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CENTRE FOR
INTERNATIONAL
ECONOMICS

NCP review of the Northern Territory Medical Services Act

Prepared for Territory Health Services

FINAL REPORT

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Executive summary and recommendations

THE REVIEW OF THE *MEDICAL SERVICES ACT* is one of 12 reviews being undertaken of the Northern Territory's health legislation under National Competition Policy (NCP) requirements. This report briefly describes NCP principles and procedures. Subsequent sections then follow the steps that must be taken in any NCP review, namely to:

- clarify the objectives of the legislation;
- identify the nature of every restriction on competition;
- analyse the likely effects of the restrictions on competition and on the economy generally;
- assess the balance between the costs and benefits of the restrictions; and
- consider alternative means of achieving the same results including nonlegislative approaches.

No explicit statements of objectives of the act have been identified, but the legislation is seen to provide the mechanisms for THS to provide for and administer medical services and other related activities other than institutions that operate under the Northern Territory's *Private Hospitals and Nursing Homes Act*.

Features of the legislation that were identified in an issues paper as potentially restricting competition include:

- specified conditions of use of designated facilities by private dentists or private medical practitioners that might be anticompetitive if the approval process and accompanying conditions were set differently for different users; and
- depending on how they are used, powers given to the Minister to:
 - determine charges for medical and related services at declared premises and elsewhere,
 - waive repayment for designated persons and postpone recovery of the whole or part of any recoverable expenses, and

- set charges to private practitioners for their use of designated medical facilities.

Subsequent inquiries revealed that none of these features were in fact being implemented in an anticompetitive way. We conclude that the *Medical Services Act* in its present form is consistent with NCP requirements. That said, consideration should be given to whether a standalone act can be justified to encompass such a narrow range of functions as are included in the current act. It may well make more sense from a legislative and administrative vantage point to combine the statutory framework for the provision of health services at public facilities with other ‘machinery type’ aspects of health care legislation into a more encompassing act. Whichever course is taken, we recommend that:

- the objectives which the legislation is designed to address be clearly stated;
- it should be made explicit that the coverage for the provision of medical services is restricted to medical services provided at public facilities;
- the current provisions specifying responsibilities of persons in charge of hospitals or nursing homes and conditions for use of declared premises by private practitioners should be deleted – there is no good reason why such provisions should be enshrined in legislation; and
- consideration should be given to developing further internal procedures and guidelines for fee recovery and the waiving of charges for treatment and patient assisted transfer to reduce the scope for discretion to be used by the Minister and secretary.

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Introduction

THE CENTRE FOR INTERNATIONAL ECONOMICS (CIE), a private economic research consultancy, in conjunction with Desliens Business Consultants has been commissioned by Territory Health Services to undertake an independent review of the *Medical Services Act* in accordance with the principles for legislation review set out in the Competition Principles Agreement (CPA) entered into by all members (Commonwealth, states and territories) of the Council of Australian Governments in 1995. The review forms part of the Northern Territory government's obligation under the CPA to review and, where appropriate, reform all laws that restrict competition by the year 2000. Legislative reviews along National Competition Policy (NCP) lines are currently being undertaken of health and health related acts in other states. The Commonwealth is also conducting NCP reviews of its health legislation.

The *Medical Services Act* is one of 12 Northern Territory health acts to be reviewed (box 1.1).

In undertaking this review we held preliminary consultations with stakeholders involved in the provision of medical services in the Northern Territory and with officers of Territory Health Services (THS). An issues paper was prepared and made available on the THS website. The issues paper worked through the various steps of an NCP review and raised questions and issues to be addressed at each stage of the review. The issues paper identified those parts of the act that potentially restrict competition.

Newspaper advertisements drew attention to the review and the issues paper, and called for submissions from interested parties. No submissions were received. Further consultations were held with interested parties to discuss aspects of the act and how it operates. This report gives due consideration to the issues raised in the consultations.

