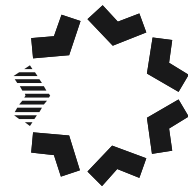


NATIONAL
COMPETITION
COUNCIL



Competition Policy Review Draft Report

National Competition Council
submission on the draft report



14 November 2014

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1 Introduction

- 1.1 The National Competition Council (Council) is a statutory agency established by Part IIA of the *Competition and Consumer Act 2010* (CCA). The Council is responsible for providing recommendations to designated Commonwealth and state or territory ministers in relation to third party access to infrastructure services under Part IIIA of the CCA and for recommendations and decisions relating to access to natural gas pipelines under the *National Gas Law* (NGL). Until 2005 the Council was also responsible for promoting National Competition Policy (NCP) and assessing governments' performance in meeting the reform commitments they made when agreeing to the NCP reforms.
- 1.2 The Council made a submission on the Review Panel's Issues Paper in May 2014 (May Submission) based on the Council's almost decade of experience in administering Australia's NCP and its ongoing experience in dealing with third party access issues under the CCA and NGL. The Council again draws on its extensive experience in these areas in making this submission on the Review Panel's Draft Report.
- 1.3 As with its May Submission, the Council's focus is on the National Access Regime and the principles and processes for effective economic reform. These are areas where the Council has particular experience and expertise to offer the Review Panel.
- 1.4 This submission addresses two particular areas considered by the Review Panel in the Draft Report, namely:
 - the National Access Regime:
 - proposed changes to declaration criteria,
 - the Australian Competition Tribunal's review of access decisions, and
 - institutional arrangements.
 - future Competition Policy reform:
 - the proposal to establish an Australian Council for Competition Policy (ACCP), and
 - competition payments.

2 The National Access Regime

- 2.1 The Council is disappointed that the Review Panel does not support the Productivity Commission's (PC's) recommendation regarding criterion (b) or the Council's view that criterion (f) should not be changed. The Council is also concerned by the Review Panel's recommendation that the Australian Competition Tribunal (Tribunal) be empowered to undertake merits review of access decisions based on new information which was not before the relevant decision-maker.
- 2.2 In October 2013 the Productivity Commission (PC) completed its year-long inquiry into the National Access Regime. The Council supports the PC's conclusion that 'the National Access Regime should be retained' (PC 2013, p 2). The Regime provides a net benefit to the community by promoting competition and investment in dependent markets where access to monopoly infrastructure services is required to compete effectively in those dependent markets.
- 2.3 The Council considers that an effective National Access Regime is an important part of a comprehensive competition policy for Australia. It supports competitive neutrality and provides a default mechanism for addressing access issues that arise in the operation of state-owned infrastructure and particularly when (or if) such assets are privatised. The Regime also operates as an important deterrent for service providers looking to block competition by refusing access. The Regime provides an incentive for parties to agree on access terms and conditions through commercial negotiation, thereby encouraging parties to arrive at commercial agreements without the need for direct regulatory intervention.
- 2.4 The Council is therefore concerned that the Review Panel appears to be contemplating the repeal of the National Access Regime, unless the facilities for which access regulation may be required in the future can be specifically identified (Draft Report, p269).
- 2.5 The role which the declaration process plays within the National Access Regime is to identify situations where access regulation is necessary and desirable. While it might be possible to identify, define and then list a number of facilities which should be subject to access regulation, this is not always the case. In addition, circumstances change in ways which may not be anticipated. Declaration allows for a case by case consideration against objective criteria through a transparent public process, where submissions from both proponents and those opposed to access regulation can be fully considered.
- 2.6 One of the important objectives of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in various industries. The certification process is designed to allow effective state and territory regimes to supplant the National Access Regime where such regimes also incorporate the principles set out in the Competition Principles Agreement. A principles based approach to the scope and operation of access regulation is important.

