

The Australian National Competition Legislative Review Programme

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Introduction

The aim of this presentation is to provide an overview of the Australian National Competition Legislative Review Program. Over the next fifteen minutes I will cover the following:

- The context of the Legislative Review Program, including its origin in the Australian National Competition Policy, its broad aims and agenda;
- The role of the guiding principles in the design of the Legislative Review Program (including good regulatory practice);
- The institutional arrangements underpinning the review program, and the role of the Australian Federal, State and Territory Governments;
- The incentive mechanisms that support and promote compliance with the Legislative Review Program;
- Monitoring mechanisms and their role in ensuring compliance, and;
- Issues and potential lessons from the Australian experience.

The National Competition Policy

In 1995 the Australian Commonwealth, State and Territory Governments adopted a nationally coordinated approach to regulatory reform when they signed three intergovernmental agreements¹⁰ to introduce a comprehensive initiative known as National Competition Policy (NCP).

The NCP package was designed to deliver benefits to the Australian community and promote the long term sustainability of Australian industries by enabling and encouraging competition. The emphasis was on delivering national open competitive markets for goods and services.

The reforms included:

- The extension of Trade Practices Legislation prohibiting anticompetitive conduct to all businesses;
- The introduction of competitive neutrality requirements so that Government and the private sector compete on an equal footing;

10. The three agreements are: the Competition Principles Agreement; the Conduct Code Agreement, and; the Agreement to Implement the National Competition Policy and Related Reforms (Implementation Agreement).

- The development of a national third party access regime for significant infrastructure (as well as specific reforms to the energy, water and transport sectors) and;
- The review and reform of all laws that restrict competition unless it can be demonstrated that the restrictions are in the public interest and that no less restrictive alternative would be capable of achieving those benefits;

It is this latter aspect which underpins the legislative review programme.

The Guiding Legislative Principle

The Competition Principles Agreement obliged governments to review and, where appropriate, reform all existing legislation that restricts competition (as it was in place in June 1996).

It requires governments to remove restrictions on competition unless they can demonstrate that the restrictions are warranted — that is, that restricting competition benefits the community overall (being in the public interest) and that the restriction is necessary to achieve the objective.

Clause 5(1) states:

The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- (a) *The benefits of the restriction to the community as a whole outweigh the costs; and*
- (b) *The objectives of the legislation can only be achieved by restricting competition. (CoAG 1995)*

Clause 5 of the Competition Principles Agreement also contains two ongoing obligations.

- It obliges governments to review, at least *once every 10 years*, any restrictive legislation against the guiding principle. The aim is to ensure that regulation remains relevant in the face of changes in circumstances, as well as changes in government and community priorities, and;
- It specifies that governments must ensure that new legislation that restricts competition is demonstrably consistent with the guiding principle. (Clause 5(1))

The legislative review program therefore requires:

- The review and reform of the stock of legislation,
- Systematic reviews of continuing legislation at least once every 10 years, and;
- The assessment of all new legislation against the guiding principle via governments' scrutiny processes.

The agreement also formalises the requirement for the reviews to be conducted according to good regulatory principles and it provides guidance and direction on matters to be considered when evaluating if a restriction is in the public interest. (The public benefit test).

Good Regulatory Principles

Clause 5(9) of the Competition Principles Agreement states that:

Without limiting the terms of reference of a review, a review should:

- (a) *Clarify the objectives of the legislation;*
- (b) *Identify the nature of the restriction on competition;*
- (c) *Analyse the likely effect of the restriction on competition and on the economy generally;*
- (d) *Assess the balance the costs and benefits of the restriction; and*
- (e) *Consider alternative means for achieving the same result including non-legislative approaches.*

The Public Benefit Test

The factors used to determine what is in the public interest are outlined in clause 1(3) of the Competition Principles Agreement (1995) they include:

- *Laws and policies relating to ecologically sustainable development*
- *Social welfare and equity, including community service obligations*
- *Laws and policies relating to matters such as occupational health and safety, industrial relations, access and equity*
- *Economic and regional development, including employment and investment growth*
- *The interests of consumers generally or a class of consumers*
- *The competitiveness of Australian business; and*
- *The efficient allocation of resources*

The list is open ended and includes any other matter relevant to determining the merits of a restriction on competition.

Incentive Mechanisms

The Federal Government agreed to make payments to the States and Territories as a financial incentive to implement the NCP program and related reforms, including the legislative review program.

The payments recognise that while the States and Territories have significant responsibility for the NCP, the Commonwealth receives a financial dividend through the tax system from the economic growth arising from the reforms.

The entitlement of the States and Territories to receive payments is based on satisfactory progress against the NCP obligations. It is seen as a dividend of the reform process. If Governments do not implement the agreed reforms, there are no dividends to share. Accordingly, the payments provide both a financial incentive to implement the NCP and a means of distributing the gains from NCP reforms across the community.

The payments therefore continue to provide a significant monetary incentive for the States to meet their reform objectives. Recognising that the States themselves do not get the benefits from taxation growth (although the subsequent implementation of a Goods and Services Tax has changed this somewhat).

The threat by the federal government of withholding payments is an incentive for the States to continue to comply. It signals the ongoing importance of the program as non compliance can quickly escalate into a political issue with financial consequences. This can lead to negotiation on reform outcomes, so as to avoid the imposition of financial penalties.

The prospective payments in 2003–04 are estimated to amount to more than AUD 720 million, distributed among the states on a per capita basis.

