Submission to the taskforce on reducing the regulatory burden on business

National Competition Council

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Key messages

- The taskforce's primary focus is on the *stock* of Australian Government regulation. As shown by the legislation review program of the NCP, reforming government's regulatory stocks can unshackle the productive capacity of the economy, thereby delivering substantial gains to the community.

- It is equally important, however, to ensure that governments adopt processes that deliver high quality regulatory *flows*. Under Australia's federal system, the parliaments of nine sovereign governments generated over 30 000 pages of new laws in 2003—contributing to a 10 per cent increase in regulatory stocks each year.

- Robust and dynamic regulation impact assessment processes overseen by independent regulatory gatekeepers are essential if unwarranted costs, including excessive compliance burdens on business, are to be addressed before new regulatory proposals pass into law. This can help to alleviate the need to address problems in *ex post* reviews of regulatory stocks.

- The Council, the Productivity Commission, some governments and various business groups have identified the need to improve regulatory gatekeeping arrangements. Ineffective scrutiny of regulatory proposals increases the prospect of adverse unintended impacts and costs falling on the community and, puts at the risk the ability to preserve the gains already achieved from a decade of integrated legislative reforms under the NCP.

- There is a need to ensure that regulation does not *unjustifiably* impede the capacity of the economy to generate higher living standards. To this end, reducing the burden of red tape on business is an important facet of high quality regulation, but it is not the only dimension. Achieving regulatory outcomes in the public interest requires that regulation be assessed from an economy-wide perspective that takes account of all costs and benefits—consistent with promoting economic efficiency. This, however, is critically dependent on governments having robust (and improving) regulatory gatekeeping arrangements that examine new regulatory proposals from the public interest perspective. Yet, many jurisdictions fall short of this.

- Fundamental systemic reform to ensure the delivery of quality regulation is needed. This will require high level endorsement by Australian governments. In its review of the NCP, the Productivity Commission identified a need to strengthen national monitoring of governments' gatekeeping procedures and the outcomes delivered. The Council considers that the commission's recommendation could, subject to discussion and endorsement by COAG, be activated through clause 5(5) of the Competition Principles Agreement.

- The Council's proposed checklist of elements required for robust gatekeeping arrangements, which draws on 'best practice' from a range of jurisdictions, is provided at the end of this submission

1 Scope of submission

In 1995 the Council of Australian Governments (COAG) established the National Competition Policy (NCP) and the National Competition Council. One of the Council's roles is to assess governments' progress in implementing the NCP, including making recommendations on competition payments. (The current NCP agenda will largely conclude with the disbursement of 2005–06 competition payments and a new agenda is being considered by COAG.)

The Council's experience with the NCP legislative reforms provides a basis for it to comment on certain areas of interest to the taskforce. The taskforce was appointed on 12 October 2005 to:

- *identify specific areas of Commonwealth government regulation which are unnecessarily burdensome, complex, redundant or duplicate regulations in other jurisdictions*
- *indicate those areas in which regulation should be removed or significantly reduced as a matter of priority*
- *examine non-regulatory options (including business self-regulation) for achieving desired outcomes and how best to reduce duplication and increase harmonisation within existing regulatory frameworks*
- *provide practical options for alleviating the Commonwealth's 'red tape' burden on business, including family-run and other small businesses.* (Howard 2005, p. 1).

The taskforce's focus is on the Australian Government with an emphasis on that jurisdiction's existing stock of regulation. The taskforce is also seeking information on 'mechanisms to deal with compliance burden problems arising from new or amended legislation' (Regulation Taskforce 2005, p. 4). Under the NCP, all governments committed to ensure that flows of new and amended legislation do not contain unwarranted restrictions on competition. Viewed from this perspective, the need to ensure that new and amended regulations are properly evaluated before entering the stock is clearly relevant to the taskforce's agenda. [1]

2 Regulation and the NCP

Clause 5(1) of the Competition Principles Agreement (CPA)—known as the guiding principle—obliges governments to ensure legislation does not restrict competition unless it can be demonstrated that the benefits of the restriction

[1] This submission draws from the Council's 2005 NCP assessment which is under embargo until released by the Australian Government Treasurer. The discussion is therefore principles-based without commentary on the performance of individual jurisdictions.

to the community as a whole outweigh the costs, and the objectives of the legislation cannot otherwise be achieved. Complying with CPA clause 5 commits governments to ensure:

- their stock of legislation satisfies the guiding principle—CPA clause 5(3)
- all new legislation that restricts competition is consistent with the guiding principle—CPA clause 5(5)
- legislation that restricts competition in the public interest is reviewed at least once every 10 years to ensure it continues to meet the guiding principle—CPA clause 5(6).

