Parliament in the spring session of 2005.

To ensure that all states stand on an equal footing, CCI believes that food regulation and standard setting policy should be transferred to a single Commonwealth agency, while the States should retain carriage of enforcing legislation. With this framework in place, domestic food laws in Australia should be developed nationally and enacted uniformly.

Competition within the current framework is also constrained by the legislative process that must be followed for developing or amending a food standard. Currently, individuals, organisations or companies seeking to change standards can make applications to do so however, the process for assessing such applications is time consuming.

Time is of the essence when applications involve product innovations that could provide a competitive advantage in the market. Additionally, current assessment processes in most cases involve several rounds of public consultation, which requires that the proponent's intellectual property be disclosed.

To alleviate these imposts to competition, the application procedure should be simplified by omitting any part of the assessment process that will not have significant or adverse effect on the interest of anyone.

The need for public consultation should also be removed once the preliminary assessment of the application has been accepted and when existing and substantiated scientific evidence has been presented in support of the application. Such changes were more broadly recommended by the 1997 Blair Review which suggested that the standards setting process be streamlined, wherever possible, without compromising the process of consultation.

Other Nationally Consistent Reforms

The regulatory reform stream of the new COAG *National Reform Agenda* aims to reduce the regulatory burden imposed by the three levels of government. As part of this agreement, COAG proposed to address six cross-jurisdictional regulatory areas where overlapping and inconsistent legislation is impeding economic activity. These include:

- rail safety regulation;
- occupational health and safety;
- national trade measurement;
- chemicals and plastics;
- development assessment arrangements; and
- building regulation.

The agreements also propose specific gate-keeping arrangements to ensure that new, amended and existing regulation is efficient and avoid unnecessary compliance costs and restrictions on competition (see page 34).

Structural Reform

Western Australia has satisfied its major structural reform obligations under NCP. However, some structural reform objectives remain. The new *National Reform Agenda* overlaps some of these existing objectives and sets some additional reform targets for the state. These are discussed in further detail below.

Water

The water industry is an obvious candidate for government regulation and intervention and justifiably so, given the public good status of some of the public health and environmental services it provides. Naturally, the monopoly character of the water and wastewater industry gives rise to competition issues.

CCI believes that it is premature to be advocating disaggregation of the Water Corporation to encourage competition. However, there is scope for greater private sector involvement in water supply and wastewater disposal.

Opening the water industry to greater private sector involvement is particularly pertinent to Western Australia given the state's low levels of rainfall and subsequent water shortages that have prevailed in recent years. Private involvement in the sector will bring a greater degree of diversity and efficiency, particularly in developing new supply options and additional infrastructure.

Opening the water industry to greater private sector involvement is particularly pertinent to Western Australia given the state's low levels of rainfall and subsequent water shortages that have prevailed in recent years.

The State Government's signing of the National Water Initiative in April 2006 was a positive step as it includes obligations for more sophisticated, transparent and comprehensive water planning, water entitlements and water trading and increased use of recycled water.

Clearer planning would allow new opportunities in the water sector for industry development, serving to facilitate competition and innovation, leading to greater reliability and security of supply, and better outcomes for customers.

Perhaps the biggest obstacle in attracting private involvement is the opaque pricing of water. Clearly, the Water Corporation must have a price at which it is prepared to buy and the price it will charge to supply water, and most certainly a price differential must exist to allow commercial recovery to Water Corporation's business.

However, as a monopoly supplier, market forces alone do not determine the price differential, and in the absence of regulation for transparency in pricing there is no imperative for this information to be available. There is a need for more transparency in Water Corporation's pricing to encourage competition in the sector.

In July 2004, the State Government directed the Economic Regulation Authority (ERA) to conduct an inquiry into water and wastewater pricing in urban Western Australia, the results of which were released in a draft report on water pricing in May 2005.

It recommended that the Water Corporation give consideration to rebalancing tariffs so that usage charges reflect the long-run marginal cost of supplying water. This would improve efficiency by more clearly signalling to customers the underlying long run cost of supplying water, where scarcity constraints exist.

The final report, including recommendations, was given to the Treasurer in November 2005 and pleasingly, the Government has accepted most of the review's recommendations which were implemented as part of the 2006-07 State Budget. Although the Government has given little detail as to exactly which reforms have been implemented, the key message of rebalancing tariff such that usage charges reflect the cost of supply has been accepted.