- 2.7 Even in cases where the need for access regulation may be obvious, the declaration process can assist in defining the scope of the regulation. The assessment of a particular situation in light of the declaration criteria also provides a basis for removing access regulation where circumstances change. For example, many gas pipelines were initially deemed to be covered under the national gas law but over time a number of these have been uncovered (on the Council's recommendation) where development of other pipelines has seen competitive options emerge.
- 2.8 It is also critical that the Review Panel recognise that the National Access Regime involves a two part process. Declaration does not automatically give rise to regulation of prices or other terms and conditions of access. Unlike electricity lines businesses under the National Electricity Law and covered gas pipelines¹ under the NGL, providers of a declared service are not required to gain ex ante regulatory approval. Declaration of a service under the National Access Regime only involves ex post arbitration of access disputes where parties are unable to negotiate an access agreement and an access dispute is lodged with the ACCC. Even then consideration of a dispute by the ACCC need not result in the imposition of regulation. In arbitrating an access dispute, the ACCC is required to apply a set of principles and safeguards in making any determination (see CCA, s 44X and 44W) and may decline to order access be provided (s 44V(2)(d)).
- 2.9 This important consideration is illustrated by the only ACCC arbitration of an access dispute to date. In the Services Sydney matter, certain sewage transportation services provided by Sydney Water Corporation had been declared and Services Sydney sought arbitration of access prices. In arbitrating the dispute, consistent with the requirements of the CCA, the ACCC proposed access prices using a retail-minus methodology. The access prices aligned with efficient utilisation of the sewerage system and would encourage Services Sydney to only purchase access services if its costs of treating sewerage were less than the (avoidable) costs to Sydney Water Corporation.² Following the ACCC's final determination, Services Sydney decided not to continue to seek access. There were no gains from trade from access and the process worked appropriately. The declaration of the relevant services allowed for negotiation and then an arbitration process that determined whether or not access by the particular access seeker would be economically/socially desirable. As it was, in the particular case, there were no economic or social gains from access and this was made clear by the access process.
- 2.10 Irrespective of whether it is possible to predetermine specific infrastructure services which the National Access Regime may apply to in the future, the Council considers that the Regime provides an important 'backstop'. Without it, and where successful claims and (importantly) effective remedies under s 46 of the CCA are elusive, remedying third party access issues would fall back on ad hoc regulatory responses such as deemed declarations, industry-specific regimes and mandatory access

¹ Unless subject to a light regulation determination.

² See Australian Competition and Consumer Commission (2007).

undertakings. The Regime provides an overarching framework, and should act as a common reference point or benchmark for other access regimes.

Criteria (a) and (e)

- 2.11 The Review Panel Report endorses the PC's recommendation that criterion (a) be amended to confirm in statute the current approach to applying the criterion. The Council also supports this approach.
- 2.12 The Review Panel has not referred to the PC's recommendation that criterion (e) be removed as a criterion for declaration and a threshold clause should be introduced stating that a service cannot be declared if subject to a certified state or territory access regime, and a mechanism for revoking the certification of a regime should be introduced. Presumably this is because the proposed change is not controversial. The Council supports the PC's recommendation.

Criterion (b)

- 2.13 The Review Panel considers that the existing 'private profitability' test, established by the decision of the High Court in *The Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* [2012] HCA] 36; (2012) 290 ALR 750 (*Pilbara Decision*), is preferable to the PC's recommendation that a new test be introduced for criterion (b).
- 2.14 In the Council's view this is wrong in principle and will create practical issues for effective implementation of the National Access Regime.
- 2.15 The PC recommended that criterion (b) should be satisfied where 'total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the (one) facility.' In other words, criterion (b) should test for the presence of natural monopoly characteristics³ in the supply of the service for which declaration is sought (rather than test whether it would be "profitable" for anyone to provide an alternative facility, which is the construction of criterion (b) determined by the High Court).
- 2.16 The PC's proposed new test would ensure that it focuses on the central policy problem which access regulation is designed to address: a lack of competition in markets due to the inability to access infrastructure services which exhibit natural monopoly characteristics, and therefore where duplication is wasteful and inefficient.
- 2.17 As stated in its May Submission, the Council strongly supports the PC's recommendation for a new test for criterion (b) and considers that this particular reform is critical to the continued effectiveness of the National Access Regime.
- 2.18 As the PC notes:

³ An infrastructure facility demonstrates natural monopoly characteristics where the total reasonably foreseeable market demand for the service of the facility is likely to be met at lower total cost by the (single) facility rather than by two or more facilities.