Together, these clauses aim to ensure that no legislation—existing, new or continuing—unnecessarily restricts competition. While the taskforce's remit is not necessarily to identify competition restrictions, the lessons garnered under the NCP are applicable to promoting good quality regulation per se.

2.1 Regulatory stocks

In 1996 around 1800 pieces of legislation, relating to the Australian Government and all state and territory governments, were identified and scheduled for review under the NCP's legislation review program. By June 2005, around 85 per cent of this legislation had been reviewed and, where appropriate, reformed.

The NCP's focus on competition restrictions (as noted above) is not directly comparable to the taskforce's focus on the regulatory burden on business (excessive 'red tape'). Indeed, regulations that impede efficiency and/or carry an excessive compliance burden, but which do not involve competition restrictions, for example, are unlikely to have been addressed under the NCP. Hence, the legislation review program will not have addressed all unwarranted regulatory red tape and the associated efficiency costs. Although conversely, any regulatory restriction on competition that cannot be justified in the public interest is an excessive burden on the economy as well as business.

Indeed, requiring that competition restrictions be proven to be in the public interest is a good proxy for engendering more efficient regulation. In part, this reflects that competition restrictions create substantial costs for (non-favoured) businesses and consumers and promote resource misallocation. For example, by impeding some businesses relative to others and/or barring entry to potential competitors, competition restrictions can be the definitive compliance burden.

The NCP has been pivotal in removing barriers to competition across activities as diverse as the professions and occupations; agriculture, forestry and fishing; retail trade; transport; planning and construction; and communications. The outcome has been a material reduction in unwarranted regulatory restrictions. Major reforms have been introduced in tandem with a

systematic transformation or removal of a multitude of smaller productivity-detracting regulations. The cumulative effect of all of the large, and myriad smaller, legislative reforms has greatly contributed to Australia's enviable economic performance.

Preserving these hard-won gains is essential. Against this backdrop, effective processes to rigorously assess new legislative proposals can provide the community with an assurance that:

- unwarranted anticompetitive restrictions will not resurface in new legislation
- new legislation is tested to ensure restrictions on competition are in the public interest and that objectives cannot be otherwise achieved.

Meeting these objectives requires strong regulatory gatekeeping mechanisms irrespective of whether concerns revolve around competition restrictions, business compliance burdens and/or efficiency per se. All these dimensions are relevant to the goal of promoting good quality regulation.

2.2 Regulatory flows

Under CPA clause 5(5), each jurisdiction committed to demonstrate that new legislative proposals restricting competition are consistent with clause 5(1). The Council has interpreted this to mean that governments should have robust regulatory gatekeeping arrangements in place (section 4), rather than seeking to interpose itself as a further layer of gatekeeping to assess all jurisdictions' new legislation.

The emphasis on new legislation enshrined in the NCP in 1995 seems particularly prescient given the rapid growth in regulation among Australian governments—see for example, AIG (2004); Banks (2005), BCA (2005), Brumby (2005); PC (2005a) and VCEC (2005). The Productivity Commission stated that:

> *In 2004-05, the Australian Government made 2552 new regulations, a significant increase over the annual average of 1441 in the previous five years* (PC 2005a, p. 2)

And, taking an Australia-wide view, a report by the Business Council of Australia (BCA) estimated that the stock of legislation across the nation is growing at around 10 per cent each year (BCA 2005). The BCA identified that Australian parliaments added 33 000 pages of new laws and regulations in 2003. It is hardly surprising therefore that the taskforce has posed many questions to participants about the Australian Government's existing regulations (box 1).