1.1 Acts to be reviewed

- ***Medical Services Act***
- *Dental Act*
- *Optometrists Act*
- *Radiographers Act*
- *Community Welfare Act*
 - Community Welfare Regulations
 - Community Welfare (Childcare) Regulations
- *Health Practitioners and Allied Professionals Registration Act*
- *Nursing Act*
- *Mental Health and Related Services Act*
- *Public Health Act*
 - Public Health (Barber's Shops) Regulations
 - Public Health (Shops, Eating Houses, Boarding Houses, Hotels and Hostels) Regulations
- *Medical Act*
- *Private Hospitals and Nursing Homes Act*
- *Hospital Management Boards Act*

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NCP principles

UNDER THE CPA, nearly 2000 pieces of Commonwealth, state and territory legislation are being reviewed over a six year period. The guiding principle behind these reviews and the reforms that follow them is that legislation (encompassing activities of authorities set up under that legislation and any regulations, rules, etc. authorised under it) should not restrict competition unless it can be demonstrated that the:

- benefits of the restriction to the community as a whole outweigh the costs; and
- objectives of the legislation can only be achieved by restricting competition.

It is significant to note that *both* of these criteria are required to be met if a restriction is to be retained. This means that even if a restriction passes a net public benefit test, it should not be retained if there are other less restrictive ways of achieving that outcome. Also, if a restriction is to be retained it is necessary to demonstrate that to keep it will result in a public net benefit. It is not sufficient to demonstrate that its removal would result in no or little net benefit.

It is important when assessing the benefits and costs of a restriction that distinctions are made between private benefits and costs, industry benefits and costs and communitywide benefits and costs.

The CPA does not define how any piece of legislation should be reviewed. However, it does state that, without limiting the issues that can be addressed, it should:

- clarify the objectives of the legislation;
- identify the nature of every restriction on competition;
- analyse the likely effects of the restrictions on competition and on the economy generally;
- assess and balance the benefits and costs of the restrictions; and

- consider alternative means of achieving the same results including nonlegislative approaches.

The CPA lists a range of public interest issues that are to be taken into account where relevant in assessing the benefits and costs of any restrictions. These include:

- ecological sustainability;
- social welfare and equity;
- occupational health and safety;
- industrial relations and access and equity;
- economic and regional development including employment and investment growth;
- interests of consumers;
- competitiveness of Australian businesses; and
- efficient resource allocation.

Thus, NCP recognises that unrestricted competitive markets may not result in best community outcomes. However, the NCP and the legislative review process is underpinned by the view that free interactions between consumers and producers result in broadly based benefits throughout the community.

This does not mean that fewer rules and restrictions would necessarily be better. Competition itself cannot operate outside a framework of trust which is underpinned by general commercial, industrial, health and safety, and environmental laws. Some features of these laws themselves restrict actions that are deemed to undermine the operations of an efficient competitive economy.

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The legislation and its objectives

THE *MEDICAL SERVICES ACT* was introduced in 1982. The act replaced the then *Hospitals and Medical Services Act*, which provided the legal authority for government medical services in the Northern Territory. The act is currently being reviewed by THS as a separate exercise to this NCP review.

Objectives

The act does not contain any objectives. Nor are objectives explicitly stated by the Minister in his second reading speech. The intent of the act is to provide a statutory framework for the provision of health services in the Northern Territory.

This objective should be clearly stated in a revised act or in whatever act the statutory framework for the provision of health services is to be located in the future.

What the act does

The act relates to the provision and administration of medical services and other related activities excluding institutions which have a license to operate under the *Private Hospitals and Nursing Homes Act*. Apart from this exclusion, the act is not specific about whether it covers only publicly owned facilities, though this is its intent.

A revised act should state clearly that the coverage for medical services is restricted to medical services provided at public (government controlled) facilities.

In his second reading speech, the Minister noted that the new act recognised that the provision of medical services was continually evolving and broadening to include services not only in hospitals but also in community health centres, clinics and mobile facilities in vehicles, aero-

planes and boats. The definition of medical services was also expanded to take account of developments in medical technology.

In administering the act and in the provision of medical services generally the Minister is required to ensure that the Medicare principles and commitments specified in the agreement between the Commonwealth and the Northern Territory in relation to the provision of public hospital services and other health services under the *Health Insurance Act* are observed and complied with. These principles cover:

- choice of services – eligible persons must be given the choice to receive public hospital services free of charge as public patients;
- universality of services – access to public hospital services is to be on the basis of clinical need;
- equity in service provision – to the maximum practicable extent, public hospital services will be provided equitably to all eligible persons regardless of their geographical location;
- information about service provision – information on the public hospital services eligible persons can expect to receive as public patients must be made available; and
- efficiency and quality in service provision – the Commonwealth and the states and territories are committed to making improvements in the efficiency, effectiveness and quality of hospital service delivery.

