Guidelines Paper for Agencies conducting a Legislation Review under the CoAG Competition Principles Agreement.

February 1998

1. Cabinet has approved the Department of Premier and Cabinet ("**DPC**") having the coordinating role for Legislation Review under the National Competition Policy [1]. DPC works closely with the Department of Treasury and Finance and the Crown Solicitor's Office ("**CSO**") in the implementation of competition policy.

2. While the prime responsibility is upon agencies to arrange for the review of legislation (Acts and subordinate legislation, including Regulations, Rules and By-laws) for which they have responsibility, DPC and the CSO are available to provide guidance and assistance where necessary. These guidelines have been produced by the CSO in conjunction with DPC for use by agencies and are intended to provide advice of a practical nature. They do not override the Guidelines for Ministers approved by Cabinet in June 1996 and reaffirmed by Cabinet in May 1997, but are to be used in conjunction with them.

3. It must also be kept in mind that legislation review is one of South Australia's obligations under the Competition Principles Agreement entered into on 11 April 1995. South Australia's entitlement to Competition Payments from the Commonwealth Government is dependent upon compliance with this and the other National Competition Policy obligations.

A: Background to the Legislation Review obligation:

4. South Australia's legislation review obligations under the CoAG Competition Principles Agreement of 11 April 1995 are set out below:

   Obligations under clause 5 of the Competition Principles Agreement:

   Cl.5.(1): "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."

   In assessing whether the threshold requirement of Clause 5 has been achieved, the NCC should consider whether the conclusion reached in the report is within a range of outcomes that could reasonably be reached based on the information available to a properly constituted review process. Within the

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range of outcomes that could reasonably be reached, it is a matter for Government to determine what policy is in the public interest. [2]

Cl.5.(3): "...each Party will develop a timetable by June 1996 for the review, and where appropriate, reform of all **existing legislation** that restricts competition by 30 June 2002." [3]

Cl.5.(5): "Each Party will require proposals for **new legislation** that restricts competition to be accompanied by evidence that the legislation is consistent with the principle set out in sub-clause (1)."

Cl.5.(6): "Once a Party has reviewed legislation that restricts competition under principles set out in sub-clauses (3) and (5), the Party will systematically review the legislation at least once every ten years."

Cl.5.(9): "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** and balance the costs and benefits of the restriction; and

(e) **consider alternative means** for achieving the same result including non-legislative approaches."

5. Clause 1.(3) of the Competition Principles Agreement provides that where there is a requirement to balance the benefits of a policy or course of action against its costs, or to assess the most effective means of achieving a policy objective - and both are required by the legislation review process - without limiting other matters, the following matters, **shall**, **where relevant**, be taken into account:

5.1 government legislation and policies relating to ecologically sustainable development;

5.2 social welfare and equity considerations, including community service obligations;

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

5.4 economic and regional development, including employment and investment growth;

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[2] The Council of Australian Governments meeting on 3 November 2000 agreed to amend the basis on which the NCC assesses whether or not jurisdictions have met their commitments under Clause 5(1) of the Competition Principles Agreement.

[3] The Council of Australian Government's meeting on 3 November 2000 agreed to extend the deadline for completing the NCP legislation review and reform program from 31 December 2000 to 30 June 2002.

5.5 the interests of consumers generally or a class of consumers;

5.6 the competitiveness of Australian business; and

5.7 the efficient allocation of resources.

6. Each year the State will publish a report on its progress towards achieving the objective of reforming all existing legislation that restricts competition by 30 June 2002. The National Competition Council ("**NCC**") will publish an annual report consolidating the jurisdictions' annual reports.

Therefore, persons conducting a legislation review must anticipate that the NCC may seek to scrutinise the final product.

The National Competition Council has set out its view of the essential elements of a legislation review process, which is at **Attachment 1.**

B: Getting Started

7. The role and responsibility of an agency, on behalf of its Minister, is to:

7.1 develop Terms of Reference ("**ToR**");

7.2 decide who is to conduct the legislative review;

7.2.1 where a review has implications for other Portfolios, relevant Ministers should be asked if they want an officer on the review team;

7.2.2 a Cabinet Submission may be required where a decision has been taken to have a review conducted by a person external to government.

7.3 establish contact with DPC, and liaise with DPC over the course of the review.

7.4 conduct the review in compliance with the ToR and the Legislation Review timetable;

7.4.1 as part of the review, identify stakeholders and conduct the public consultation process;

7.5 provide a draft of the review to DPC prior to finalisation - DPC will check for content, adequacy, etc;

7.6 where considered necessary, circulate the DPC approved draft review to stakeholders for final comments;

7.7 note that a Cabinet Submission will need to be prepared for all Acts and Regulations for which legislative changes have been recommended - see Cabinet Handbook.