Box 1: Unnecessarily burdensome or complex regulation

- Insofar as it can be determined, what is the annual cost to business created by the regulation?
- Who pays these costs? Are they absorbed by the business, passed on in higher prices or does the Government reimburse (in full or part) the compliance costs incurred by businesses and individuals? Does the Government levy a fee on the businesses subject to the regulation — for example, a licensing or inspection fee?
- In what way is the burden imposed by the regulation unnecessary, or in what way is the regulation unnecessarily complex, taking into account the objectives of the regulation?
- Could the regulation and/or its administration be reformed or simplified to reduce the compliance burden on business, while still allowing the underlying policy objective to be achieved? If so, how?
- Could any alternatives achieve the underlying policy objective while imposing less of a burden on business?

Source: Regulation Taskforce 2005, p. 6

That such pertinent questions need to be posed in an assessment of regulatory stocks can reflect that, in a dynamic economy, past regulations are no longer appropriate. It also suggests a systemic problem with processes governing regulatory flows. Assessments of the need for, and public benefit of, regulating to achieve governments' objectives should occur through rigorous examination before legislative proposals pass into law. Fortunately, processes to ensure that such questions are explored *ex ante* already exist—albeit in forms that require improvement (see sections 3 and 4).

3 Regulation impact assessment

Most OECD nations have systems to promote and improve regulatory quality. Generally, in Australia, where new legislation will have nontrivial effects, a form of regulation impact assessment is triggered. There are several variations on this theme across the country. For example, where new legislation will involve competition restrictions, there is a requirement for a regulation impact statement (RIS) which may also be referred to as a competition impact analysis or a public benefit test. Various Australian governments may also require other forms of RISs, such as business, small business, regional, community and family impact assessments.

A RIS is a document prepared by an agency responsible for a regulatory proposal. Ideally, it should formalise the analysis of the impact of a regulation, including an assessment of the risks, costs and benefits, and a consideration of regulatory and nonregulatory alternatives.

Like the Council, many have identified the importance of RIS processes and the need for them to be improved. For example, the Productivity Commission reported that:

> *The RIS process is recognised internationally as playing a pivotal role in improving the quality of regulation. RIS processes also reinforce other processes of government designed to improve the quality, transparency and administration of regulations. In 2003-04, RIS processes were strengthened in several jurisdictions. Nevertheless, some regulators continue to experience difficulties in complying with such best practice processes*. (PC 2004, p. 1)

Similarly, the Australian Chamber of Commerce and Industry stated that:

> *A robust RIS must form the basis for greater transparency in regulation through better information of causal relationships and possible alternatives. A clearly defined RIS process also acts as a buffer against political expedience in times when considered policy can be difficult to implement* (ACCI 2005, p. 37)

The volume of new legislation is a stark reminder of the potential for poor quality regulation, with all its attendant costs, to be introduced. It is fundamental, therefore, that new legislative proposals are tested appropriately. The integrity of the RIS process is central to the capability of governments to devise good quality regulation. And, this integrity is a function of the proficiency of the regulatory gatekeeper—that is, the entity with responsibility for ensuring the requisite processes are adhered to (see section 4).

There is a large literature on the appropriate conduct of regulation impact assessments. Yet, the Council's experience in examining legislative outcomes and the associated RIS's is mixed. Some analyses are detailed, include a thorough quantification of costs and benefits, examine impacts from a communitywide perspective (including impacts on businesses, consumers and the economy as a whole), assess alternative (regulatory and nonregulatory) means of achieving the objectives, determine the best form of regulation (for example, outcome oriented versus input controls) and so on. Other RIS's appear to be rushed *ex post* justifications replete with qualitative assertions that simply pay 'lip service' to the RIS process. The latter categorisation highlights a need for governments to commit to good process, rather than allowing agencies and gatekeepers to view the RIS process simply as a paper flow exercise.