The act deals with:

- the provision of medical services;
- the transport of patients inside and outside of the Northern Territory;
- recovery of charges for services rendered; and
- the responsibilities of persons in charge of hospitals or nursing homes and the conditions for use of declared premises by private practitioners.

Provision of medical services

The act gives power to the Minister to declare premises to be a hospital, nursing home, urban health centre or any other centre and to determine the charges to be made for medical services (includes all medical, dental, diagnostic, pathology, all types of therapy and paramedical, nursing, provision and repair of surgical aids and equipment, provision of drugs and dressings, collection of human blood and blood products, burial-cremation of stillborn infants and disposal of human tissue) at these

declared premises and elsewhere. Charges set can vary according to the type of recipient (pensioner, disadvantaged person, insured person, etc.). The provision of medical services under the act must observe the principles of the agreement between the Commonwealth and the Northern Territory in relation to the provision of public hospital services and other health services.

The act places responsibility for the management of all hospitals, nursing homes and medical services provided by the Northern Territory in the Chief Executive Officer (Secretary) of Territory Health Services or who he appoints to be in charge and empowers the relevant authorised persons to recover the cost of medical services from the persons receiving them.

Transport of patients inside and outside of the territory

The act gives power to the secretary (or his delegate) to make provision as he sees fit for the transport of persons who are in need of or who have been provided medical services. This includes providing transport outside the Northern Territory (and return transport after the medical services have been provided) for persons who, in the opinion of a salaried medical practitioner, are in need of receiving medical services outside the Northern Territory. If the patient also requires the care of an attendant, this can also be authorised, with costs to be met from the Northern Territory treasury. The Minister, in his second reading speech, stated that it was the government's intention to ensure that all Northern Territory residents have access to the best health care that can be provided. If a patient anywhere in the Northern Territory requires medical attention that is only available in, say, Sydney, the patient will receive such attention at no greater cost than he would have paid had he been a Sydney resident.

Recovery of charges

The act sets out the provisions for the recovery of charges by the government for medical and related services provided and who is liable for payment. But the act gives the Minister power to waive repayment for designated persons and to postpone payment of the whole or part of any recoverable expenses.

Miscellaneous

The act contains several provisions relating to persons in charge of hospitals or nursing homes. These seem to make explicit what would normally

be taken to be implicit as responsibilities for anyone in charge. They require the person in charge to be responsible for:

- the supervision of all medical services in the hospital or home to maintain good, safe medical care for patients;
- maintenance of good order and conduct by staff, patients and visitors; and
- the administration of finances, personnel, security and property.

They also require that owners of vehicles used within the premises use them within the meaning of the *Motor Vehicle Act*.

Although none of these provisions are anticompetitive in NCP terms and do not need addressing in that context, consideration should be given to why they need to be mentioned explicitly in a medical services act.

The act also contains provisions to cover the use of (public) medical facilities by private practitioners. The secretary may approve (with or without conditions) private dentists and medical practitioners as visiting practitioners to provide treatment for patients. Visiting dentists and medical practitioners using the facilities may be charged for their use at rates determined by the Minister and are subject to the instructions of the person in charge when using the facilities. Appropriate medical records must be kept.

The secretary may also approve health practitioners to attend patients in declared premises and the person in charge of a hospital or nursing home may also approve private nurses to attend patients.

Regulations

The act allows the Minister to make regulations concerning exempting persons from charges, admissions and discharge of patients from hospitals and nursing homes; accommodation and maintenance in hospitals and nursing homes for persons who are patients of a private dentist or private medical practitioner; and discipline, conduct, cleanliness and other aspects of behaviour and order among patients and persons employed in declared premises – including vehicle parking and speed limits.