The need for the Government to adhere to principles of competitive neutrality and co-operate with the private sector in establishing greater private sector participation in the water industry has also been highlighted recently, with proponents of proposals to privately develop alternative water supplies in regional areas of the state raising concern over the application of competitive neutrality principles.

Transport

An efficient and reliable freight transport system is vital to the Western Australian economy given the size of the state and the distance of many of its towns and cities from other major Australian cities.

Australia's road transport industry has historically operated within a diffuse and inefficient regulatory framework which has imposed costs on road users. To this extent, CCI supports the new COAG agreements with regard to transport reform. The proposed measures aim to foster greater efficiency, adequacy and safety within Australia's transport infrastructure. The key agreements include:

- asking the Productivity Commission to develop proposals for efficient pricing of road and rail freight infrastructure through consistent and competitively neutral pricing regimes, in a manner that maximises net benefits to the community, in particular rural, regional and remote Australia;
- harmonising and reforming rail and road regulation within five years, including productivity-enhancing reforms, improved road and rail safety regulation and performance-based standards for innovative vehicles that do less road damage;
- strengthening and coordinating transport planning and project appraisal processes to ensure the best use of public investment by adopting Australian Transport Council-endorsed national guidelines for evaluating new public road and rail infrastructure projects by December 2006; and
- reviewing the main causes, trends, impacts and options for managing congestion (focusing on national freight corridors) with a view to reducing current and projected urban transport congestion, within current jurisdictional responsibilities.

An efficient and reliable freight transport system is vital to the Western Australian economy given the size of the state and the distance of many of its towns and cities from other major Australian cities.

A national approach to transport reform is most appropriate, as inefficiencies within this sector have primarily stemmed from complex and inconsistent regulations across state jurisdictions. In this context, it is disappointing that the State Government has recently moved to change road freight regulations in Western Australia.

In November 2005, the State Government announced a legislative package in response to concerns from truck owner-drivers that rising fuel prices, excessive competition and unsustainable transport rates were causing their businesses to become unviable, often leading to unsafe practices.

The package proposes anti-competitive practices by seeking to establish a mandatory code of conduct and sustainable guideline rates which would be reviewed annually by a tripartite industry council.

Ensuring the safety of drivers and the public is appropriate and in the public interest, although the government's response in attempting to put a floor under freight rates is inappropriate.

The main issue is safety. In the presence of more stringent laws and policing of driver practices, all parts of the transport chain would need to adjust their expectations of performance and pay. Nationally consistent legislation soon to be introduced by the State Government will assign responsibility for safety to all parts of the transport chain, placing greater emphasis on the policing and enforcement of safety requirements.

Therefore, Government action is better spent on enforcing safety regulations in the public interest. Government efforts to prescribe freight rates are unlikely to yield a net benefit to the public. Rather, it threatens to compromise competition and create inefficiencies within the sector.

Infrastructure

In 2005, the *Exports and Infrastructure Taskforce* made a series of recommendations to COAG regarding national infrastructure, which led the council to consider regulation of ports and export-related infrastructure as part of its review of NCP.

As part of the new national reform agenda, COAG signed a *Competition and Infrastructure Reform Agreement* to provide for a simpler and consistent national system of economic regulation for nationally-significant infrastructure. CCI supports the proposed agenda.

The agreed reforms aim to reduce regulatory uncertainty and compliance costs for owners, users and investors in significant infrastructure and to support the efficient use of national infrastructure.

Importantly, the agreement includes that third-party access to services provided by means of significant infrastructure facilities should be on the basis of terms and conditions commercially agreed in negotiations between the access seeker and the operator of the infrastructure wherever possible. Where third-party access regimes are needed, the *Competition Principles Agreement* will be amended to incorporate the following principles:

- all third-party access regimes will include objects clauses that promote the economically efficient use of operation and investment in significant infrastructure;
- all access regimes will include consistent principles for determining access prices; and
- where merits review of regulatory decisions is provided for, the review will be limited to the information submitted to the regulator.

The agreement also includes:

- new requirements that regulators will be bound to make regulatory decisions under an access regime within six months, provided the regulator has been given sufficient information;
- to promote consistency, all State and Territory access regimes will be submitted for certification by 2010 following agreement on a streamlined certification process;
- implementation of a simpler and consistent national system of rail access regulation for agreed nationally significant railways using the Australian Rail Track Corporation access undertaking as a model;
- that each jurisdiction review the regulation of its ports and port authority, handling and storage facility operations at significant ports to ensure that where regulation is warranted, it conforms with agreed access, planning and competition principles; and
- a commitment to principles to enhance the application of competitive neutrality to government business enterprises engaged in significant business activities in competition with the private sector.