8. **Review Process:**

A typical review might follow the following process:

First:

- Appointment of a review person or panel;
- Reviewer acquaints himself / herself with the relevant legislation and market information, and develops an initial list of restrictions on competition;
- Make initial assessment of degree of severity of the restrictions on competition
- ToR developed, and discussed with DPC;

Then:

For a MAJOR review, follow a more detailed process for legislation that contains **serious** restriction(s) on competition:

- Develop a public consultation list of stake-holders;
- Produce an Information / Background paper for persons wishing to make submissions, and made it publicly available on request. That Paper should include:
  - ToR;
  - process and time-lines;
  - identification of the policy behind the legislation, including public benefits;
  - identification of restrictions on competition; and,
  - market and background information that may assist persons making submissions.
- Public submissions required by a set date;
- Assess public submissions;
- Produce a Review **draft Report** that follows the ToR and takes into account all relevant information including public submissions;
- Provide draft Review Report to DPC for approval;
- Provide approved draft Report to persons who made submissions for further comment;
- Finalise Report;

- Final Report to DPC for approval, indicating where, if any, changes were made from the draft;

Or:

For a MINOR review, for an Act containing only **intermediate** or lesser restrictions:

- Produce a Legislation Review **draft Report** that follows the ToR and takes into account all relevant information;
- Public consultation list of stake-holders developed - probably a targeted list;
- Settle draft Review Report and consultation list, and give it to DPC for approval;
- Provide DPC-approved draft Report to persons on consultation list seeking their submissions;
- Public submissions required by a set date, and then assessed;
- Finalise Report;
- Final Report to DPC for approval.

General comments:

9. The conduct of a Legislation Review should always be guided by "**common sense**". This impacts upon the time, effort and money allocated to investigating costs and benefits, the depth of analysis, and the breadth of public consultation, with respect to each particular restriction on competition.

To assist this process, restrictions on competition should be categorised as **serious**, **intermediate**, or **trivial**.

A **serious** restriction on competition demands a **Major Review**, an **intermediate** restriction would normally have only a **Minor Review**, and a **trivial** restriction would not usually be reviewed at all - unless it was in the same Act as serious or intermediate restrictions. If several trivial restrictions in the same Act logically form part of an overall scheme, it would be appropriate to classify the whole scheme as intermediate or serious.

In arriving at the conclusion that a restriction is **trivial** (eg: a restriction in form only and of no, or minimal, effect), apart from assessing its impact and cost in the market, some implicit balancing of cost / benefit would take place. Thus; if a conclusion is reached that a restriction is only nominal, or only a restriction in an analytical sense, and quite obviously its benefits outweigh its detriment, it might be appropriate to categorise it as **trivial**. If such a **trivial** restriction is contained in legislation that also

contains restrictions of a more significant nature, the **trivial** restriction may be identified as such and cursorily dealt with in the review.

NOTE: what may appear initially to be a **trivial** restriction may have weightier consequences because of the administrative burden it creates for market participants. The Guidelines for Ministers specifically draws attention to the need for agencies to use the opportunity of a NCP legislation review to seek opportunities to streamline licensing, improve administration, etc.

EXAMPLES:

Assume there is a scheme for licensing an activity that requires a simple application and a payment of a $20 fee. There is nothing onerous that needs to be satisfied in the application, it does not create a "paper burden", and there are no restrictions on market entry except for the fact of the licence itself. Assume the purpose of the licence is to gather industry information relating to service providers, to assist implementation of an industry self-regulatory code, and for governmental research purposes. That would be a **trivial** restriction. If it stood by itself, it would not warrant a legislation review.

However, in addition to the facts set out above, if there were market entry restrictions, such as a requirement for professional qualifications, there would be two restrictions on competition. The qualification requirement could be either a **serious** restriction, or an **intermediate** restriction, on competition depending upon the cost (actual cost, duration, difficulty of the course, etc) of the qualification and on its availability. The $20 application would still be trivial, but because the Act would be reviewed, it would be referred to in the review and then discounted as a trivial restriction viewed in its own right. If the qualification requirement was removed from the Act, the $20 application requirement might either: be repealed, or be maintained if the purposes set out above were still valid.

Example: Assume there is a law that restricts the top speed of commercial vehicles to 100 kph. Arguably, that provision (or indeed **any** top speed restriction) restricts competition amongst freight drivers in that otherwise drivers with a powerful rig could offer a faster service. Similarly, a requirement to obey traffic lights and road signs has the same effect.

However, any commonsense analysis would show that the costs of such a restriction on competitive conduct are entirely marginal (any savings from speed advantage is offset by increased risk of loss of rig and cargo, which would likely be uninsurable). Further, an intuitive cost / benefit analysis shows that public safety considerations, insurance cost increases, etc, clearly outweigh the marginal cost savings (if any) that would arise by having no top speed limitation. Therefore, such a restriction would be categorised as **trivial** and not reviewed.

10. While there is a preference for pro-competitive outcomes, that preference is not because competition is an end in its own right, but because generally competition can deliver better outcomes for consumers (cheaper prices, higher quality, and more innovative products) and a better allocation of scarce resources within the economy.

    Thus, the critical point is not that a restriction on competition exists, but that the restriction imposes a cost in the relevant market and in the economy generally. Similarly, a public benefit is only as important as the value, quantitative or qualitative, that is assessed for that benefit.

11. Competition occurs in markets, and must, therefore, be assessed by reference to the relevant market (for more detail, see below). Where a restriction is assessed as other than trivial in a market, it must be reviewed.

