5 Effective regulation: Competition Principles Agreement clause 5

Under clause 5 of the Competition Principles Agreement (CPA), governments undertook to conduct a program for the review, and where appropriate, reform of legislation that restricts competition. The CPA originally set 2000 as the deadline for governments to complete their programs. The Council of Australian Governments (CoAG) extended this timeframe on 3 November 2000 and the target date is now 30 June 2002 (CoAG 2000). CoAG also established ongoing annual assessments following this assessment.

Clause 5 focuses on effective regulation, not necessarily reduced regulation. The threshold requirement of clause 5 is that legislation should not restrict competition unless the restriction benefits the whole community and is necessary to achieve the objectives of the legislation. Clause 5 also obliges governments on an ongoing basis to have evidence to demonstrate that restrictions in proposed new legislation meet the threshold requirement. The test of whether reform is appropriate — the assessment of benefits and costs to the whole community — involves governments considering the public interest factors in CPA sub-clause 1(3). Governments are required to publish annual reports on their review and reform progress and the National Competition Council is required to publish an annual consolidation of these reports.

The NCP's communitywide perspective means that restrictions need to be shown to benefit the whole community, not just particular groups. Nonetheless, it is important for governments to take account of impacts on the individuals, regions and industries exposed to reform. CoAG agreed on 3 November 2000, that governments, when examining public interest issues associated with NCP reforms, should consider identifying the likely impact of reform measures on specific industry sectors and communities, including the expected costs in adjusting to change.

Two other CPA obligations relate to the objective of more effective regulation. The first — an ongoing commitment under the Conduct Code Agreement — is that governments notify the Australian Competition and Consumer Commission (ACCC) of legislation or provisions in legislation enacted or made in reliance upon s51(1) of the *Trade Practices Act 1974* (TPA). The second is that governments ensure national standards are set according to the principles and guidelines endorsed by CoAG (1997). Governments' compliance with these two obligations is discussed in chapter 26.

Assessing governments' compliance with CPA clause 5

CoAG sets the National Competition Council's framework for assessing governments' compliance with NCP legislation review and reform objectives. For this progress assessment, the 1995 NCP Implementation Agreement sets as the condition for NCP payments assessment of:

> *... the extent to which each State and Territory has actually complied with the competition policy principles in the Competition Principles Agreement, including the progress made in reviewing, and where appropriate, reforming legislation that restricts competition;* (NCP Implementation Agreement Attachment (c))

Considering governments' progress with their review and reform programs

All governments established programs in June 1996 for reviewing and reforming (where appropriate) all legislation they had then identified as restricting competition. Governments have continued to develop their programs after 1996; most have scheduled additional legislation for review where they later found restrictions on competition. Overall, governments' programs involve review of around 1700 pieces of legislation over six years.

For this assessment, the Council focused on legislation that it considered was likely to contain significant restrictions on competition. These areas, drawn from governments' legislation review programs, are listed in box 5.1. The Council considered review and reform activity over the period to June 2001, basing the assessment primarily on the progress reported by governments in their annual reports and on supplementary information provided by governments where annual reports did not address all relevant matters.

The Council concluded that governments have met their CPA clause 5 obligations in this assessment where they completed comprehensive and rigorous reviews and implemented pro-competitive reforms. Alternatively, where governments introduced or retained regulatory restriction(s) on competition, the Council considered that they complied with their CPA clause 5 obligations where they provided a robust net community benefit case to support the restriction(s). Where a government had not completed its review and/or substantially implemented its reform response at the time of this assessment, or where the Council identified matters that were still to be satisfactorily resolved, the Council will assess progress in 2002 in line with CoAG's extension in the time available for the legislation review and reform program.