4 Gatekeeping arrangements

Having a regulation impact assessment process does not guarantee that agencies sponsoring new legislation will adhere to that process. The Council's experience with the legislation review program demonstrates the imperative for strong gatekeeping mechanisms to act as a countervailing force against three main sources of pressure:

1. The reticence of governments to implement contentious legislative reforms, or to implement good quality new regulation, where this could alienate an important constituency.

2. Overly expeditious policy making in politically sensitive and urgent areas leading to 'rushed' regulation with unanticipated costs. (For example, the Council has previously commented on the haste with which several state governments regulated, without considered review, legal professional advertising to address a perceived insurance crisis.)

3. The off-budget capability of some regulation that can make the achievement of policy objectives appear to be low cost. (For example, the Council has encountered regulatory proposals designed to engineer inefficient cross-subsidies between groups rather than meet community service obligations through transparent budget funded programs.)

As noted, under the CPA clause 5(5), each jurisdiction must ensure that new legislative proposals restricting competition are consistent with clause 5(1). The Council has interpreted this to mean that governments should have robust regulatory gatekeeping systems in place. It therefore has looked to governments to establish that their gatekeeping systems are consistent with the following principles:

- all new legislation that contains nontrivial restrictions on competition should be subject to a formal regulatory impact assessment to determine the most effective and efficient approach to achieving the government's objective, including alternatives to regulation. The impact analysis must explicitly consider competition impacts.
- there are mandatory guidelines for the conduct of regulation impact analysis by government bodies
- there is an independent body with relevant expertise to advise agencies on when and how to conduct regulatory impact assessment with the power to examine regulatory impact assessments and advise on the adequacy and/or quality of the analysis
- there should be monitoring and annual reporting by the independent body on compliance with the regulation impact analysis requirements.

For its NCP assessments, the Council requested details on the key elements, operations and institutional underpinnings of governments' gatekeeping arrangements. In particular, it has sought to be satisfied that each government had, at a minimum, a formal process for the regulatory impact assessment of new and amended primary legislation, subordinate legislation and ideally quasi-regulation.

All governments have arrangements to examine regulatory proposals with nontrivial effects and each, to varying degrees, embodies the elements necessary for effective gatekeeping. The Council nevertheless considers that while all jurisdictions have gatekeeping mechanisms that can, *in principle*,

deliver good quality regulation, it has reservations about whether all gatekeeping processes are capable of delivering such outcomes *in practice*.

A gatekeeping model with the requisite processes and mechanisms does not, of itself, ensure *outcomes* consistent with the public interest. Rather, good regulation is a function of the overarching commitment shown by the government and of the practices, conventions and relationships between that government, its gatekeeper and the agencies devising regulation. A gatekeeper that is not sufficiently independent of the executive arm of government, for example, is less likely to provide unconstrained independent advice on the adequacy of regulation impact analyses.

The following sections discuss two elements that the Council considers to be critical for effective gatekeeping: (1) the independence and form of the gatekeeper; and (2) the transparency of its processes.

4.1 Independence

The most important determinant of effective gatekeeping is the independence of the gatekeeper and its institutional underpinning. The Council has identified the gatekeeping arrangements of the Australian Government as currently representing best practice, in large part owing to the independence of the gatekeeper—the Office of Regulation Review. Recently, Victoria established the Victorian Competition and Efficiency Commission (VCEC) as an independent statutory gatekeeper[2]. Other jurisdictions locate their gatekeepers within their Treasuries or Departments of Premier and Cabinet/Chief Minister.

Some smaller jurisdictions have told the Council that the resource cost of a stand alone gatekeeper cannot be justified. However, the benefits to a state or territory that flow from good regulatory practice and integrated policy making (that is, avoiding bad regulation) are substantial. For small jurisdictions, an option could be to locate the gatekeeper function as a discrete unit within an existing independent entity such as an audit office or a prices oversight body—which all jurisdictions have as part of their NCP commitments.[3]

Without an independent statutory gatekeeper, or one located within an independent entity, it would be preferable to house the function within agencies that are:

- removed, to the greatest extent possible from the politics of sectoral policy development

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2 VCEC was established by an Order in Council that provides for a limited statutory form. It has independent commissioners, and the protocol between the VCEC chair and the Department of Treasury and Finance specifies the former's independence.

