

REVIEWING RESTRICTIONS ON COMPETITION IN PROPOSED NEW LEGISLATION

Department of Premier and Cabinet
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NCP OBLIGATIONS REGARDING LEGISLATION REVIEWS

The Competition Principles Agreement of 1995 states that jurisdictions must:

- develop a timetable for the review and reform legislation **existing** at June 1996 - clause 5 (3)
- ensure that proposals for all **new legislation** that restrict competition are accompanied by evidence that the legislation is consistent with the principle that there should not be restrictions on competition unless it is shown that the benefits to the community outweigh the costs and the objectives of the legislation can only be achieved by restricting competition – clause 5(5)
- systematically review **legislation that has already been reviewed** ten years after the initial review – clause 5(6)

Summary of what is required

Legislation to July 1996	Legislation July 1996 to November 2001	Proposals for new legislation
Requirement to review and reform legislation with restrictions on competition	To be treated as new legislation; may not have been assessed for NCP compliance	Evidence that proposal complies with clause 5 NCP requirements
Scheduled for review	Not scheduled, catch-up	Ongoing obligation
Formal review	Desk-top review	NCP issues dealt with as part of development
Public interest reasons for retention of reforms to be made available to the public	If trivial restriction, no further action. If intermediate or serious restriction, needs net public interest justification.	Evidence presented via agency desktop review; or part of public discussion paper on proposal; or specific paper on NCP aspects of proposal.
Review and implementation of reforms to be completed by 30 June 2002	If no net public benefit in restrictions – assess risk of suspension of payments if not remedied.	Also refer to in Cabinet submission, second reading speech, and press release.

This paper supplements the 1998 DPC publication *Guidelines Paper for Agencies conducting a Legislation Review under the COAG Competition Principles Agreement* which was designed for scheduled legislation (column 1 above) It applies to proposals for legislation (column 3 above), not legislation that has already been enacted. Slightly different requirements apply to legislation enacted between July 1996 and August 2001 (column 2 above, see Attachment 1).

The process described in this paper applies to both proposals for new Acts or Regulations, and proposals for amendments to existing Acts or Regulations.

SUMMARY OF PROCESS FOR ASSESSING PROPOSALS FOR NEW LEGISLATION

1. Look at the proposal for restrictions on competition (see below for examples)

2. Check:

- Are the objectives of the legislation specified?
- Is there an alternative way to achieve the objectives other than restrictions in legislation?

3. Rate the restrictions as:

- serious – impose high costs or high entry barriers to market entry or re-entry,
- intermediate – impose substantial costs upon competition, or
- trivial – minimum impact on competition in a market - no further action required except to report this.

4. Get evidence of the costs and benefits of intermediate or serious restrictions

5. Consult publicly where restrictions are serious or intermediate – stakeholders only for intermediate restrictions; broader public consultation for serious restrictions

6. Balance the costs against the benefits to discover if there is a net public benefit (see below for more on public benefit). If there is not, and the proposal proceeds, there is a risk of the NCC recommending a suspension of payments.

7. Make the evidence available by reporting on the process, for any level of restriction (Ministerial approval will be required for public release):

- by a desktop review report
- by a report from a formal, public NCP review, or general review which includes NCP issues
- referring to the NCP issues in the Cabinet submission seeking approval to draft the amendments
- referring to the NCP issues in the Second Reading Speech (Bills) or Report to the Legislative Review Committee (Regulations)

Other options

- referring to the NCP issues in any media release regarding the new legislation
- placing the review report on the agency internet site

Please provide a copy of the evidence to DPC.

The NCC may ask to see the evidence in order to assess compliance with clause 5 of the CPA.

DETAILED EXPLANATION OF THE PROCESS

During the development of any policy leading to a need to amend an Act or Regulations or make a new Act, consider whether the proposed legislation will restrict competition.

If it may, look at alternative, non-legislative ways to achieve the same results. If these cannot achieve the desired objectives, and it is necessary to place the restrictions in legislation, assess the level of restriction necessary. To analyse the level of restriction, look at the impact on the market and the level of costs and benefits.

If the restrictions are trivial, no public consultation is required. Evidence that consideration of the NCP issues has been undertaken would be presented via an agency desk top review report, and mention in the Cabinet submission and Second Reading Speech. Where an NCP review of the principal legislation has been carried out, and the proposed amendments reduce the restrictions that have been justified in the NCP review, a brief statement to that effect would be sufficient.

If the restrictions are intermediate or serious, public consultation will be necessary. The level of consultation will depend on the seriousness and sensitivity of the restriction. For serious restrictions, ensure all stakeholders are aware of the review by publicly advertising it and asking for submissions. For intermediate reviews, a targeted group will probably be sufficient. The NCP issues could be one aspect of consultation on a proposal, or could be the only issue to be considered.

In the Cabinet submission seeking approval to draft the new legislation or amendments, refer to the fact that NCP issues have been considered and there are no restrictions to competition in the legislation; or if there are, put an explanation about objectives, consultation, costs, benefits and net public interest for the restrictions. If there are restrictions on competition in a proposal, DPC should be one of the agencies to be consulted on the submission.

One of the aims of the NCP legislation reviews is to make the public benefit justification for restricting competition clear and public. For this reason, best practice is to release publicly the evidence of the review. Ministerial approval should be sought for this. This can also be conveniently done in any Cabinet submission seeking approval of the proposal. It is also highly recommended that a reference to NCP issues be made in the Second Reading Speech of a Bill, as this is then on the public record, easy to access and to locate. Reference to the NCP issues might also be made in a media release regarding the legislation.

The NCC may ask to see the evidence that the NCP issues have been considered in order to assess compliance with clause 5. Because the NCC may use parts of the information in its own public reporting, if the evidence is not already in the public arena, Ministerial approval would be required to

release the evidence.