    However, while markets are the "arena" within which competition occurs, an adverse effect that is trivial in an economically large market (eg: viticulture) may have intermediate or serious effects in terms of **the whole economy of South Australia**, and so should be reviewed. Similarly, public benefits arising from a restriction in a particular market may have economy wide implications (eg: State revenue, environmental considerations, consumer impacts that flow into the general economy such as health, safety, financial security implications, etc).

12. Given that competition occurs in markets, and that markets are rarely if ever perfect, there may be a need for intervention in markets to produce better results for consumers. Further, there may be other sound policy reasons for some form of regulation, such as: information inequalities, social policy and equity reasons, environmental considerations, economic development, State revenue, etc. It is for these reasons that restrictions on competition are assessed by weighing their anti-competitive costs against the public benefits that they are expected to deliver. Certain factors set out above in paragraph 5 above must, if relevant, be considered.

C: Terms of Reference

13. It is suggested that, unless there are sound reasons otherwise, you follow the general format for ToR discussed below. Most Government Agencies will be reviewing more than one piece of legislation, and it is helpful to both the Agency and the NCC for a systematic approach to be taken in reviewing legislation.

14. ToR must be prepared for all reviews and will be publicly available on request.

    Clause 5(9) of the Competition Principles Agreement (set out in Part "A" above) identifies the key **Terms of Reference** for a legislation review.

    Other matters to be covered by the ToR:

    - process for the review, including critical dates;
    - name(s) of the reviewer(s) and contact address;
    - details of public consultation process.

15. At **Attachment 2** is a template for Terms of Reference for a competition policy review that has been prepared by the Commonwealth Office of Regulation Review. As an example, it may be of use to Agencies, but should be modified to suit the circumstances of particular legislation using a "commonsense" approach. Further examples of ToR are available from DPC.

Discussion of clause 5(9) ToR requirements:

16. Clause 5(9)(a): Clarifying the objectives of the legislation:

The review must clearly state what the legislation is intended to achieve in terms of policy outcomes. It may be that an Act or Regulation is intended to achieve more than one outcome. If that is so, the various outcomes must be identified and stated. There is no need for a detailed description of how the legislation operates.

Sources of information of the objectives of the legislation include:

16.1 the legislation itself - it may be implicit from the Act, or there may be an explicit purpose / policy section;

16.2 Second Reading Speech and Parliamentary debates;

16.3 other formal documentary evidence such as agency papers, green papers, etc; and

16.4 less direct sources, such as the understandings of persons closely involved with the legislation, including agency officers, industry representatives, consumer groups, etc.

17. Clause 5(9)(b): Identifying the nature of the restriction(s) on competition:

This step requires:

- a description of the nature and type of the restriction, and
- an initial categorisation of how each restriction impacts upon competition in the relevant market as **trivial**, **intermediate**, and **serious**.

The **nature of the restriction** on competition may be:

17.1 a barrier to entry (including a barrier to exit);

17.2 a restriction on the types of competitive conduct that persons within the market may engage in;

17.3 discrimination between persons in, or attempting to enter, the market; **and**

may be either **supply side or demand side** orientated. There may be overlapping effects between these categories, but one of them will predominate.

See **Attachment 3** for further examples of the types of conduct that can restrict competition.

18. Any one Act may contain more than one restriction on competition. In addition, within the one Act, different restrictions on competition will probably be of a different nature and may need to be given a different weighting (an assessment as to the seriousness of its effect on competition).

However, it may be necessary to examine several restrictions together, because they form a consistent whole in a particular regulatory scheme. In that situation, to remove one of the restrictions would not make sense, because the regulatory scheme (and its benefits) are dependent on all operating together.

If no restrictions, or only **trivial** restrictions, can be identified, that should be recorded and the review concluded. However, as indicated in the note at para. 9, the administrative or paper burden created by what appears at first to be a trivial restriction may convert it into one of intermediate rating.

19. **Categorisation:**

As described in paragraph 9 above, effects on competition or on the economy as a whole can be classified as **trivial, intermediate or serious**. Such a classification is of assistance in prioritising, and in deciding the depth of analysis that is required of the costs and benefits, and of the breadth of public consultation that is required.

Making a decision on classification would involve considering the:

- height of barriers to entry, or exit (particularly, sunk costs),
- the impediments to robust commercial conduct by market participants; and
- the degree of discrimination in favour of, or against, market participants (or potential participants);

in light of all the factors relevant to that restriction in the market. Relevant factors might include: the cost structure for establishing a business or doing business, market size (including potential size), structural issues (such as a single up-stream supplier and few importers), external restrictions (such as laws of other jurisdictions), market concentration, degree of vertical integration, product cost structure compared with the restriction (eg: a labelling requirement), etc.

20. Market analysis:

To analyse the likely effect of a restriction on competition requires the identification of the market(s) that are being affected.

A market is the **area of close competition between firms**, or, putting it a little differently, the field of rivalry between them. (If there is no close competition, there is of course a monopolistic market.)

Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing

prices. **A market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.**

Supposing that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their geographic plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely, depends ultimately on customer attitudes, technology, distance and cost and price incentives [4].

21. Markets are defined in terms of all of the following four elements:

21.1 product;

21.2 **functional level** - production / manufacture; distribution / wholesale; and retail;

21.3 geographic area; and,

21.4 **temporal** (limited by time) **aspect** - often markets are not differentiated by time, or to put it another way, there is usually a continuous market.

EXAMPLE: the national electricity market ("**NEM**") is a market:

- for the **product** of physical electricity (energy);
- at the **functional level** of the wholesale market (generators supplying retailers);
- with a **geographic location** determined by the nature of the wires interconnect (NSW, Victoria, SA and the ACT - QLD and Tasmania will join once there is a physical interconnect); and
- that is a half hour spot market (**temporal aspect** - medium and long term supply contracts for physical electricity are not allowed).

It is noted that actually there are several markets in the NEM, including markets for ancillary services and a financial instruments market (hedging, etc). There is also the retail market, which is limited geographically (eg: Adelaide metropolitan area), and even the spot market itself becomes limited geographically eg, to South Australia, once the Victoria - SA interconnect is at full capacity.

22. **Substitution possibilities** may be determined by examining those other goods or services, and those other sources of supply or demand, that would be available if there was a **SSNIP**: "a small but significant and non-transitory increase in price". Thus, if the price of apples rises 10%, what would most retail customers buy as a substitute ? They might buy other fruit, but not chocolate bars. Most retailers would decrease their availability of apples, and have more fruit substitutes. Thus, the relevant product

[4] See: QCMA case and QWI case

market is limited to fruit. It is noted that while there may be a few consumers who may wish to buy a chocolate bar if the price of apples rises 10%, market analysis is not concerned with marginal behaviour !

When considering substitution possibilities, it is sometimes necessary to consider a chain of substitution possibilities creating **"ripple effects**". This is most useful in determining geographic markets, eg, supermarket retail markets - thus; there may be a continuum of geographic substitution across the Adelaide metropolitan area, although Coles at Smithfield Plains and Woolworths at Seaford Rise are obviously not in direct competition with each other. A **SSNIP** in one suburb could be defeated by customers shopping in the next suburb, where prices are constrained by prices in the next suburb, etc, etc.

23. Clause 5(9)(c): Analyse the likely effect of each restriction on competition and on the economy generally:

Having identified the nature of the restriction, the next step is to:

- describe the effect of the restriction and then to
- **weigh** the **effect of the restriction** (using either quantitative or qualitative methods).

Thus, a restriction may have certain **adverse effects** on suppliers (or on potential suppliers), and on acquirers in the market. It may also have certain **beneficial outcomes** for suppliers and acquirers. Both the adverse and the beneficial effects may extend beyond the particular market into other markets, or into the economy of South Australia generally.

A comprehensive descriptive exploration of the effects of the restriction will assist the next step, the giving of a weighting to the costs and benefits of the restriction.

24. It may be that for both the costs imposed on, and benefits provided to, suppliers and acquirers, and (less likely) for the costs and benefits on the economy as a whole, **quantitative data** exists, or can be obtained at a reasonable price.

Review panels should observe the guiding principle of "commonsense" in determining whether to commission outside consultants to provide quantitative input. Such a study might be justified if a serious effect on the economy as a whole is identified, as well as significant public benefits, such that an analysis in depth is required.

Sources of hard numerical data include:

- specific studies commissioned by the review panel;
- existing South Australian industry or governmental studies / reports, if they are up-to-date and the fundamentals underlying their assumptions are still valid;
- studies / reports produced in jurisdictions where there is a similar restriction, or where the restriction has been removed (for comparison), including use of OECD reports;

- anecdotal evidence of actual cost may come from public submissions or be otherwise publicly available - including the mere fact that "X" percentage of submissions supported / did not support the restriction; and
- agency annual reports to Parliament may contain relevant data.

25. In the absence of readily available quantitative evidence of the costs or benefits of a restriction on competition, a **qualitative** (descriptive) weighting would be appropriate. A mixture of both quantitative and qualitative analysis is appropriate if some numerical information is available but not a comprehensive case. In any event, the **balancing** of cost and benefit is likely to assume a **qualitative** nature when public benefits such as health and safety, environmental values, distribution effects, etc are being considered.

This is simply a reflection that legislation review is not a measurable scientific exercise, but a matter of sound analysis involving judgement and commonsense.

26. Set out below are some simple examples of an analysis of the **nature of a restriction**, and its **effect on competition**:

EXAMPLE:

An Act has a requirement for a certain professional qualification before particular medical services can be supplied into the market:

cl. 5(9)(b): The nature of the restriction on competition: The requirement for a qualification is a barrier to entry in that it limits the number of service providers by imposing a cost on market entry.

It could be categorised as either "**serious**" or "**intermediate**" in impact, depending upon the cost, duration, availability and difficulty, of acquiring the qualification.

Assuming the restriction is "serious", there should be widespread public consultation and considerable effort in the analysis of cost and benefit.