In infrastructure markets, an enduring lack of effective competition will usually occur where the incumbent facility can meet total market demand for the infrastructure service at least cost. If a facility can meet total market demand at least cost it would likely hold a strong position in the market for the infrastructure service, given it could draw on its lower costs to deter competitors that threaten its market position. A test that accounts for total foreseeable market demand (including demand for any substitute services provided by facilities serving that market) would direct criterion (b) toward identifying the most likely source of an enduring lack of effective competition in infrastructure service markets. (PC 2013, p 19)

- 2.19 It is the lack of effective competition in related markets which is at the heart of the issue to be addressed and the test proposed by the PC is best suited to address this issue.
- 2.20 The Council considers that retention of the private profitability test is highly problematic. The Review Panel's proposed alternative of excluding the incumbent from the profitability consideration will not address the underlying misdirection of the test. While the 'private profitability' test will protect owners of bottleneck infrastructure from up or downstream competition, it is inconsistent with promotion of competition in these markets and the national interest.
- 2.21 The Council agrees with the PC's view that the private profitability test is 'particularly difficult to apply', with the Council and decision makers having to estimate 'uncertain measures such as costs, process, demand, capacity and required rates of return' (PC 2013, p 163). For example, assessing the profitability of infrastructure for exporting mineral resources is inexorably tied to the prices for such resources. In recent years prices for iron ore, coal and other minerals have varied widely. An investment that is profitable at \$100 per tonne may not be at \$50 per tonne. Over a commodity life cycle, associated infrastructure may move between being not profitable and profitable to duplicate—and hence susceptible to access regulation—possibly on multiple occasions. A profitability test requires the Council and decision makers to forecast such prices.
- 2.22 Judgements about private profitability also require an evaluation of ex post competition, whereas an evaluation of whether provision of a particular infrastructure service exhibits natural monopoly characteristics, while not necessarily a simple exercise, centres on observable factors such as the underlying cost function and current and foreseeable demand for the service.
- 2.23 Furthermore, to the extent reliable information on which to assess the profitability of an investment exists, in most circumstances such information will be held by the incumbent service provider and will likely be difficult for decision makers to obtain and/or verify.
- 2.24 The Council shares the PC's view that determining whether a facility is profitable to duplicate is problematic. Duplication could, for example, 'have a positive net present value but generate a rate of return that is insufficient to justify investment when ranked alongside alternatives' as the Commission recognises (PC 2013, p 163) and

(whether or not the definition of ‘anyone’ is amended) there is scope for parties to make a case that duplication of a facility that is part of a production chain that is profitable overall is itself also profitable to duplicate when in fact duplication of the facility would be unprofitable because duplication of the facility can be cross-subsidised by the profitable elements of a business.

Criterion (f)

- 2.25 The Review Panel endorses the PC’s recommendation that criterion (f) be amended to require an affirmative test that requires the public interest to be promoted (rather than the current test which requires that access to the service ‘would not be contrary to the public interest’). The Review Panel considers that one of basic principles of competition policy is that regulatory intervention into markets should only occur where it promotes the public interest (Draft Report, p272).
- 2.26 This is the one significant PC recommendation that the Council does not support.
- 2.27 As it is now, criterion (f) asks whether the Council (and Minister) is satisfied that access is not contrary to the public interest. It is important to recognise that this question is addressed in the context of (currently) four other declaration criteria which must be positively satisfied (including national significance; that declaration would overcome natural monopoly barriers to competition; and that declaration would materially increase competition in a market). The criteria operate together to ensure the public interest is advanced.
- 2.28 The proposed change to criterion (f) to introduce an affirmative test would mean that if the Council does not know whether the public interest will be promoted, it could not recommend declaration, even though all the other criteria may be satisfied, and if the Minister similarly does not know then he or she could not make a decision to declare a service.
- 2.29 The Council considers such an outcome to be inappropriate. The Council’s view is that where all the other declaration criteria are met, declaration should only be precluded where it can be positively demonstrated that access would be contrary to the public interest. Essentially, criterion (f) seeks to identify whether there is any matter not already considered in addressing the other criteria which would make declaring a service contrary to the public interest. Where an application for declaration has satisfied all of the other criteria, it should not have to meet a further positive public interest requirement.
- 2.30 The PC considers a change to criterion (f) to be necessary because the current test “sets a hurdle for declaring an infrastructure service that is too low” (PC 2013, pp178-9). It is unclear on what basis the PC has reached this view given its concurrent finding that the Hilmer Committee’s intention that the Regime be applied sparingly has been borne out in practice. Only six declarations have occurred in the nearly 20 years since the Regime was introduced, and only two services are currently declared.