If the NCC found that the evidence did not show the restrictions were justified by a net public benefit, it may recommend to the Commonwealth Treasurer that if the restrictions were not removed (by amending the legislation) South Australia's competition payments be suspended or reduced.

HOW TO RECOGNISE RESTRICTIONS

(See also Attachment 3 of the Guidelines Paper, 1998)

These will take the form of:

1 Barriers to entry or exit from a market

- Licences, leases, indentures
- Discretionary powers (CEO, Minister or Governor may appoint, may declare, may establish/create, etc)
- Accreditation, registration, entrance requirements (eg prescribed qualifications, experience)
- Exclusions, prohibitions, bans, restrictions on who can do something (eg registered health professional, sale or use of explosives)
- Exclusive or sole provider/acquirer provisions, restrictions on how many people can do something (eg number of employees in an architectural practice, or on a tow truck roster)
- Costs, levies, fees, etc of carrying on the business or occupation (eg cost of surveying a houseboat, insurance, including professional indemnity provisions)

Some questions:

- Does it create entry criteria affecting the ease with which new firms may enter and secure a viable market?
- Does it result in increased costs of production or compliance costs for those wishing to participate in the industry?
- Does it limit the number of firms which may participate in the industry, the locations in which they may operate, or affect the degree of market concentration?
- Are incumbent firms provided with market information or research which may not be available to new entrants?

2 Conduct restrictions

- Restrictions on what someone can do (eg leases, mineral exploration licences)
- Conditions for operating in an occupation or a business (eg advertising restrictions)
- Specifications on how someone can do something (eg code of practice)
- Disciplinary procedures
- Standards

- Collective buying or marketing schemes

Some questions

- Does it constrain firms in terms of the business decisions they are free to make?
- Has it given firms extra functions or reduced independence across the production chain?

3 Discrimination between market participants

- Ban on multi-disciplinary firms
- Advertising or marketing restraints

Some questions

- Does it discriminate between firms or between consumers?
- Do existing arrangements limit the ability of firms to innovate, to introduce new technology, to differentiate between products or to advertise their products?

4 Exemptions under s.51 of the Trade Practices Act

- It is possible to specifically exempt behaviour from the Trade Practices Act provisions, eg exclusive licence conditions (recent example – licence for X-Lotto). If a restriction on competition is dealt with in this way when it comes to drafting the legislation, ensure DPC is aware so it can notify the ACCC as required under clause 2(1) of the Conduct Code Agreement. Note that exemptions in Regulations, as opposed to Acts, automatically expire after two years.

PUBLIC BENEFIT

In balancing the costs against the benefits, clause 1(3) of the CPA states:

the following matters shall, where relevant, be taken into account:

(d) government legislation and policies relating to ecologically sustainable development;

(e) social welfare and equity considerations, including community service obligations;

(f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;

(g) economic and regional development, including employment and investment growth;

(h) the interests of consumers generally or of a class of consumers;

(i) the competitiveness of Australian businesses; and

(j) the efficient allocation of resources.

The above factors allow public benefit to be considered in more than purely economic terms. Public benefits refer to benefits to the community as a whole, not benefits to a particular interest group.

ASSISTANCE IN NCP MATTERS

DPC

DPC can provide advice and can help with any queries on NCP matters. It can also provide training for officers developing proposals for new legislation on the identification of restrictions, alternatives to legislation and other matters necessary for compliance with the requirements of clause 5. Contact Rod Williams 8226 1931 or Andrea Pearce 8226 2018

NCP information is available on the internet at:

www.premcab.sa.gov.au

www.ncc.gov.au

for a publication on alternatives to regulation, see:

www.dsrd.vic.gov.au/regreform

Crown Solicitor's Office

Agencies may be able to engage the services of the Business, Competition and Industry Unit to undertake the analysis and collection of evidence to justify the imposition of restrictions on competition in proposed legislation.

The Unit can also advise on NCP obligations. Contact Greg Cox 8204 9792

Consultants

In March 1998 DPC compiled the following list of consultant firms interested in doing NCP reviews

- Cole Solicitors
- Coopers and Lybrand
- Economic & Business Development/Hassel
- Johnson Winter Slattery
- Finlaysons
- KPMG
- SA Centre for Economic Studies
- Thomson Playford

Subsequently, it has come to DPC's attention that the Centre for International Economics has done NCP reviews, and that Price Waterhouse Coopers, Minter Ellison and Hawkless Consulting Pty Ltd may also be interested.

LEGISLATION JULY 1996 – NOVEMBER 2001

This legislation was enacted after the original list of legislation to be reviewed was made in June 1996 and possibly before agencies adopted a procedure for reviewing proposals for new legislation.

The legislation enacted during this period may not have been assessed for compliance with clause 5 of the CPA.

Agencies have been requested to assess all this legislation if it has not already been reviewed. Records will need to be provided as evidence of the assessment and the findings.

Only a desk-top review is required. If restrictions are found and they are assessed as trivial, no further action is necessary, except to report the outcome of the desk-top review.

If restrictions are intermediate or serious, a cost benefit assessment must then be undertaken. If there is a net public benefit for the restriction, no further action is necessary, apart from reporting on the evidence and the outcome. Any public consultation undertaken during the development of the legislation should be referred to.

If there is not a net public benefit, there is a risk that the NCC may recommend suspension of payments if the restriction is not removed (by amending the legislation). The level of risk should be assessed and specific recommendations made on how to address it. DPC can assist in this risk assessment.

DPC can advise on any aspect of the process and can review draft reports, proposals for issues papers for consultation, etc. It is recommended that completed reports be provided to DPC.