If "intermediate"; the public consultation could be targeted, and a consultancy to explore quantitative aspects of cost/benefit would be less likely.

cl. 5(9)(c): an analysis of its effect on competition and on the market generally might show:

Adverse the requirement for a professional qualification severely limits the number of service providers, thus leading to a market characterised by lack of price competition, lack of vibrancy (limited new entry and exits, lack of product differentiation, etc), and a requirement by incumbents to recover the costs of obtaining the qualification. The critical effects are increased costs to consumers and lack of innovation in service delivery.

It is noted that sometimes the product may well be defined by the skill level imparted by the qualification that is required or offered. Without that qualification, the product would be different (compare: medical services and naturopathic healing). The Reviewer would need to take evidence on whether, or to what degree, the products were in fact substitutable.

Weighting: At first glance, if no qualifications were required there would seem, potentially, to be unlimited market entry, and significant cost savings for consumers from price competition.

However, it could be argued that university trained medical service providers would quickly differentiate themselves from those who did not have traditional training. In the end, there may not be many patients who would go to "alternate" medical providers over and above those already doing so, seeing that those providers already operate without any special restriction.

The introduction of a wider range of approved training courses (thus: recognising overseas trained medical service providers) might have a greater impact on competition than the removal of the formal status that medical service providers have under the Act.

Beneficial consumer protection may be enhanced because the qualification gives the service providers the skill and knowledge to deliver the service, in an environment where the acquirer would not have had sufficient knowledge of the product to determine quality. Further, a consumer benefit may be identified in that the service is of such a critical nature (eg: the particular medical services) that high quality service delivery is considered essential to the health and welfare of the community.

Weighting: There may be some historical data showing the incidence of a particular medical condition before qualified practitioners were able to provide widespread treatment. If only qualified practitioners can identify and treat this condition, each unqualified treatment may carry a high level of risk to the community, which may be capable of quantification.

Example: The same Act has a requirement for an annual registration fee of $5000.

cl. 5(9)(b): the nature of the restriction on competition is that such a fee could act as a barrier to entry and, as a cost burden, could restrict the ability of service providers to act flexibly once in the market.

However, while such a fee could be seen as "intermediate" restriction in an industry where the income levels are low, it would be a "**trivial**" restriction for industries such as the medical profession where the income levels are very high.

cl. 5(9)(c): an analysis of its effect on competition and on the economy generally might show:

Adverse simply, that the cost will be passed on to consumers (the market structure is such that consumers are price-takers). For the medical profession, the size of the fee did not constrain their behaviour within the market.

Weighting: $5000 pa, amortised amongst an average of 500 patients *per* practitioner *per annum* adds $10 *per* patient's total bill.

Beneficial the registration fee pays for the administration of the Act. It is a user pays system (costs of administration are not passed onto other areas of the economy through funding by way of general taxation). The Act also provided a disciplinary and a consumer complaints mechanism.

Weighting: In the previous year "X" number of professional negligence and misconduct cases had been heard resulting in $ "A" being paid to patients. There is also (an unquantifiable, but significant) benefit to the community in the removal of certain incompetent / dishonest practitioners from the industry.

Example: The same Act contained a prohibition on misleading or deceptive conduct contained in a Code of Ethics.

cl. 5(9)(b): the nature of the restriction is that it could restrict the ability of those in the market to act flexibly, and thus be a barrier to competitive conduct.

This would be assessed as a "**trivial**" restriction. It is only technically a restriction because the same conduct is also prohibited by the general application of the *Trade Practices Act* and the *Fair Trading Act*. As the Act is being reviewed because of more weighty restrictions, trivial restrictions should be identified, categorised as such, and cursorily dealt with in the review (see: para 9 above).

cl. 5(9)(c): an analysis of its effect on competition and on the economy generally might show:

Adverse no significant practical effect beyond that already prohibited by the *Trade Practices* and *Fair Trading Acts*, except that it may preclude service providers from making the more extreme claims in their advertising because their conduct would be monitored by the Registrar of the relevant Professional Board (providing a more focussed enforcement than that under the other Acts).

Weighting: negligible cost.

Beneficial enhances consumer protection by precluding misleading and deceptive representations (including advertising) by service providers. Further, the particular service providers are in a position of trust and therefore the highest ethical standards are required of them. Patients must make important and expensive decisions regarding treatment as a result of advice given by the practitioner.

Weighting: an important benefit arises from the transparency that this requirement gives to the perception of the service providers as honest and trustworthy, and where there is a failure of professional standards, by the ability of the Board to hear cases that might otherwise not fall within the consumer protection enforcement priorities of the ACCC or OCBA.

27. **Clause 5(9)(d): Assess and balance the costs and benefits of the restriction that has been identified:**

Having:

- identified the nature of the restriction, and given it a preliminary weighting; and,
- described its effect on competition and on the economy generally including giving a weighting to the costs and benefits of the restriction,

the next step is to undertake **a comparative assessment** and **thereby arrive at a conclusion, on balance, of the merits of the restriction**.