- 2.31 In the Council's view, the declaration criteria taken together—as they must be—already represent a sufficiently high hurdle for declaration of a service and the amendment to criterion (f) proposed by the PC and the Review Panel is unnecessary and undesirable.
- 2.32 There is a genuine risk that raising the hurdle higher will render declaration impossible and as a result nullify any effective threat from declaration as a means of encouraging private settlement of access disputes.
- 2.33 If this occurs, there will be a stronger incentive for parties seeking access to bypass declaration under the National Access Regime in favour of lobbying for industry-specific access regimes. Most regulated third party access already occurs as the result of state or territory access regimes or mandatory requirements for access undertakings. Further raising the threshold for declaration will reinforce this trend.
- 2.34 Rather than limiting the application of access regulation, the changes proposed by the Review Panel are likely to see more services exposed to access regulation but in an ad hoc and fragmented manner.
- 2.35 The Council is strongly of the view that the Review Panel's proposed amendment to criterion (b), combined with its acceptance of the PC's proposed changes to criterion (f), will likely render declaration under the National Access Regime ineffective.
- 2.36 Changes of this type are also inconsistent with the National Access Regime having any useful framework role.
- 2.37 If the declaration process is to be rendered ineffective it might be preferable for it to be abandoned and reliance placed on individual state or territory jurisdictions to introduce industry-specific access regulation and ad hoc interventions where services are subject to deemed declaration or mandatory access undertakings.
- 2.38 State and territory regimes already predominantly determine the scope of infrastructure access regulation and impose access requirements without a service being declared. The vast majority of services subject to access regulation (approximately 30) have arrived in that position as a result of ad hoc decisions, rather than by declaration under the National Access Regime (only two services are currently declared under the Regime).
- 2.39 Removing declaration under the Regime as an effective means of addressing access issues will not see such concerns go away. Rather, it will strengthen the current trend of ad hoc access regulation. Unlike the National Access Regime, mandatory requirements for provision of access undertakings do not provide for mechanisms to terminate such regulation when it is no longer necessary.
- 2.40 The Council has repeatedly expressed concern at situations where the declaration process provided for under the National Access Regime—in which the Council conducts a public examination and provides an independent recommendation as to whether the statutory requirements for regulation are met—is by-passed and access regulation is imposed by other means. In such situations it cannot be assumed that

the relevant statutory requirements have been met and that access regulation will enhance efficiency, promote competition or enhance the welfare of Australians.

The Australian Competition Tribunal's review of access decisions

- 2.41 The Review Panel favours empowering the Tribunal to undertake merits review of access decisions, including hearing evidence from employees of the business concerned and experts where that would assist (Draft Report, p274). This would widen the scope of the information which the Tribunal may take into account beyond what was before the original decision maker.
- 2.42 In the Council's view, it would be inappropriate to allow the Tribunal to review a Ministerial decision on the basis of new material or evidence that was not before the Council (when making its recommendation) or the Minister (when making the decision). This would amount to a rehearing and not a re-consideration of the matter, which the High Court in the *Pilbara Decision* found to be inappropriate.
- 2.43 Such an approach would also be inconsistent with the objectives of the 2010 amendments to Part IIIA, which included limiting the Tribunal to only consider information taken into account by the original decision maker (along with additional information that the Tribunal considers reasonable and appropriate). It is also inconsistent with the nature of the decision making which occurs in making a declaration decision.
- 2.44 In the Council's view, the nature of the merits review process has been clarified following the *Pilbara Decision*. Whilst this decision covered provisions which applied before the 2010 amendments, the comments which are made by the High Court about the nature of the review process are significant and reflect the significant public policy issues involved in declaration decisions. Precisely how the comments of the High Court will influence the interpretation of the current provisions remains to be seen but it would seem to be consistent with a limited review right and extensive new evidence and arguments to the Tribunal are likely to be precluded.
- 2.45 In the Council's opinion the availability of merits review reduces the effectiveness and value of the National Access Regime.
- 2.46 Further, the Council considers that the availability of merits review has increased uncertainty and extended delays in the declaration process. It is neither necessary nor an efficient use of resources to provide two levels of inquiry and fact-finding in declaration matters. The two-level process provides an opportunity for gaming and a 'second bite of the cherry' which is a situation that should not be endorsed having regard to the political, regulatory and public interest importance of declaration decisions. It is inappropriate for a system to encourage the withholding of relevant material from the primary decision making body.
- 2.47 Rather than attempting to refine the specific arrangements for merits review of declaration decisions, the Council advocates it be replaced with judicial review.