3 Small jurisdictions could also seek to outsource this function from larger jurisdictions or contemplate a joint arrangement of some sort.

- culturally attuned to a broad (economywide or statewide) perspective of the net public benefit.

In practical terms, these criteria suggest locating the gatekeeper within treasury departments. In addition, the Council considers there are two key requirements for non-statutory gatekeeper models:

- *an effective 'Chinese wall'*—political considerations must be kept separate from the robust assessment of the costs and benefits of regulation, and RISs prepared within the portfolio agency housing the gatekeeper must be assessed without undue influence
- *'potency' and resources*—the gatekeeper needs to have sufficient resources to undertake its functions effectively, and it should be headed by a senior official with direct reporting to the head of the agency in which it is housed and ultimately to a senior minister (such as a Treasurer).

Finally, effective gatekeeping needs strong legislative underpinning. In many jurisdictions, subordinate legislation Acts dictate processes for the making of (subordinate) regulations. Processes for assessing new legislation, however, are typically less formalised and therefore likely to be less effective.

4.2 Transparency

Effective gatekeeping requires transparent processes. Generally, to the extent that RISs are undertaken for subordinate legislation across Australia, they are publicly accessible. But, this is not always the case for new legislation proposals. In some states, Cabinet confidentiality is afforded to RISs for new legislation. This contrasts with the approach of the Australian Government where the vast majority of RISs for primary legislation are published *ex post*.

Where Cabinet confidentiality needs to be preserved in the national interest, it should still be possible to make expurgated RISs available. If necessity demands an urgent response, ideally such regulation should have a short sunset period enabling it to be formerly reconsidered and, if necessary, amended in accordance with general principles. (In these instances, exposure drafts for new legislation can be a useful adjunct to encourage early alerts to potentially unanticipated consequences.) If regulatory assessments are not made public, affected stakeholders may have no way of determining the basis on which decisions were made.

Also consistent with transparency and good practice, is the requirement by some governments for agencies to prepare consultation (or draft) RISs in addition to RISs for the decision maker. It is in the public interest to have transparent RIS processes involving appropriate consultation (properly the role of the sponsoring agency rather than the gatekeeper) and which make clear the reasons that governments pursued a particular course of action. Such transparency can highlight the trade-offs made and make governments more accountable for their decisions.

Extending the principle of transparency further, the Council considers that jurisdictional central repositories of RISs would be valuable resources for interested parties and public policy practitioners. If this practice were widespread, it would allow policy makers (and others) to compare and contrast regulatory approaches, and their rationales, around the country. This could help to promote harmonisation of regulations across jurisdictions. Moreover, a public repository of RISs would facilitate *ex post* evaluation and expose whether estimated costs and benefits were as anticipated. Such scrutiny would provide an incentive for vigorous analysis in the first instance.

5.1 A way forward

Like most modern economies, Australia is subject to a rapid regulatory growth as governments face a variety of pressures to enact new laws. Where new laws are in the public interest, community welfare is enhanced. But the costs as well as the anticipated benefits of regulation must be assessed objectively. This is the role of regulation impact assessment and gatekeeping systems, and while there have been improvements, many governments have systems that fall short of best practice, particularly given that the 'best practice frontier' is dynamic.

Governments need to ensure good policymaking is promoted through effective scrutiny of their agencies' performance in developing regulations. Such scrutiny should be undertaken by gatekeepers that are sufficiently independent to genuinely assess the quality of proposed new regulations and whether the new laws will be in the public interest. Having processes, procedures, guidelines and mechanisms in place will not ensure regulatory quality if the gatekeeper perceives its role as uncritically shepherding through regulatory proposals because they reflect the desire of the government. While politics may figure prominently in policy formulation, the gatekeeper should be effective in ensuring the result is high quality regulation that delivers a net benefit to the community when meeting the objectives of governments—without unnecessarily restricting competition, generating avoidable efficiency costs or creating excessive burdens on business.