The Council identified some areas of review and reform activity where a government had reviewed legislation and determined its approach to reform, but will not complete its reform program by 30 June 2002. Recognising that satisfactory reform implementation can encompass a government having a 'firm transitional arrangement' extending beyond June 2002 (see CoAG 2000), the Council considered in this assessment that governments have met their CPA obligations, even if they will not complete reforms by June 2002, where they:

- presented a robust net community benefit case to support the (temporary) retention of restrictions beyond June 2002; and
- announced a transitional strategy for removing the restriction within a reasonable period of June 2002 (for example, by 'locking in' the reform through legislation).

The Council also found cases where legislation that restricts competition was not scheduled for review under the NCP. It has been common for governments, through the NCP assessment process and their own ongoing scrutiny of legislation, to discover competition restrictions in legislation that they did not originally identify as being anticompetitive. Recognising the resource demand placed by the legislation review program, the Council considered that governments have met their CPA obligations where they added such legislation to their review programs even though in most cases they will not complete the review by June 2002.

Box 5.1: Priority legislation areas

Agriculture, forestry and fishing
Barley/coarse grains
Dairy
Poultry meat
Rice
Sugar
Wheat
Fishing
Forestry
Food regulation
Agricultural and veterinary chemicals
Quarantine
Bulk handling

Communications
Australian Postal Corporation Act 1989: third-party access regime
Broadcasting Services Act 1992 and related legislation
Radiocommunications Act 1992

Education services

Fair trading legislation and consumer legislation
Fair trading legislation
Consumer credit legislation
Trade measurement legislation

(*continued*)

Box 5.1 continued

Finance, insurance and superannuation services
The finance sector: post Wallis Report regulation
Workers compensation insurance
Compulsory third party motor vehicle insurance
Public sector superannuation; scheme choice

Health and pharmaceutical sector
Chiropractors
Dentists and dental paraprofessionals
Health Insurance Act 1973 (Cwlth)
Medical practitioners
Medicare provider numbers for medical practitioners
Nurses
Occupational therapists
Optometrists, opticians and optical paraprofessionals
Osteopaths
Pathology collection centre licensing
Pharmacists
Physiotherapists
Podiatrists
Psychologists
Radiographers
Speech pathologists
Traditional Chinese medicine

Legal sector
Legal profession regulation
Professional indemnity insurance for solicitors

Mining

Other professions and occupations
All other professions and occupations, particularly those that are 'partially' registered (that is, registered or licensed in some but not all jurisdictions)

Planning, construction and development services
Planning and approvals
Building regulations and approvals
Related professions and occupations, such as architects

Retail regulation
Shop trading hours
Liquor licensing
Petroleum retailing

Social regulation with implications for competition
Gambling
Child care services

Transport services
Road freight transport: tow truck legislation, dangerous goods legislation
Rail services
Taxi and hire cars
Ports and sea freight
International liner cargo shipping (part X of the TPA)

Considering whether review processes are open, independent and rigorous

Achieving well-considered and effective reform depends on high quality review processes. Open, independent and rigorous review processes provide the best opportunity to identify and assess all costs and benefits of restrictions on competition and to implement regulations (including alternatives to restrictions) that best achieve the community's goals. A rigorous analytical approach by reviews, whereby all relevant evidence is considered and conclusions and recommendations are drawn from that evidence, is also important.

The Council has consistently emphasised the benefits from independent processes, in correspondence to all governments in September 1997 and by commissioning the Centre for International Economics to develop guidelines for conducting reviews.[1] The Commonwealth Office of Regulation Review (ORR) also commented on the importance of independent review processes and on how interested parties might be best involved. It stated:

> *One issue, which has arisen, is the appropriateness of industry and other stakeholder groups being represented on review bodies. While this may offer some advantages, it can also alter perceptions about the impartiality of such reviews and the validity of their findings. In general, if direct representation by industry or other groups were considered desirable, a preferable approach would be to include them on a reference group.* (PC 1999b, p. xviii)

CoAG's amendment to CPA clause 5 reinforces the need for properly constituted and rigorous reviews. The CoAG amendment requires governments, for NCP compliance, to conduct 'properly constituted' reviews, with these reviews reaching conclusions that are 'within a range of outcomes that could reasonably be reached based on the information available'. The Council's assessments thus consider whether there have been flaws in review processes that may have compromised the review's recommendations. Flaws may occur for a number of reasons; for example, review terms of reference may not encompass relevant questions, the review analysis may be deficient and lead to recommendations that are inconsistent with the evidence, or the review may fail to consider relevant evidence.