The commitments to improve regulatory decision timeframes concerning access regimes and to enhance the application of competitive neutrality in infrastructure provision are important.

However, timeliness must not come at the expense of poor quality decision-making caused by a lack of appreciation of all of relevant issues. At times, a longer time frame may legitimately be required by the regulator.

The issue of merits review of regulatory decisions based on the papers submitted to the regulator is similarly complex. While this approach may speed up the review process, a potentially changing factual situation means this approach may lead to inappropriate outcomes. These inherently complex issues emphasise the need for sound judgement by the regulator and any reviewer of regulatory decisions.

The commitment to competitive neutrality principles in the provision of infrastructure is particularly important in the context of port services in WA.

Competition in the provision of port services is especially important in WA, given the state's reliance on exports as a source of economic wealth. All port authorities in Western Australia are corporatised, with the authorities primarily involved in the provision of core activities. More contestable elements such as harbour towage, dredging and stevedoring are provided by private contractors.

Western Australia is currently in a unique position in relation to the establishment of private port facilities in direct competition with public corporatised ports. This has raised specific competition issues, particularly with regard to competitive neutrality.

More generally, private ports raise issues for the State Government concerning competition policy issues versus port efficiency. A recent ABARE report[10] highlights the inherent costs and inefficiencies associated with multi-user infrastructure when compared with single user infrastructure. In assessing private port facilities this trade-off between timely expansions – with associated increase in sales tonnages and royalties – and possible competition policy issues will need careful consideration.

A key concern in relation to infrastructure provision in Western Australia has been that public infrastructure projects have generally been undertaken on an ad hoc fashion, without a strategic direction or focus.

The announcement of a *State Infrastructure Strategy* was therefore welcomed by CCI. Additionally, in its June 2005 meeting, COAG agreed to six infrastructure measures in response to the findings of the *Exports and Infrastructure Taskforce*. One of these measures required that each jurisdiction provide a five-yearly infrastructure report. At the most recent COAG meeting, the council agreed that these reports should include:

- a strategic overview of existing infrastructure;
- a pragmatic outlook for infrastructure demand; and
- a forward-looking strategic assessment of future infrastructure needs.

Such an approach to infrastructure planning may assist competition by providing somewhat greater certainty for industry in making investment decisions. However, the inherent volatility in demand estimates, coupled with the possibility of gaming of the estimates by competitive industry participants, means that this approach will never be a complete solution. It is important that the State Government recognise that reducing the lead time on infrastructure investments (by, for example, specifically facilitating timely investments) is a more important mechanism to prevent future infrastructure bottlenecks.

A key concern in relation to infrastructure provision in Western Australia has been that public infrastructure projects have generally been undertaken on an ad hoc fashion, without a strategic direction or focus.

Energy

The COAG agreements with regard to energy includes the establishment of an *Energy Reform Implementation Group* to report back to COAG before the end of 2006 with proposals for, among other things, achieving a fully national energy transmission grid.

Western Australia and the Northern Territory are not part of the National Electricity Market (NEM) due to of the lack of electrical interconnection and the large distance between their load centres and the interconnected electricity network that forms the NEM.

With regard to gas, Western Australia has implemented the *National Third Party Access Code for Natural Gas Pipeline Systems* and has opened the domestic market to full retail contestability.

The COAG agreements aim to foster further efficiency and security in energy supply throughout Australia. The key agreements include:

- a commitment to the progressive national roll out of 'smart' electricity meters from 2007. This will improve price signals for energy consumers and investors by allowing for 'time of day pricing';
- to ensure the electricity transmission system supports a national electricity market, providing energy users with the most efficient, secure and sustainable supply of electricity from all available fuels and generation sources. For this reason, COAG agreed to establish the *Energy Reform Implementation Group* to report back to COAG before the end of 2006 with proposals for:
  - achieving a fully national electricity transmission grid;
  - measures that may be necessary to address structural issues affecting the ongoing efficiency and competitiveness of the electricity sector; and
  - any measures needed to ensure transparent and effective financial markets to support energy markets.

CCI broadly supports this agenda and will be looking to participate in further debate and reviews related to these issues.