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Nature of restrictions on competition and their effects

ALL LEGISLATION REGULATES BEHAVIOUR in some way, but not all regulation necessarily restricts competition. The National Competition Council (NCC), the Commonwealth body set up to advise on progress in meeting NCP obligations, has suggested seven ways in which regulation might restrict competition (NCC, *Legislation Review Compendium*, April 1997, p. 4). According to the NCC, legislation could restrict competition if it:

- governs the entry and exit of firms or individuals into or out of markets;
- controls prices or production levels;
- restricts the quality, level or location of goods and services available;
- restricts advertising and promotional activities;
- restricts price or type of input used in the production process;
- is likely to confer significant costs on business; or
- provides advantages to some firms over others by, for example, sheltering some activities from pressures of competition.

The review is required to identify the *nature* of restrictions in the act that limit competition. Some of these may be more *potential* than *real*. For example, registration potentially limits market entry, but if it is used solely to require certain standards for market participants and is not used to limit their size or numbers, it should not be considered to have any actual impact on market entry.

The actual impact of each restriction on competition or potential restriction on competition needs to be assessed prior to any evaluation of the balance between benefits and costs to the community.

As noted earlier, efficient competition cannot take place in a totally unrestricted way, but requires a body of laws which set the rules in terms of

property rights, the types of commercial and industrial relationships permitted, and obligations within commercial relationships for health and safety and for the environment. Indeed, part IV of the *Trade Practices Act 1974* (which is an integral part of NCP) prohibits a range of actions which, while they might otherwise be used by individual market players to promote their competitiveness, are considered anticompetitive in an economywide context.

A competitive industry is generally considered to be one in which:

- there are no restraints on firms or consumers entering or leaving the industry;
- there are no constraints on the free flow of information between suppliers and consumers; and
- prices paid and received for the industry's outputs and inputs are determined by the independent actions of many supplies to and consumers in the markets for those services.

The act contains several regulations that could be classified as restricting or potentially restricting competition under several of the headings used by the NCC as follows.

Restrictions on entry and exit

The requirements in section 17 of the act specifying conditions of use of designated facilities by private dentists or private medical practitioners could be construed as being anticompetitive depending on the conditions and how they are applied. This could be the case if, for example, the approvals process and accompanying conditions of use were set differently for different users.

Restrictions which control prices or production levels

The act gives the Minister the power to:

- determine the charges to be made for medical and related services at declared premises and elsewhere;
- waive repayment for designated persons and postpone recovery of the whole or part of any recoverable expenses; and
- set charges to private practitioners for their use of designated medical facilities.

Depending on how they are applied, these powers might be construed as being anticompetitive. For example, undercharging private practitioners for their use of designated facilities could impose a competitive disadvantage on the private owners of suitable facilities and represent a violation of competitive neutrality principles between government and private providers.

There is also an important potential equity issue involved with the discretion the Minister has to determine the charges to be made for medical services provided under the act and waive all or part of recovery of charges. Under the act the Minister can vary the charges for medical services according to whether the services are provided at declared premises or are received by persons who are: eligible pensioners; covered by insurance for the charges; aliens; or have been provided by or at the request of a private dentist or private medical practitioner. It would seem wise to have in place transparent guidelines on how charges should be set for designated categories of users and the circumstances in which charges might be reduced or waived. Procedures for the waiving of charges are set out in an internal THS accounting and property manual.

5

The balance between benefits and costs of each restriction

THE FOURTH REQUIREMENT OF THE NCP review process is to assess the balance between the costs and benefits of any potential restrictions on competition. That is, there is a requirement to consider whether restrictions on competition are in the public interest. The guiding principle of NCP requires the onus of proof in this regard to be with those who argue for the maintenance of any restrictions.

The case for restrictions on competition being in the public interest (that is, their social benefits exceed their social costs) is usually made on grounds of 'market failure' in an unrestricted market. But the usual market failure arguments do not appear to be of any relevance in the case of the *Medical Services Act*, which is concerned essentially with the provision and administration of medical services in public facilities.

Costs of the potential restrictions on competition

Social costs of restrictions on competition are of three types:

- administrative, enforcement and compliance costs;
- efficiency losses caused by appropriate services not being provided or such services as are provided not being supplied at least cost; and
- restrictions on choice by users.