Institutional Arrangements

The NCC

At the time that the agreements were entered into the National Competition Council (NCC) was established with the purposes of:

- Assisting Governments to achieve reform outcomes;
- Assessing each government's progress against the NCP obligations, and;
- To make recommendations to the Federal Treasurer on the distribution of the NCP payments.

The NCC provides guidance to the states as to how reviews should be structured and conducted and sees this as its principal aim.

Appointments to the NCC are nominated by the Federal Government and must have the approval of a majority of the States and Territories.

The Competition Policy Units

The State and Territory Governments were required to have established appropriate scrutiny arrangements to examine the competition impacts of new and amended legislation.

Each State and Territory established Competition Policy Units (usually in central agencies). Their important role is (has been):

- To compile schedules of legislation for review;
- To co-ordinate those reviews, and;
- To prepare reports to the NCC on compliance within their jurisdiction.

The competition policy units also:

- Provide training and guidance to individual departments responsible for managing and conducting reviews;
- Are represented on review steering committees, and;
- Approve review processes, including terms of reference for reviews.

In its report on compliance with NCP, the NCC includes an assessment of whether the local scrutiny arrangements represent regulatory best practice.

(Note that in the context of institutional mechanisms facilitating the NCP, the role of the Committee of Australian Governments (COAG) and the signing of the intergovernmental agreements is also of particular importance.)

Monitoring Mechanisms

The NCC, through its role in reporting compliance by the States and Territories, is the principle monitoring mechanism of the Legislative Review Programme. (It also reports on the performance of the Federal Government, although the Federal Government does not receive competition payments).

The NCC produces regular reports on their assessment of the compliance by the States and Territories with their NCP requirements, including the legislative review program (These were produced in 1997, 1999, 2001 and 2002). The reports form the basis of the recommendation by the NCC to the Federal Government as to whether jurisdictions should receive competition payments. They are made available to the states at the same time, and also made available publicly.

The NCC reports included the timetable for the review of legislation and an assessment of the progress of that jurisdiction against the timetable. It is worthy of noting that the NCC also required reviews to have been conducted according to “adequate” review processes as a pre-requisite for accepting that review obligations have been met.

However, in assessing compliance by a jurisdiction, the NCC has been asked by the Committee of Australian Governments to take the following into account:

- The extent of the jurisdiction’s overall commitment to the NCP.

- The effect of one jurisdiction's reform efforts on another jurisdiction and.
- The impact of a jurisdiction's failure to undertake a particular reform.

The NCC therefore applies a significance test; minor breaches will not have an adverse impact on their overall assessment if the jurisdiction has generally performed.

Issues and Lessons

The legislative review program included approximately 1 800 pieces of legislation. It has been generally successful in achieving its aims. However, there have been some areas of slippage (more so in some jurisdictions) and some reforms have not gone as far as some commentators would like.

There are many potential lessons to be drawn from the legislative review program. For this forum, and given time constraints, I would like to highlight just five areas of those that have been identified in the literature¹¹ and I think may be relevant.

Managing Public Perceptions

Firstly, there is a clear need to communicate the benefits of NCP reforms and to garner stakeholder and community support for the conduct of the reviews. The NCP has been blamed for negative social impacts, such as unemployment in rural and regional areas. However, reviews of the policy have found that the negative outcomes attributed to NCP are likely to have been caused by other influences (such as a decline in the terms of trade) In addition, there is a clear need to educate the community, business and decision makers about the issues involved ahead of reform decisions being taken.

The Benefit of Having Clear Objectives

Having clear objectives from the outset has facilitated selling the benefits of the legislative review program and maintaining political support. In particular I refer to the objective of creating open competitive national markets for goods and services and the specific elegance of the guiding legislative principle. A powerful and compelling aspect of the design of the guiding principle is its emphasis on the proponents of regulation to always justify a restriction on competition. (Restrictions on competition are guilty until proven innocent.)

Involve all Jurisdictions

The program has benefited through involving all jurisdictions. The policy was explicitly endorsed from the outset by all governments. This has reduced the opportunity for subsequent challenge by any particular jurisdiction. Similarly, there has been a benefit from having all industry sectors subject to the same discipline, giving no advantage to particular interest groups.

11. A number of lessons from the implementation of National Competition Policy are identified in the paper: National Competition Policy: key lessons for policy-making from its implementation. [Revised version of an address delivered to the International Forum on Regulatory Reform (Foro Internationale Sobre Mejora Regulatoria), (2000: Puebla, Mexico).] Rex Deighton-Smith, Australian Journal of Public Administration, v.60, no.3, Sept 2001: (29-41).

Specific Reporting Requirements

Having in place specific reporting requirements has been a useful discipline. The reform program was “mapped out” from the commencement. Furthermore, the “competition agreements” allocated clear and specific responsibilities to identified parties, established agreed mechanisms and timetables for compliance.

Monetary Incentives

Finally, the link to competition payments has been a significant motivator of compliance. It provided an incentive for Governments to participate in the program, and Governments have been genuinely reluctant to forgo the competition payments. There have been few instances of withholding payments so far. However, the threat of withholding payments remains credible and has led to the negotiated attainment of reforms in many cases.

Final Note

The timetable for the legislative review program was originally to 2000. This was extended to 2002, and the NCC is currently reporting on compliance beyond 2002. The NCC has also been invested with an ongoing annual reporting role to 2005. By which time the role of the NCC and the Competition agreements is to be reviewed.

In addition to the specific reforms achieved, a key benefit of the legislative review program to date has been that it has entrenched that “principles of good regulation” should be paramount in regulatory design, ahead of the competing imperatives of vested interests, thereby producing better regulatory outcomes for the general community.