The Council's general approach is to look for evidence that reviews:

- had terms of reference based on CPA clause 5(9), supported by publicly available explanatory documentation such as an issues paper;

[1] The guidelines (CIE 1999) were provided to all governments and are available on the Council's web site (http:www.ncc.gov.au).

- were conducted by an appropriately constituted review panel able to undertake an independent and objective assessment of all matters relevant to the legislation under review, including restrictions on competition and public interest matters;

- provided for public participation (including participation by directly interested parties) through appropriate consultative processes;

- assessed and balanced all costs and benefits of existing restrictions on competition and considered alternative means of achieving the objective of the legislation;

- considered all relevant evidence and reached reasonable conclusions and recommendations based on the evidence before the review; and

- demonstrated a net public benefit where there are recommendations to introduce or retain restrictions on competition.

Considering whether policy responses to review recommendations meet the CPA tests

The threshold CPA obligation means that governments, in addition to reviewing restrictive legislation, need to change their legislation if restrictions cannot be justified. CoAG reinforced the importance of these considerations, amending CPA clause 5(1) to guide the Council's assessments. CoAG's amendment to clause 5(1) states that:

> *In assessing whether the threshold requirement of Clause 5 has been achieved, the [National Competition Council] should consider whether the conclusion reached in the report is within a range of outcomes that could reasonably be reached based on information available to a properly constituted review process. Within a range of outcomes that could reasonably be reached, it is a matter for government to determine what policy is in the public interest.* (CoAG 2000, Attachment B)

CoAG also determined that governments, in meeting the requirements of sub-clauses 1(3)(a)(b) and (c) (which relate to the application of the public interest test), should document the public interest reasons for a decision or assessment and make them available to interested parties and the public. For this assessment, the Council looked for governments to show, through transparent and logical reasoning, that restrictions on competition meet the tests in CPA clause 5 — that is, they provide a net benefit to the whole community and are necessary to achieve a government's legislative objectives.

The Council encourages governments, as part of their public interest reasoning, to make their review reports publicly available. Because NCP reviews are required to assess and balance the costs and benefits of restrictions, arguments supporting a restriction would usually arise through

the evidence and recommendations of the relevant review. Thus, the Council has looked for governments to ensure that reform outcomes that restrict competition had due regard to review recommendations (assuming reviews were properly constituted and conducted). The Council also considers that open public policy-making processes offer a public benefit, which is enhanced where members of the public can participate in the review of legislation and have access to the review report that results from their participation.

The Council does not consider that a public interest case that does not contain relevant supporting evidence and robust analysis is sufficient for NCP compliance. In particular:

- where a government introduces or retains competition restrictions on the basis of review recommendations, but the review does not provide clear reasoning and argument to support its recommendations, the government should make transparent the evidence and logic underlying its decision; and

- where a government introduces or retains competition restrictions, but this approach is not reasonably drawn from the recommendations of the review, the government needs to provide a rigorous case for its approach, including demonstrating flaws in the review's analysis and reasoning.

While the Council looks for governments to take reform action that has regard to review recommendations, the threshold CPA requirement does not mean that governments must always have conducted a full public review before removing a restriction. Jurisdictions commonly repeal redundant legislation after preliminary scrutiny shows that the legislation provides no public benefit. Such action meets the CPA objectives. Similarly, a government can choose to disregard a review recommendation supporting a restriction. Under CPA clause 5, the obligation on governments is to show, where their legislation restricts competition, that the restriction provides a net benefit to the whole community and that the restriction is needed to achieve the objective of the legislation.