28. As noted in paragraph 5 above, clause 1(3) of the Competition Principles Agreement lists several matters that **must**, **where relevant**, be taken into account where there is a requirement to balance the benefits of a policy or course of action against its costs, or to assess the most effective means of achieving a policy objective. They include:

- ecologically sustainable development;
- social welfare / equity considerations, including community service obligations;
- occupational health and safety;
- industrial relations;
- access and equity;
- regional development;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

29. In arriving at conclusions, both in the weighing process and in the comparison / balancing process, there are likely to be values both of a quantitative and qualitative (descriptive) nature given to costs and benefits.

While there is no adverse implication to be drawn from the fact that numerical values are not available (even if they were available, that says nothing about their accuracy) any analysis - whether qualitative or quantitative - will ultimately stand or fall on its own internal rigour and consistency. It is important to ensure that all assessments, and the conclusions on the balance between them, are:

- actually based on information set out in the review document,

- follow logically from that information, and

- state the basis on which the conclusion is made, identifying value judgements where these are made.

30. **Clause 5(9)(e): Consider alternative means for achieving the same result including non-legislative approaches.**

Even if an assessment of the costs and benefits of the restriction concludes that it is in the public interest, there is still a requirement to consider methods other than the restriction of competition for achieving the policy outcome. Even more so, if the cost of the restriction outweighs the benefit, and the benefit is still worthwhile, an alternative method of achieving the public benefit should be considered.

Policy objectives can be achieved by methods such as:

- a less intrusive method of legislative intervention, such as an "outcomes" orientated regulation rather than mandated actions;
- requiring the provision of consumer information, rather than mandating particular standards;
- industry self-regulation,
- codes of conduct,
- relying upon private contractual arrangements, or
- altering other factors adversely affecting the legislative policy so that "market forces" provide the necessary degree of regulation.

31. It is noted that private arrangements involving industry participants may require "authorisation" or "notification" under Part VII of the *Trade Practices Act, 1974 (C/wth)*. The CSO is the first point of contact with the Australian Competition and Consumer Commission ("**ACCC**") and can assist you in examining proposals that may have implications under the Trade Practices Act. Approval of arrangements by the ACCC will also require public benefits to outweigh anti-competitive detriment.

For example, the arrangements between poultry processors and growers, once regulated by the *Poultry Meat Industry Act*, now are dealt with in a collective agreement between growers and processors that has ACCC authorisation (A90595; Final Determination issued 9 April 1997).

32. Recommendation:

A legislation review Report is concluded with a Recommendation Section. Depending on the number of restrictions identified (and that may include restrictions that have been reviewed together as part of a consistent whole), and the result of the cost / benefit conclusion relating to each restriction, the recommendation may be either to repeal or amend certain sections, to redesign a regulatory scheme, or to maintain the present scheme.

Review panels should propose alternate arrangements if the policy of the legislation can be achieved without restricting competition.

Further, there may be a need to consider **transitional arrangements** if there is a major adverse impact from a reform falling on one sector of the community - even though there is a net benefit to the community as a whole.

D: Public Consultation Process

33. The level of public consultation will be determined **first**, by the categorisation given to restrictions identified in the legislation:

- Where an Act has a legislative restriction(s) categorised as "serious", the public consultation process should be as extensive as necessary to ensure all stakeholders are aware of the review and have an adequate opportunity to contribute to it.

- Where the restriction on competition is "intermediate", the public consultation process may be somewhat less formal - probably a targeted group will be canvassed.

- A public consultation process will rarely be undertaken if a restriction is categorised as "trivial".

Secondly, where the subject matter of the review is controversial such that the credibility of the final report would be adversely affected by lack of an extensive public consultation process, such a process should be undertaken. Even a trivial restriction would require a public consultation process if there were adverse public perceptions about the restriction (they would need to be unfounded for it to be trivial) such that the credibility of the review would be threatened without public consultation.

34. Elements of an **extensive public consultation process** would include:

- Advertise in a wide-circulation daily newspaper, as well as targeting key stake-holders, to identify those wishing to make submissions;

- Make ToR available to the public on request;

- Provide a Background /Information Paper to those seeking to make a submission. That Paper would set out the ToR as well as the process for receiving public submissions;

- Set at least 4, preferably 6, weeks for public submissions;

- In addition to written comments, opportunities can be made available for oral comments to supplement or explain the written submission;

- A targeted, second round of submissions might be sought from those persons who had responded with an initial submission. Alternatively, comments could be sought on an exposure draft of resulting legislation.

35. Elements of a **less formal process** include:

- Identify a list of key stake holders, such as:
  - industry or consumer peak bodies;
  - major SA suppliers, and SA acquirers, of goods or services in the relevant market;
  - up-stream or down-stream industry representatives if the restrictions or benefits impact on them; and
  - relevant government, local-government, academic, interests.

- Send either the Draft Report or the Terms of Reference to them and request submissions. Allow an adequate period to reply - 4 to 6 weeks.

- No opportunity for subsequent comment.

36. At the lowest level, a less formal consultation process might involve simply a meeting with the interested parties in order to ascertain their views. Of course, a copy of the Terms of Reference should be provided first. It might become apparent from such a meeting that an opportunity for written submissions should be allowed.