- 2.48 Judicial review provides an appropriate level of oversight for declaration decisions, which are properly viewed as akin to policy determinations by Ministers. The Council maintains its view that allowing the judgement of the Tribunal to override that of elected, politically accountable Ministers, who must consider (but are not bound by) the advice of an independent expert body, is inappropriate. The political nature of a declaration decision by a Minister and the breadth of the issues that may be canvassed in making such a decision were recognised by the High Court⁴ in the *Pilbara Decision*.
- 2.49 In the Council's view, applying the generally applicable processes and standards for review available through judicial review, and the associated jurisprudence, is preferable to a scheme for merits review that applies only to some decisions under the CCA. It appears to the Council that compared to the availability of judicial review, merits review of declaration decisions by the Tribunal is of little benefit while significantly increasing the cost, uncertainty and delay in the declaration process.

Institutional arrangements

- 2.50 The Council notes the Committee's draft report proposes the Council's roles in relation to declaration of services under the National Access Regime and coverage (and other functions) in relation to gas pipelines be transferred to a new prices and access regulator.
- 2.51 This recommendation runs contrary to a long standing expectation that determination of the scope of regulation and regulatory activities should be addressed separately.
- 2.52 From 1 July 2014 the NCC moved to acquire its secretariat services from the ACCC. While the Council now draws on ACCC staff to assist it in its work, the Council remains the responsible decision making and advisory body and its decision-making is entirely separate from the ACCC.
- 2.53 The Council's changed secretariat arrangements met with some concern from parts of the business and legal community which had issues with maintenance of the Council's independence and sharing of confidential information. The Council has put in place measures to address these issues. The Committee's proposal would however merge decision making on the scope of access regulation with the conduct of that regulation.

⁴ French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [42], and Heydon J at [135].

3 Competition Policy Reform

- 3.1 The Council supports the Review Panel's proposal to re-establish a body to advocate for economic reform (the ACCP) and to undertake a range of functions similar of those undertaken by the NCC in relation of the earlier NCP reforms.
- 3.2 However such a body is only valuable if political leaders at the national and state and territory levels are willing to agree to an agenda and principles for economic reform. Ultimately, further reforms and the ACCP (or any other body) will not succeed in the absence of substantive political commitments to reform and the processes that underpin this.
- 3.3 Under the NCP governments established a set of principles and processes to advance economic reform. These were incorporated in the *Competition Principles Agreement* and the *Conduct Code Agreement* which all jurisdictions signed. These agreements established reform institutions, including the NCC, but more importantly they established the agenda for reform and a set of principles to be applied in the reform process.
- 3.4 While recommending institutional arrangements is of consequence, it is the principles and agenda for reform that are of greatest value. In the Council's respectful submission the Review Panel has said much about institutions and relatively little about the principles and agenda for reform.⁵ At the very least the Review Panel's final report should endorse the continued applications of the principles associated with NCP.
- 3.5 Based on its experience under the NCP, the Council considers that the inclusion of a type of "reform payment" for achievement of reform objectives is desirable and the application of these payments to the Commonwealth is a worthwhile extension.
- 3.6 In the Council's view, such payments assist in focussing attention and effort on removal of barriers to reform and could provide a metric for achievement. The Council recognises that payments cannot be a replacement for a genuine commitment to reform and the political will to address embedded vested interests.
- 3.7 As well as providing a reward/penalty mechanism reform payments can serve a strategic purpose and can be used to reinforce reform commitments. The Council's approach to Competition Payments under the NCP programme was set out in its 2003 assessment report (see Appendix A). This approach illustrates how competition payments were used to encourage reform by providing repeated opportunities for payment deductions to be reinstated. The Council's approach, which did not "put a price" on each individual reform element also allowed for the focus of payment deductions to shift as required to concentrate on outstanding elements.