The NCP provides for the possibility that different governments may evaluate the contribution of the various factors differently and thus reach a different conclusion on the appropriate regulatory approach. However, because Australia is essentially one national market, uniform or consistent regulation across jurisdictions is likely to benefit the community because it reduces regulatory imposts on businesses and service providers, and may lead ultimately to lower prices for consumers. The Council therefore looks for governments to be cognisant of the approaches adopted in other jurisdictions, particularly where these involve removing restrictions on competition.

Governments encourage greater legislative consistency in various ways. Apart from the national approach envisaged by the NCP, governments have implemented mutual recognition since 1993. They also reviewed various 'partially registered' occupations (those registered in at least one, but not all States and Territories) to determine the appropriate regulatory treatment of such occupations (box 5.2).

Box 5.2: Encouraging greater national consistency

Mutual recognition

State Premiers and Territory Chief Ministers signed the Intergovernmental Agreement on Mutual Recognition in May 1992, committing jurisdictions to implement mutual recognition from March 1993. Mutual recognition is aimed at creating a regulatory environment that will 'encourage enterprise, enable business and industry to maximise their efficiency, and promote international competitiveness' (CoAG 1998).

The Commonwealth *Mutual Recognition Act 1992* and related State and Territory mutual recognition legislation aim to achieve a national market in goods and services via two principles:

- that goods that may be sold legally in one State or Territory may be sold in a second State or Territory, regardless of differences in standards applying to goods in the relevant jurisdictions; and
- that a person who is registered to practise an occupation in one State or Territory be able to be registered to practise an equivalent occupation in a second State or Territory.

Review of mutual recognition agreement

Governments agreed to review the mutual recognition agreement in its fifth year. Governments also undertook to conduct NCP reviews of their mutual recognition legislation. A national review of the agreement and implementing legislation was completed in 1998 to address these two purposes.

The review found that the scheme is generally working well in minimising impediments to trade in goods and services, and in establishing a truly national market in goods and services in Australia. The review recommended that governments endorse the continued operation of the mutual recognition agreement and made 30 recommendations addressing the operation of the legislation. All governments generally support the review recommendations and are working together to implement recommended reforms.

The review noted concerns that separate NCP reviews might adversely affect the national consistency of registration requirements; for example, one jurisdiction may decide to remove registration as a result of an NCP review, whereas another may retain it and this inconsistency could reduce the mobility of occupations from the former jurisdiction to the latter. (This issue is discussed in chapter 18, which deals with professional and occupational licensing.)

The review recommended that governments consider greater use of national reviews and that they consider, in carrying out reviews, the impact of their recommendations on the mobility of persons in registered occupations. There have been two national reviews for occupations/professions (reviews of legislation covering architects and travel agents) and 11 other national reviews.

Encouraging greater national consistency

Governments recognised that problems for mutual recognition may arise where occupations are registered in some, but not all jurisdictions. Governments established a working party to determine, for such 'partially registered' occupations, whether each should be deregistered or fully registered in all jurisdictions. Specific recommendations from this review are discussed in chapter 16 (for health and pharmaceutical services), chapter 18 (for other professional and occupational licensing) and chapter 24 (for planning, construction and development services). The process on partially registered occupations was superseded by the NCP.

Sources: CoAG (1997 and 1998); VEETAC (1993).

Considering whether new legislation that restricts competition meets the CPA tests

CPA clause 5(5) obligates governments to also ensure that all new restrictions on competition provide a net community benefit and that the restriction is the only way in which to achieve the objective of the legislation. All governments advised in the earlier NCP assessments that they had implemented arrangements for 'gatekeeper' scrutiny of the impact of new legislation. As part of this assessment, the Council has looked to ensure that gatekeeping processes considered all relevant legislation. The Council also looked for whether governments demonstrated that new anticompetitive legislation in the priority areas meets the tests in CPA clause 5 — that is, whether there is evidence that the restriction provides a net community benefit and is necessary to achieve the objectives of the legislation.