E: Independence of the Review

37. Who should conduct the review? The critical element is that the review must have **credibility**. For **serious** restrictions on competition, and where there is a perceived governmental vested interest, a person outside of government should be considered. DPC would advise whether a Cabinet Submission would be required to support such a proposal.

An external reviewer would need a sufficient level of professional status, and may also require access to agency typing and other resources.

The decision to appoint an external reviewer should take into account that while such a person would be independent of government and may add credibility to the review, he/she may lack accountability, may not have sufficient political judgement on distributional and equity matters and, in order to get someone with sufficient industry knowledge, may have ties to the industry or other vested interests.

38. An alternative, is to include an external person on the panel in a quality assessment role, not an initial drafting role. Such a person would assist the panel in its assessment role and read the drafts produced by the relevant panel member - thus adding value and a further element of independence but without excessive cost.

39. The following guidelines may assist the decision as to who should conduct the review:

39.1 External (to Government) Review:

39.1.1 is the Act or Regulation very controversial, or is there a heightened degree of national interest in the Act, such that an external reviewer is required to give the review credibility ?

39.1.2 is it alleged that there are serious economic / commercial effect in markets or in the economy that are attributable to this Act ?

39.1.3 does the Government have a significant commercial interest in markets affected by the legislation ?

39.2 **Internal Government Review:**

39.2.1 **Government Business Enterprises:** Where there is **not** to be an external review, GBEs should not control the review of legislation that affects themselves. Thus, a Review Panel should, at least, be chaired by someone from another agency (it could be from within the same Portfolio), should include a representative from another Portfolio (CSO, Treasury, DIT, etc), and should **not** have a majority of appointees from the GBE. To assist credibility, a person external to government could be appointed to the panel.

39.2.2 **Regulatory Agency administering an Act with a high degree of regulation:** An agency that regulates an industry to a significant degree, where there are restrictions on competition that are either of a

serious or an intermediate level, should include on its review panel, etc, a person from another agency who will fill the "honest broker" role. If credibility demands it, the panel should be chaired by the representative from the other agency, or it may have an external person on the panel.

39.2.3 **Regulatory Agency administering an Act with a low level of regulation:** This legislation would not exhibit "serious" restrictions on competition, nor would it be very intrusive in terms of impact on commercial conduct (low intensity of regulation). This review could be wholly internal to the agency itself.

39.2.4 **Independent Government Boards with Regulatory Functions:** Professional Boards that regulate a profession, such as the Dentists Board, Veterinary Surgeons' Board etc, should not review their own legislation. Such Boards have industry participants in their membership. The review panel should be chaired by, and largely staffed by, another agency (which may be within the same Portfolio). Again, "honest broker" participation from outside the Portfolio (eg, from CSO, Treasury, DIT, etc) would be worthwhile to consider. Again, it may have an external person on the panel.

This Paper is designed as a guideline only. Any further clarification can be obtained from the Competition Unit of the Crown Solicitor's Office, 45 Pirie Street Adelaide, (08) 8207 2541. Also, Dr Rosemary Ince, (08) 8226 2244, and Ms Pamela Tomes, (08) 8226 3695, of the Department of Premier and Cabinet are available to help with any enquiries. Additional background information and discussion of the legislation review process can be obtained from a copy of the Legislation Review Guidelines produced by Western Australia's Treasury in April of 1997. A copy can be obtained on the Internet at: "**www.wa.gov.au/treasury/commpub.html**", or from the SA Department of Premier and Cabinet. **February 1998**

ATTACHMENT 1

The National Competition Council has set out its view of the essential elements of a legislation review process. In particular, the NCC considers that a review should:

- "have appropriately scoped terms of reference (ToR) based on clause 5(9) of the CPA, ideally supplemented by supporting explanatory review information. Both documents should be available upon request;
- have an independent and appropriately constituted review panel for major reviews;
- be genuinely aimed at reform;
- be independent from political interference;
- provide for participation by interested parties through an appropriate consultative mechanism;
- consider all matters relevant to the legislation under review, including public interest issues;
- consider all evidence put forward in an objective way prior to forming a balanced view on the material;
- establish the underlying objective of the legislation;
- identify the impact and magnitude of competitive restrictions;
- identify the costs and benefits arising from the competitive restriction(s) and those which would arise from reform options;
- clearly demonstrate a net public benefit in support of a recommendation to retain restrictive legislation and/or arrangements, and that the objectives of the legislation can only be achieved by restricting competition; and
- make the final report and recommendations publicly available.

The application of each of these elements will vary depending upon the type of review undertaken, but the Council expects that most of the elements will apply in all circumstances. Even in cases where public participation is expected to be minimal, review panels would need to consider options for public consultation. Apart from the benefit of gaining a number of different perspectives and insights on an issue, genuine consultative processes assist in engendering community support for the review program."

ATTACHMENT 2

TEMPLATE TERMS OF REFERENCE

1. The [legislation], and associated regulations, are referred to the [Review Body] for evaluation and report by [date]. The [Review Body] is to focus on those parts of the legislation which restrict competition, or which impose costs or confer benefits on business.