⁵ If the Review Panel does not consider it is in a position to articulate principles and agenda for further economic reform, it should specifically recommend this as an important first task for a new reform agency.

- 3.8 The Council is less convinced of the desirability of direct “reform payments” to local governments. Compared to developing a mechanism for state and territory governments to share their rewards with local government, such direct payments are likely to over-complicate the process for assessing reform achievements.
- 3.9 One of the strengths of the assessment process under NCP lay in the role of jurisdictional competition policy units. These groups of officials acted as the principal contact and liaison points for the Council in dealing with states, territories and the Commonwealth. Generally these groups were established in Treasury departments, although a few were located in Premiers’ Departments. They assisted in assembling progress reports and acted as advocates for reform within state/territory bureaucracies. Competition Policy Units (especially those within Treasury Departments) were generally more supportive of economic reform and less concerned with sectional interests and politics than sectoral departments and agencies.
- 3.10 The Council considers that the work of the proposed ACCP or any similar body would be enhanced by jurisdictions being asked to re-establish reform units as counterparts to the ACCP.
- 3.11 In the Council’s view, it is important that states and territories have a stake in the ACCP. In the case of the NCP this was achieved through requirements of the *Conduct Code Agreement* - including requirements for consultation on appointments, rather than any form of dedicated jurisdictional representation. The Council considers that cross jurisdictional involvement in appointments to the ACCP is preferable to appointments being made on a jurisdictional basis, where inevitably such appointees will be seen to represent particular interests.
- 3.12 While establishing a new agency may assist in giving state and territories ‘ownership’ of a new reform agency, this may be of limited value unless these jurisdictions are willing to also fund the agency. If this is not the case, the Council questions the value of establishing a new agency.
- 3.13 A more timely and efficient alternative might be to use the statutory provisions that established the Council to re-establish an economic reform agency. This would avoid the need for new separate legislation to set up the relevant body. A new work programme—focussed on promoting and assessing a new round of economic reform—could be agreed and implemented through s29B of the CCA and appropriate new staffing and membership arrangements could follow.

4 References

Australian Competition and Consumer Commission (2007) "Access dispute between Services Sydney Pty Ltd and Sydney Water Corporation", *Arbitration Report*, 19 July.

Australian Governments, *Competition Principles Agreement*, 11 April 1995 as amended to 13 April 2007.

Available at:

<http://www.ncp.ncc.gov.au/docs/Competition%20Principles%20Agreement%2C%2011%20April%201995%20as%20amended%202007.pdf>

—, *Conduct Code Agreement*.

Available at:

<http://www.ncp.ncc.gov.au/docs/Conduct%20Code%20Agreement%20amended.pdf>

Hilmer Committee (Independent Committee of Inquiry into Competition Policy in Australia) 1993, *National Competition Policy*, Australian Government Publishing Service, Canberra.

NCC (National Competition Council) 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005*, October.

— 2012, *Submission to Productivity Commission Inquiry into the National Access Regime*, 1 November.

— 2013, *Submission to the Productivity Commission Inquiry*, 8 February.

— 2013, *Submission on the Productivity Commission Draft Report*, 3 July.

— 2014, *Submission on the Issues Paper (May Submission)*, May.

OECD (Organisation for Economic Cooperation and Development) 2005, *OECD economic surveys 2004*, Australia, vol. 2004/18, Paris, February.

PC (Productivity Commission) 2005, *Review of National Competition Policy Reforms*, Inquiry Report no. 33, Canberra.

— 2013, *National Access Regime*, Inquiry Report no 66, Canberra.

Appendix A . Competition payments: the Council's approach

Extract from: National Competition Council 2003, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: Volume one – Overview of the National Competition Policy and related reforms*, AusInfo, Canberra.

The Commonwealth Government makes payments to the States and Territories as a financial incentive to implement the NCP and related reform program. The payments recognise that the States and Territories have responsibility for significant elements of the NCP, yet much of the financial dividend from the economic growth arising from the NCP reforms accrues to the Commonwealth through the taxation system.

Competition payments in 2003-04 are approximately \$A765 million and are allocated to the States and Territories on a per capita basis. The Commonwealth Treasurer decides on the actual payments after considering the Council's advice on jurisdictions' progress in meeting their NCP obligations. The Council may recommend a reduction or suspension of payments where it assesses that governments have not implemented the agreed reform program. The Council also assesses the Commonwealth's progress, but the Commonwealth does not receive payments and is therefore not subject to reductions or suspensions.

