

Submission by Professor Graeme Samuel AC, Monash Business School, in relation to inquiry into the future of National Competition Policy

I make this submission having had the privilege of being an inaugural member of the National Competition Council (1995) and then its President (1997-2003) following which I assumed the position of Chair of the Australian Competition and Consumer Commission (2003-2011). Preceding my role with the NCC, I held the position of President of the Australian Chamber of Commerce and Industry, which played a significant role in promoting the implementation of the Hilmer Report reforms by the Keating government.

A. Some background

The leading of the reform process by the NCC developed in its modus operandi, as lessons were learnt as to the most effective means of achieving reform. The process was assisted by initially strong support for the reforms by the Keating government, slightly less enthusiasm, for the reforms from the Howard government, a generally rational approach from the National Party with leaders like John Anderson, Tim Fischer and Doug Anthony. Fierce political resistance emanated from Pauline Hanson and elements of the small business lobby led by COSBOA.

The States and Territories were initially supportive of the reforms, noting the potential rewards of \$16Bn of competition payments agreed to be paid to them by the Keating government, conditional on the reforms being implemented. One of the roles assigned to the NCC was to oversee the reform implementation by all governments and to report annually to the Commonwealth Treasurer whether States and Territories were entitled to receive the whole or part of their programmed competition payments.

The programming of those payments proved to be their fundamental weakness - State and Territory Treasurers built the programmed payments into their forward estimates and regarded any reduction in payments recommended by the NCC as a penalty. As Keating once remarked, the most dangerous place to be in is to stand between a treasurer and a pot of money. I will comment more on this later in this submission in my recommendation as to the future of competition payments.

The developing resistance to reform implementation led me to publicly 'lecture' governments on their obligations through speeches, interviews and opinion articles in daily newspapers. This was a mistake and it became clear that lecturing ministers and governments was ineffective and potentially destructive of the reform process. So my modus operandi changed to one of negotiation, guidance as to how reform might be implemented efficiently and causing least expenditure of political capital and most importantly stressing the need for competition payments and other financial resources to be applied in structural adjustment for businesses and communities adversely affected by reform implementation.

Structural adjustment was more honoured in the breach than in the observance.

One of the most glaring examples of this was in the deregulation of the farm gate price for milk. This was clearly going to affect dairy farmers and their local communities. Despite the NCC urging the Commonwealth Government to focus on structural adjustment for affected farmers and their local communities, the government simply determined to allocate \$1.8Bn of financial assistance to affected farmers which in many cases was simply applied to subsidise the reduced income of farmers flowing from the deregulation of farm gate prices - and of course when that subsidy ran out, the anger over the reforms emerged. Had the funds been applied to persuade farmers to aggregate their dairy processes with other farmers and adopting advanced milking technology, the reforms might have been less painful. It was no surprise that the Financial Review had a front page article reporting on a review undertaken by the ACCC of the impact of the reform, headlined "Only Consumers Benefit from Dairy Reforms".

A review of the reform process was undertaken by the State and Territory governments in the early 2000s, led by Glyn Davis then head of the Queensland Department of Premier and Cabinet. While the States and Territories agreed to continue with the reforms, there were some significant wind backs particularly in the area of competitive neutrality.

The death knell of the reform process occurred soon after I retired as President of the NCC to assume the role of Chair of the ACCC. The primary reason for the cessation of the reform process was the decision of the then Treasurer Peter Costello to cease the competition payments. His reasoning was that as the original agreements between the governments only provided for 10 years of payment, the Commonwealth Government had no ongoing obligation to continue the payments.

I had advised the Treasurer that the payments were in fact intended to be ongoing - they represented the calculated increase in income tax revenue to be gained by the Commonwealth flowing from productivity gains expected to be the result of the reforms. The ten year limit shown in the governments agreements was simply the result of the limited width of the computer printout setting out the ten year projections of the competition payments

Nevertheless, the reform process ceased in June 2004. The NCC issued soon after its final report as to what had been achieved and what was left to be done. This was followed by a Productivity Commission Report in 2005 that expressed its opinion on the same issues. Gary Banks, the former chair of the Productivity Commission delivered his farewell speech in 2012 and set out 27 recommendations for continued reform - his 'to do list'.

In 2014 the Harper Review canvassed the whole of competition policy. The deficiencies of that review were that it focussed heavily on potential amendments to the Competition and Consumer Act and then some of the more obvious carry over reforms to anti competitive regulations (eg. taxis and pharmacies). But it didn't attempt to advise how these reforms might be undertaken causing least pain to affected businesses and diminishing the political capital required to be expended. A truly lost opportunity to re-energise the reform process.