Climate Change

COAG agreed to adopt a new national *Climate Change Plan of Action* and to establish an inter-jurisdictional *Climate Change Group* to oversee implementation of the Plan's recommendations. CCI is broadly supportive of the plan, which is driven by the need to accelerate conversion to low emissions practices and adoption of technologies to reduce the risk of adverse climate change.

A formal framework will provide greater investment certainty for businesses in the light of greenhouse risk, while national consistency (with enough flexibility to accommodate the differing needs of each jurisdiction) is also important in the context of competition.

The reduction of greenhouse gas is a particularly salient challenge for Western Australia, given the economy's mining and industrial base. COAG envisages that undertaking a national reform process on climate change is important not only from a sustainability point of view, but also because of the risks and the opportunities that are likely to be created for Australian businesses as its international trading partners and competitors begin to respond to the greenhouse issue.

Key initiatives in the plan include:

- a national framework for the take-up of renewable and low emission technologies;
- a national climate change adaptation framework to assist effective risk management by business and community decision-makers;
- a study to identify the gaps in technology development;
- a study to examine options for ensuring that Australia's scientific research resources are organised to effectively support climate change decision-making at the national and regional levels;
- acceleration of work by Ministerial Councils that are investigating options to strengthen emissions reporting approaches; and
- all relevant Ministerial Councils to consider any climate change implications of their decisions and activities.

Reports on how to address any gaps will be provided to COAG later this year. In order to involve the community and businesses in the implementation of the action plan, the *Climate Change Group* will hold public forums in the first half of 2006.

Communications

Communications infrastructure has a major impact on the competitiveness of business and upon standards of living. Regulation that restricts new entrants from entering the market or that hinders innovation in the sector therefore has an adverse effect on the economy.

Current restrictions in this sector relate to constraints on competition in broadcasting and the regulatory regime governing Telstra.

A bill to remove the requirement that the Commonwealth Government retain majority ownership in Telstra was passed through Parliament in September 2005, along with assistance packages for regional areas. The possibility of the full privatisation of Telstra is welcome given the Commonwealth's conflicting role as regulator and majority shareholder of the entity.

Although privatisation is important, CCI believes that privatisation into a fully competitive market is likely to yield the greatest benefits in terms of improving the efficiency of the sector. As a 'natural' monopoly, it is therefore appropriate that Telstra be regulated to promote competition in the telecommunications sector, even if full privatisation occurs.

Some of the key competition issues in telecommunications which require further investigation include:

- whether further operational separation of Telstra's wholesale and retail arms would yield net benefits;
- the merits of an access regime for telecommunications;
- if subsidies for services to high cost users should be made available equally to all potential suppliers; and
- whether the current regulatory framework is adequate to address any future acquisitions or entry into new activities by Telstra which could compromise the development of a competitive telecommunications market.

Competitive Neutrality

Another of the significant failures of NCP in Western Australia has been in the area of competitive neutrality. The major concern here is the coverage of the competitive neutrality complaints mechanism. Indeed, Western Australia would appear to have the most ineffective complaints mechanism of any jurisdiction in Australia.

Another of the significant failures of NCP in Western Australia has been in the area of competitive neutrality.

The issue is that the WA complaints mechanism only applies to public sector agencies that are subject to the state's competitive neutrality policy. An agency is subject to competitive neutrality if a competitive neutrality review is required, or has been undertaken, and the review recommends that competitive neutrality principles apply.

A neutrality complaint against a government business in WA cannot progress if the business is not covered by the policy.

The complaints handling process is also drawn out. Initially complainants must make contact with the agency alleged not to be complying with neutrality principles in order to discuss and, if possible, resolve the matter.

If resolution cannot be reached, complaints can then be referred to the complaints secretariat located within the Department of Treasury and Finance. The secretariat assesses if a complaint warrants further investigation, and if so, it seeks authorisation from the Treasurer to pursue any formal investigations into the complaint, with investigations undertaken by the secretariat. Recommended actions are then brought to the Expenditure Review Committee of Cabinet for consideration.

It would appear that Western Australia's competitive neutrality complaints mechanism needs a wider scope, a greater degree of independence and a substantial revision to its complaints handling processes for it to be deemed fair and effective.

Ideally, the complaints mechanism should be transferred to the newly established Economic Regulation Authority (ERA), which commenced operations on 1 January 2004. The ERA is an independent specialist regulatory body that has assumed responsibility for a range of economic regulatory functions related to the gas, rail, water and electricity industries.