In terms of the CoAG target for the completion of the legislation review program, for the 2003 NCP assessment the Council regarded a government as failing to meet its obligations where (a) the review and reform of legislation was not completed or (b) completed reviews and/or reforms did not satisfy NCP principles. Where review and reform activity was incomplete owing to a need to resolve outstanding national reviews or other interjurisdictional processes, the Council considered that there should not be adverse payment implications.

The significance of an individual compliance failure can reflect an array of considerations, including:

- The extent of anticompetitive restrictions remaining. Significance may vary across jurisdictions for the same area of regulation, depending on the extent of the restriction. Two jurisdictions might have identical barriers to entry to an industry, but one jurisdiction might allow greater entry to providers of a closely substitutable service, thereby mitigating the impact of the primary restriction (such as for taxis and hire cars).
- The relative importance of a compliance breach in terms of its impacts on the community and economy. Single desk arrangements for an agricultural commodity, for example, are more significant than, say, reservation of title for speech therapists.
- How the effects of anticompetitive impacts are manifested. Some restrictions on competition:
 - result in financial transfers to incumbent beneficiaries at the expense of potential competitors and users and final consumers;
 - have significant, albeit less tangible, effects on consumer convenience (such as the restrictions on shop trading hours); and

- have pronounced impacts on the allocation of resource use in other jurisdictions or the economy generally, such as differential restrictions across jurisdictions that raise business costs and distort location decisions.

In addition to accounting for the significance of any particular compliance breach, CoAG has directed the Council, when assessing the nature and quantum of any financial penalty or suspension, to take into account:

- the extent of the relevant State or Territory's overall commitment to the implementation of the NCP; and
- the effect of one State or Territory's reform efforts on other jurisdictions.

The Council interprets this guidance to mean that individual minor breaches of reform obligations should not necessarily have adverse payments implications where a government has generally performed well against the total NCP reform program. Nevertheless, a single breach of obligations in a significant area of reform may be the subject of an adverse recommendation, especially where the breach has a large impact and/or an adverse impact on another jurisdiction. Further, the Council interprets the CoAG guidance as suggesting that the quantum of any payments recommendation should bear some relationship to a government's overall performance in reform implementation, the impact of the breach of reform obligations and whether there are adverse impacts on other jurisdictions.

In taking account of the significance of an individual compliance failure and CoAG's direction that a jurisdiction's overall performance in meeting the suite of NCP obligations should also condition payments recommendations, the Council determined that, for each State and Territory:

- significant individual compliance breaches should attract penalties (suspensions or deductions) in their own right; and
- other compliance breaches should be agglomerated and a general 'pool suspension' applied.

For the purposes of the 2003 NCP assessment, the categories of penalties are elaborated on below.

- Permanent deductions are irrevocable reductions in governments' 2003-04 competition payments for specific compliance failures. The Council may recommend that the permanent deduction not be imposed for competition payments in subsequent years where governments introduce appropriate reform. In the absence of complying action the Council is likely to recommend in future assessments that the 2003-04 deductions be ongoing.
- Specific suspensions apply until pre-determined conditions are met, at which time the suspension is lifted and suspended 2003-04 competition payments released to the relevant jurisdiction. Suspensions of this type recognise that governments are taking action to comply but have not as yet completed that action. The Council will address these matters as and when significant commitments are made, or reforms implemented. Where commitments are not made or met, or reform action not implemented by the 2004 NCP assessment, the

Council is likely to recommend that suspended 2003-04 competition payments be withheld permanently (that is, converted to a permanent deduction). In subsequent years the Council will consider whether further suspensions or permanent deductions should apply.

- Pool suspensions apply to a pool of outstanding legislation review and reform compliance failures and relate to payments for 2003-04. The Council will reassess progress with the pool of compliance failures in the 2004 NCP assessment. If satisfactory progress is made, the Council may recommend that the suspension be lifted or reduced and the funds released to the relevant jurisdiction. If satisfactory progress is not made, the Council is likely to recommend that all or part of the suspension be converted to a permanent deduction for the 2003-04 NCP competition payment and that the deduction be ongoing.