B The way forward

The reform process through 1995-2004 provided several lessons on how the reform process might be improved. These lessons guide my recommendations on the way forward.

(A) Less focus on amendments to the CCA

There should be less focus on amendments to the CCA. These are low hanging fruit, but offer very little productivity gains. We already have in the pipeline new merger processes, an inquiry into supermarket prices, further Senate inquiries into big box retail, and selective calls for break up or divestiture by big business.

The inquiries into pricing practices of big business and recommendations as to break up or divestiture are essentially political populist measures exacerbated by the forthcoming election. Fortunately they are receiving little credibility from either government or responsible media commentary. In almost all cases they reflect a poor understanding of the current provisions of the CCA and seem to reflect a disconnect between the recommended actions and the intended outcomes. The National Party call for divestiture by the major supermarket chains together with the expanded role of the Food and Grocery Code of Conduct intended to provide higher prices for farmers and lower prices for consumers, appears to be the ultimate oxymoron, leaving aside the disconnect under the Food and Grocery Code of Conduct between farmers and supermarkets if farmers are not engaged in direct dealings as suppliers to the supermarkets.

(B) Low priority for low productivity yielding reforms - let technology deliver the reform outcomes.

We should place in the bottom drawer the reforms that are of little consequence for productivity gains AND recognise that technology will soon overwhelm the anti competitive regulations and structures in place.

So taxi reform, resisted for so long by the taxi licence owners and short sighted governments, was overtaken by ride share, in particular Uber. The pity was that governments (as did external reviews of taxi regulation) failed to recognise the impending arrival of ride share with its ability through the use of technology to provide a significantly more satisfactory experience for consumers, such that taxi protective regulation became irrelevant. Instead external reviews advised governments to apply more generally ineffective regulation on taxis. This failure by governments, in spite of warnings and advice by the NCC as to how to address the transition of taxi licence holders to the new era, resulted in significant financial distress to taxi licence holders and political pain for governments.

Pharmacy anti competitive regulations are destined to follow the same course with digital prescriptions and fast delivery or click and collect processes making pharmacy ownership and location restrictions irrelevant. But a combination of lobbying by the Pharmacy Guild and responses by governments throughout

Australia are destined to ultimately cause financial pain to community pharmacies and political pain to governments.

So we should carefully assess both the anticipated productivity gains to flow from each reform and whether technological advances will ultimately achieve the same outcomes - and then seek to persuade stakeholders and governments of the inevitability of change and advise on how structural adjustment might best be handled.

(C) Competition pavements

The competition payments are a vital element of the reform process - at least so far as States and Territories are concerned. But they should not be promised upfront. Rather decisions should be made, with the advice of the Productivity Commission as to the important reforms to achieve productivity gains and the calculated Commonwealth revenue gains from such reforms - these will guide the potential reward payments to States and Territories in return for undertaking the reforms.

Where the Commonwealth alone is responsible, there needs to be a strong commitment to address these reforms with agreement by the States and Territories that they will support and facilitate the Commonwealth reforms. Both commitment and support were lacking throughout the Howard government era of NCP reform. Competition payments might also be directed to securing State and Territory support and facilitation for Commonwealth led reforms.

Each State and Territory focussed reform should be the subject of negotiation with the relevant government - potentially undertaken by the reformed NCC, which should be vested with the roles of negotiation, advice on the modus operandi to implement the reform and relevant structural adjustment measures, the expected competition payment if the reform is implemented, including as to the modus operandi and implementation of recommended structural adjustment measures.

Thus the competition payments will be separately agreed for each reform, having regard to a cost benefit analysis by the Productivity Commission - *'If you undertake the reform in the manner agreed and with the structural adjustment processes as agreed, you will be paid. If you elect not to undertake the reform or the agreed processes, including structural adjustment measures, you will not be paid'*. In other words the payments become rewards for performance, not penalties for non performance

(D) Governance - a restructured NCC with an expanded role

The NCC should be restructured. Its members must have commitment, conviction, courage, commercial, political and policy smarts, communication skills and above all gravitas.

The role of the chair at least is full time. They should have the ability to negotiate with governments and stakeholders the way through the impediments and political imperatives. This was the fundamental lesson we learned in the late 1990s and early 2000s. Given that substantial Commonwealth funds are involved, the NCC would need to work closely with the Productivity Commission and its assessments of the productivity gains to flow from each reform and importantly with Treasury and the Commonwealth Treasurer on the agreements to be reached with individual States and Territories on each reform and the associated competition payments.

The NCC would be independent insofar as it reports on reform progress but reportable to the Treasurer on reform agreements and competition payments.