The provisions of the *Economic Regulation Authority Act 2003*, may allow the ERA to assume this responsibility (albeit at the discretion of the Treasurer), although making competitive neutrality complaints an explicit, separately identifiable function of the ERA would provide the complaints mechanism with more integrity, giving complainants more confidence in the system.

Adding an explicit competitive neutrality complaints mechanism to the functions of an independent economic regulator follows a similar approach adopted in New South Wales by the Independent Pricing and Regulatory Tribunal, in Queensland by Queensland Competition Authority and in Tasmania by the Government Prices Oversight Commission.

Reform of Administrative Arrangements

Like NCP, governments at all levels will have a central role in implementing the new *National Reform Agenda*. However, in Western Australia, relying on the government to take responsibility for reforming its own laws has not been successful.

CCI considers that changing the administrative arrangements currently in place to implement competition policy reform (to ensure that independent review and implementation actually does take place in an appropriate manner) is part of the reform agenda itself. Some key stumbling blocks to reform and recommendations to overcome them are highlighted below.

Political Interference

In many instances, NCP processes designed to act as a counterweight to vested interests have not succeeded in WA because of a lack of political will on behalf of the Government and opposition parties. In numerous cases, reforms in the public interest were sidelined by groups with vested interests in maintaining anti-competitive regulation, lobbying politicians to keep the status quo (e.g. reform of retail trading hours, liquor licensing, potato marketing, taxis licensing and electricity regulation).

This lack of commitment to the NCP process was also evident in drawn out processes and implementation time frames. For example, the Acts Amendment and Repeal (Competition Policy) Act 2003 which repeals two minor acts (Bread Act 1982 and the Wheat Marketing Act 1989) and amends a range of other relatively minor legislation took almost four years to be proclaimed (in part). For such uncontroversial and minor NCP reforms to take so long to be implemented gives some indication as to the priority of, and commitment to, NCP in Western Australia.

A Lack of Independence

Another key stumbling block to reform in Western Australia has been due to the fact that Ministers were given responsibility for reviewing legislation in their own portfolios. This arrangement has in many instances reduced the probability of successful NCP outcomes where Ministers have been 'captured' by the industries affected by their portfolios, or government agencies have vested interests in maintaining the status quo.

The process and method for conducting and implementing NCP reviews of legislation are detailed in Western Australia's *Public Interest Guidelines for Legislation Review*. The Department of Treasury and Finance liaises with the proponent agency or Ministerial Office to ensure that a review is conducted in a manner consistent with NCP principles and to advise on the scope and scale of the review. However, the Minister/agency did not always accept this advice.

As a consequence, legislation review reports have not always been publicly available or easily accessible. They are often poorly written, show little understanding of the NCP principles they are supposed to be implementing and either fail to provide evidence, or provide evidence of questionable validity and independence.

On some occasions, genuinely independent reviews were conducted in accordance with NCP principles, generally concluding that pro-competitive reform was in the public interest. But when the government disagreed with these findings, it generally refused to implement the recommendations and in some cases failed to publish the review.

The importance of independent, transparent and rigorous processes when considering significant public interest matters cannot be overstated. Such processes are essential to maintaining community confidence that public interest considerations have been objectively examined and that it is the public interest that is paramount, rather than the concerns of vocal vested interests.

Weak Gate-Keeping Provisions

Another issue relates to the 'gate-keeping' provisions of the *Competition Principles Agreement*, which aimed to ensure that no legislation - existing, new or continuing - unnecessarily restricted competition. While the underlying aim of this provision (to set competition policy within the legislative framework) is commendable, the limited scope of the Agreement meant that regulations that impeded efficiency, but which did not involve competition restrictions, could have been passed into law.

There is also a lack of due process in the current gate-keeping process in WA. Here, the gate-keeping responsibility under the *Competition Principles Agreement* was given to the Department of Treasury and Finance. The process relied on the Department identifying competitive restrictions in legislation and then ensuring that a review is conducted of the identified restrictions.

However, in a number of instances, reviews of new legislation have occurred after the legislation has already been enacted. A notable example is the case of fuel price regulation. The *Petroleum Products Pricing Amendment Act 2000* and the *Petroleum Legislation Amendment Act 2001* that impose fuel price regulation in Western Australia were only reviewed after they were passed by Parliament.