None of these headings is particularly appropriate in the case of the *Medical Services Act*.

Benefits of the potential restrictions on competition

The benefits of the restrictions need to be assessed with regard to the objectives of the *Medical Services Act*. Although these are not articulated in

the act itself, they were noted earlier to be to provide a statutory framework for the provision of health services in the Northern Territory.

In addition, the overriding objective of NCP itself, which is to encourage efficiency by means of a more competitive economy, must be considered, as should the public interest issues nominated in the Competition Principles Agreement – namely, the environment, employment, regional effects, consumer interests as well as the competitiveness of business.

Good health services are necessary to achieve high standards of health care. And good health outcomes for the population enhance community living standards and also play a role in generating good economic performance.

Assessment of benefits and costs

Conditions of use of designated facilities by private practitioners

In practice, there is no evidence of anticompetitive behaviour in how these conditions are being applied. Private dentists and private medical practitioners face the same access conditions. All hospital staff specialists employed at Northern Territory hospitals may apply for the right of private practice under an agreement between the Northern Territory government and the trustees of the Darwin (or Alice Springs) private practice trust fund. Under this agreement, private patients can be accepted for treatment by staff specialists exercising their right of private practice. Private patients are charged by the trust fund. There is no evidence to suggest that competitive neutrality principles are being violated.

We conclude that there is no actual restriction on competition associated with this provision.

Powers to determine and waive charges

Charges are gazetted and procedures for waiving charges are set out in an internal THS accounting and property manual. Because of these procedures, there is no evidence that powers to determine and waive charges are being used in anticompetitive ways. We conclude that there is no actual restriction on competition association with these provisions.

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Alternative ways of achieving objectives

THE FINAL TASK IN AN NCP REVIEW is to consider whether there are alternative means of achieving the same result as those which restrict competition, including nonlegislative approaches. This issue must be addressed even if the restrictions are assessed to be in the net public benefit.

Most of the other health acts being reviewed are concerned with the provision of health services and contain various restrictions on this provision. But the *Medical Services Act* is mainly about a framework for service provision in public facilities. With no actual restrictions on competition identified in how the act is operating, the task of considering alternative ways of achieving objectives is redundant.

Appendix

Terms of reference

THE REVIEW OF THE LEGISLATION shall be conducted in accordance with the principles for legislation review set out in the Competition Principles Agreement. The underlying principle for the review is that 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; and
- the objectives of the legislation can only be achieved by restricting competition.

Without limiting the scope of the review, the review is to:

- clarify the objectives of the legislation, clearly identifying the intent of the legislation in terms of the problems it is intended to address, its relevance to the economy and contemporary issues and whether or not the legislation remains an appropriate vehicle to achieve those objectives;
- identify the nature of the restrictions to competition for all relevant provisions of the specified legislation. This analysis should draw on the seven ways identified by the National Competition Council in which legislation could restrict competition, which include:
 - governs the entry or exit of firms or individuals into or out of markets,
 - controls prices or production levels,
 - restricts the quality, level or location of goods or services available,
 - restricts advertising and promotional activities,
 - restricts price or type of input used in the production process,
 - is likely to confer significant costs on business, or
 - provides some advantages to some firms over others by, for example, shielding some activities from the pressure of competition;
- analyse the likely effect of any restriction on competition and on the economy generally;

- assess and balance the costs and benefits of the restrictions for each anticompetitive provision identified;
- consider alternative means for achieving the same result and make recommendations including nonlegislative approaches; and
- clearly make recommendations. These should flow clearly from the analysis conducted in the review. If change is not recommended and restrictions to competition are to be retained, a strong net benefit for retention must be demonstrated.

When considering the matters referred to above, the review should, where relevant, consider:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and equity;
- interests of consumers generally or of a class of consumers;
- government legislation and policies relating to ecologically sustainable development;
- economic and regional development including employment and investment growth;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

The review shall consider and take account of relevant legislation in other Australian jurisdictions and any recent reforms or reform proposals including those relating to competition policy in other jurisdictions.

The review shall consult with and take submissions from those organisations currently involved with the provision of health services, other interested territory and Commonwealth government organisations, other state and territory regulatory and competition review authorities, affected members of the medical profession and their organisations and members of the public.