The Council acknowledges the importance of the taskforce's role in targeting excessive business compliance burdens in the stock of Australian Government legislation. But, it is important to not lose sight of other considerations. Eliminating unwarranted competition restrictions or reducing excessive compliance burdens are elements of good quality regulation, but they are not the only dimensions. Reviews of extant legislation and gatekeeping processes should identify and assess all costs and benefits including the impact on the community and economy as a whole.

The Council notes that the government 'intends to introduce a new annual review process to examine the cumulative stock of Australian Government regulation and identify an annual red tape reduction agenda' (Howard 2005).

While the government's intention is constructive, this submission has primarily focussed on the need, in managing the stock, to stem the flow of new legislation with unwarranted costs (and help obviate the need to address problems in *ex post* assessments of regulatory stocks). The complementarities between regulatory stocks and flows can be enhanced by effective gatekeeping mechanisms.

Fundamental systemic reform to ensure the promulgation of good quality regulation will require high level endorsement by Australian governments. This is not an easy task in a federation. The Productivity Commission observed in its recent review of the NCP:

> *All Australian governments should ensure that they have in place effective and independent arrangements for monitoring new and amended legislation.*
>
> *Governments should also consider widening the range of regulations encompassed by gate keeping arrangements and strengthen national monitoring of the procedures in place in each jurisdiction and the outcomes delivered* (PC 2005b, recommendation 9.2, p. 259).

The Council agrees that in the early phases of systemic improvement, national monitoring would be important for success. Such monitoring could continue to derive from the Competition Principles Agreement (clause 5(5)) following appropriate consideration by COAG.

If an environment can be cultivated whereby jurisdictions operate transparent gatekeeping arrangements and strive to improve outcomes, a second tier of systemic improvement could stem from the Regulation Review Unit Forum. The forum, which comprises Australian Government and state and territory (and New Zealand) gatekeepers, meets annually and is, in part, a vehicle for exchanging information on better practices. Exposure to different processes and associated feedback and learning could be promoted through this forum.

Box 2, which draws from the elements of various models operating within Australia, provides the Council's checklist for robust gatekeeping arrangements.

Box 2: Elements of best practice gatekeeping

Institutional environment settings (COAG and individual governments)

- A high level commitment by governments to the importance of good process to achieve high quality regulation
- Consideration given to assessing the quality of the stock of legislation, in addition to ensuring the flow of high quality new legislation
- (At least initial) external monitoring, comparison and assessment of the performance of gatekeeping systems as governments move to improve these arrangements
- Cross-jurisdictional information exchange through the Regulation Review Forum as a vehicle to continually promote best practice gatekeeping systems

Whole-of-government process issues

- Legislative underpinning for the application of regulatory impact assessments for primary, subordinate and quasi regulation
- Structured integration of RIS processes into agencies' regulatory policy development roles
- Mandatory guidelines for the conduct of RISs, with appropriate cost–benefit assessment frameworks that focus on the quantification of costs and benefits for consumers, business, government and the community, and that appropriately explore alternatives to meet the stated objectives
- Greater awareness of the risks of using regulation to achieve off-budget solutions and/or to placate vested interests, rather than adopting a community-wide perspective

The gatekeeper

- Optimal model: an independent statutory gatekeeper established under a separate Act or through protocols to ensure independence
- Second best: an independent entity removed from a direct role in policy formulation with an appropriate 'Chinese wall', adequate resources and a high level line of reporting
- Responsibility for 'failsafe' systems to ensure all regulatory proposals are scrutinised to determine whether a RIS should be undertaken, and that RISs are conducted in a timely manner to avoid *ex post* justifications
- Capability to provide/withhold certificates of adequacy for RISs before consideration by Cabinet (or to not accept poor quality RISs)
- Training capabilities and high level imprimatur to work with agencies in developing RISs
- Public monitoring and exposure of agencies' compliance with RIS requirements and the quality of RISs prepared

Transparency

- Where appropriate, preparation of RISs at the consultation stage and for the decision maker
- RISs made publicly available when legislation is introduced, including expurgated RISs where genuine confidentiality considerations arise
- A publicly accessible repository for RISs
- Incorporation of sunset clauses to facilitate *ex post* evaluation of the projected costs and benefits from the RIS

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