Recommended Changes

The commitment by the Western Australian Government to the new *National Reform Agenda* provides an opportunity for it to implement new administrative measures to manage the competition reform process in WA.

It is understood that the Department of Premier and Cabinet now appear to be driving the reform process under the new national reform agenda, although CCI believes that all reform targets should be made the responsibility of one designated Minister to champion competitive reform and to ensure a more co-ordinated and cohesive approach to competition policy.

The commitment by the Western Australian Government to the new *National Reform Agenda* provides an opportunity for it to implement new administrative measures to manage the competition reform process in WA.

While the reform process maybe spearheaded by a central agency and/or Minister, CCI stresses the need for independent review of anti-competitive legislation and market structures.

To this extent, CCI encourages the State Government to utilise the services of the Economic Regulation Authority (ERA) more extensively in undertaking reviews under the *National Reform Agenda* and in implementing the state's broader competition policy, particularly with regard to gate-keeping and competitive neutrality assessment.

In Western Australia, these responsibilities sit ideally with the ERA as the independent economic regulator for the state. The ERA currently oversees regulation and licensing for the gas, electricity, water and rail industries.

Synergies already exist between the functions of the ERA and the objectives of competition policy. The *Economic Regulation Authority Act 2003* allows for the State Treasurer to refer any matter related to a regulated industry to the Authority for the purposes of an inquiry[11]. The Act goes on to state the matters that can be referred to the Authority include, but are not limited to:

- prices and pricing policy in respect of goods and services provided in the industry concerned;
- quality and reliability of goods and services provided in the industry concerned;
- investment and business practices in the industry concerned; and
- costs of compliance with written laws that apply to the industry concerned.

The Act specifically directs the ERA to have regard for the need to promote competitive and fair market conduct, as well as to prevent abuse of monopoly or market power in performing its functions.

The likelihood for more independent review of anti-competitive regulation would be significantly enhanced under this structure as Ministers and agencies responsible for the legislation under review would not have direct control of the process.

CCI recognises that giving the ERA the responsibility to champion the reform process would not necessarily overcome the government's lack of will in implementing reforms, but it would help to ensure that the review process is more robust, transparent, independent and better co-ordinated than under the NCP.

In its February 2006 meeting, the COAG also formally agreed to reduce the regulatory burden imposed by Australian governments. The agreement includes measures to:

- establish and maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition;
- undertake targeted public annual reviews of existing regulation to identify priority areas where regulatory reform would provide significant net benefits to business and the community;
- identify further reforms that enhance regulatory consistency across jurisdictions or reduce duplication and overlap in regulation and in the role and operation of regulatory bodies; and
- in-principle, aim to adopt a common framework for benchmarking, measuring and reporting on the regulatory burden.

These new measures are a welcome extension of the 'gate-keeping' provisions of the *Competition Principles Agreement*. This new gate-keeping framework developed by COAG effectively combines the objectives of creating regulation that will not restrict competition nor reduce economic efficiency. Given the importance of this gate-keeping role, CCI believes the State Government should also transfer this responsibility to the ERA, given its role as the overall independent economic regulator for Western Australia. In discussing gate-keeping arrangements under the *Competition Principles Agreement*, the National Competition Council said:

> "The most important determinant of effective gate-keeping is the independence (location) of the gatekeeper and its institutional underpinning."[12]

In its input to the Productivity Commission's review of the NCP, the WA Department of Treasury and Finance itself acknowledged the value of independence in this gate-keeping process:

> "Perhaps jurisdictions that do not have a sufficiently robust gate-keeping mechanism in place should work towards establishing independent bodies with relevant expertise to advise agencies on when and how to conduct regulatory impact assessments."[13]

Passing the gate-keeping responsibility to the ERA, along with the responsibility for competitive neutrality and legislation review under the *National Reform Agenda*, would place Western Australia in a similar position to other states.

Passing the gate-keeping responsibility to the Economic Regulation Authority, along with the responsibility for competitive neutrality and legislation review under the *National Reform Agenda*, would place Western Australia in a similar position to other states.

For example, the Victorian Government recently established the Victorian Competition and Efficiency Commission (VCEC), which is that Government's principal body advising on business regulation reform and identifying opportunities for improving the state's competitive position. Similarly, the Queensland Competition Authority was established in 1997 as an independent statutory authority with the specific mandate of carrying the NCP reform process in that state.

Incentives for Reform

Under the NCP, the Commonwealth Government made payments to the States and Territories as reform progressed (as judged by the National Competition Council against a pre-agreed framework).

The payments were appropriate because while the States and Territories had responsibility for key elements of NCP, much of the financial dividend from the economic growth arising from the NCP reforms accrued to the Commonwealth through the taxation system, notably in company and personal income tax.

Importantly, the NCP agreement also recognised the political reality that governments can be intimidated by vocal (usually narrow) vested interest groups determined to preserve anti-competitive regulations that benefit their members. So it was hoped that the payments would provide greater incentive to state cabinets and Premiers to act in the community interest.

While this provision was still insufficient to achieve reforms in WA, for all its largesse in implementing reforms, the Western Australian Government did become more focused on attempting to resolve some NCP issues when the threat of withholding competition payments (and the media publicity that came with it) became real.

To this extent, the National Competition Council, who were responsible for recommending payments based on the progression of reforms in each jurisdiction, played the difficult but useful role of 'whipping boy', as state governments were able to blame it for forcing them to implement reforms in politically sensitive areas, or else face deduction of competition payments.

This strategy did not have the desired effect in WA. Rather than laying blame on the NCC and biting the bullet to implement reforms (and hence avoid payment deductions), the Western Australian Government and State Opposition saw fit to publicly criticise the NCC for withholding competition payments even though the required reforms were not carried out.

Nonetheless, the competition payments system and the role of the NCC as an independent oversight of the program were effective in at least encouraging governments to consider reform initiatives and giving guidance on the process.

This system has broadly been retained in the new reform agenda, with the Commonwealth indicating that it will provide funding to the States and Territories on a case-by-case basis once specific implementation plans have been developed - that is, if funding is needed to ensure a fair sharing of the costs and benefits of reform.

Payments to the States and Territories and, where appropriate, to local government, would be linked to achieving agreed actions or progress measures and to demonstrable economic benefits and would take into account the relative costs and proportional financial benefits to the Commonwealth, the States and Territories and local government of specific reform proposals.

COAG have also agreed to establish a COAG Reform Council (CRC) to report to COAG annually on progress in implementing the National Reform Agenda. It is envisaged that the CRC will be an independent body that will replace the National Competition Council (NCC), which was established to oversee the implementation of NCP. A final decision on the CRC is still subject to agreement following the development of a business plan.

Akin to the current role of the NCC, the CRC would report to COAG on the performance of all jurisdictions (including the Commonwealth), and the Commonwealth would then decide on payments to States and Territories, based on those reports.

Any funding could take the form of Commonwealth and/or shared funding for specific initiatives, and/or payments from the Commonwealth linked to results.

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End Notes

[1] Productivity Commission Inquiry Report. *Review of National Competition Policy Reforms*. 28 February 2005. Page XXIII.

[2] Economic Regulation Authority Act 2003. Part 5, References on regulated industries, Division 1.0, s.032.

[3] OECD. *Economic Survey of Australia 2004: Economic performance and key challenges*. February 2005. http://www.oecd.org/document/29/0,2340,en_2649_201185_34037213_1_1_1_1,00.html

[4] As measured by Australia's key labour productivity index; trend real output per hour worker in the market sector.

[5] Productivity Commission Inquiry Report.*Review of National Competition Policy Reforms*. 28 February 2005. Page XXIII.

[6] Electricity Reform Task Force. *Electricity Reform in Western Australia, 'A Framework for the Future'*. 2002. Page 85.

[7] At the time of publication, Western Australia's final competition payment entitlement for 2005-06 was $71 million, but maybe higher depending on the National Water Commission's assessment on the State's progress under the National Water Initiative.

[8] National Competition Council, *Review of Government Progress in Implementing NCP Reforms*, October 2005. Page 14.31.

[9] Allen Consulting Group, *Assessment of the Impacts of Liquor Licensing Reforms: A review of Australian experience*. Report to the Department of Racing, Gaming and Liquor. December 2005.

[10] Australian Commodities, Vol. 13 No2, June quarter 2006, pp 366-397

[11] Economic Regulation Authority Act 2003. Part 5, References on regulated industries, Division 1.0, s.032.

[12] National Competition Council, *Review of Government Progress in Implementing NCP Reforms*, October 2005. Page 4.9.

[13] Department of Treasury and Finance in Review of National Competition Policy Reforms, *Productivity Commission Inquiry Report*. February 2005. Page 257.