2. The [Review Body] is to report on the appropriate arrangements for regulation, if any, taking into account the following objectives:

   a) legislation/regulation should be retained only if the benefits to the community as a whole outweigh the costs; and if the objectives of the legislation/regulation can not be achieved more efficiently through other means, including non-legislative approaches.
   b) in assessing the matters in (a), regard should be had, where relevant, to effects on the environment, welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business including small business, and efficient resource allocation.
   c) compliance costs and the paper work burden on small business should be reduced where feasible.

3. In making assessments in relation to the matters in (2), the [Review Body] is to have regard to the analytical requirements for regulation assessment by the Commonwealth, including those set out in the Competition Principles Agreement. The report of the [Review Body] should:

   a) identify the nature and magnitude of the social, environmental or other economic problem(s) that the [legislation] seeks to address.
   b) clarify the objectives of the [legislation].
   c) identify whether, and to what extent, the [legislation] restricts competition.
   d) identify relevant alternatives to the [legislation], including non-legislative approaches.
   e) analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of [legislation] and alternatives identified in (d).
   f) identify the different groups likely to be affected by the [legislation] and alternatives.
   g) list the individuals and groups consulted during the review and outline their views.
   h) determine a preferred option for regulation, if any, in light of objectives set out in (2).
   i) examine mechanisms for increasing the overall efficiency, including minimising the compliance costs and paper burden on small business, of the [legislation] and, where it differs, the preferred option.

4 In undertaking the review, the [Review Body] is to advertise nationally, consult with key interest groups and affected parties, and publish a report.

5. Within [3/6] months of receiving the [Review Body's] report, [the Government] intends to announce what action is to be taken, after obtaining advice from [the Secretary/Minister] and where appropriate, after consideration by Cabinet.

ATTACHMENT 3

WHAT IS MEANT BY: "RESTRICTS COMPETITION" ?

1. There are three broad categories of restrictions:

   (a) Those that **restrict entry to the market**;

   (b) Those that **restrict competitive conduct by persons in the market**.

   (c) Those that **discriminate between competitors**.

2. Legislation may achieve these effects either, directly, by:

   • express prohibition,

   or, indirectly, by:

   • enabling subordinate legislation (regulations, rules and by-laws) to be made to that effect, or

   • providing for legislative instruments to achieve that effect; such as providing for terms and conditions to that effect (or an unspecified power to impose terms and conditions) to be imposed in Ministerial consents.

3. It is noted that the categories of restriction overlap. For example, restrictions that discriminate between persons may be either by way of barriers to entry or by way of restrictions on competitive conduct. The practical examples given below are simply to assist in the identification of legislative provisions that "restrict competition".

4. **Examples (non-inclusive) of legislation that restricts competition. Legislation that:**

   (a) **creates a monopoly** (supply side) by prohibiting all persons from engaging in particular commercial conduct except the monopolist -

   the legislation may itself prohibit the conduct generally as well as establish the rights of the monopolist (such as in *the Barley Marketing Act*), or,

   the conduct (opening a lottery) may be prohibited in one Act (the Lotteries and Gaming Act) and another Act (the State Lotteries Act) may establish the rights of the monopolist such as the Lotteries Commission of South Australia.

   (b) **creates a monopoly or restricts entry** (demand side) by prohibiting all persons from acquiring certain goods or services, except from a licensed or monopolist supplier. Thus it is an offence to participate in, aid or abet, an unlicensed lottery;

(c) **restricts entry** (supply side) by limiting the number of providers in the market. Before a person can engage in a particular trade or in certain commercial or professional conduct, they may be required to:

(i) hold a licence;

(ii) obtain the approval of a Minister or an Official;

(iii) obtain certain professional or trade, qualifications or standards;

(iv) obtain membership of, or registration with, a professional or trade, body or organisation;

(v) satisfy certain medical, psychological, or "fit and proper person" standards or tests. This may apply to employees and agents as well as to principals;

(vi) observe certain industrial relations, gender or race quota, occupational health and safety, or other similar obligation that may impose a cost on participation in a market activity; or

(vii) pay a fee or charge (including revenue collection), which is of such an amount, or is discriminately applied, so that it could inhibit entry.

(d) **restricts entry and restricts market conduct** (demand side) by limiting the number or types of goods or services that persons can acquire, thus limiting the size of the market, through:

(i) requiring a prescription or licence to acquire the product;

(ii) limiting the quantity of any particular product that a person may acquire; or

(iii) any outright ban on the acquisition of a particular product (eg, certain "adult" products).

(e) **restricts market conduct** (supply side) by rules that impose, or provide for the imposing of, the:

- price, or
- conditions of quality or standard,

of products provided in the market; or

- the way in which those products may be provided;

for example:

(i) fixing the price of certain goods or services (such as the farm-gate price for milk) or providing a mechanism for fixing the price, such as approval by a Board (eg, the Poultry Meat Industry Committee) or by reference to external factors (eg, the "official" price in another market). Price includes any discount, allowance, rebate or credit.

(ii) rules relating to the quality or standard of goods or services, or to the provision of those goods or services, that may be provided in the market, eg, by requiring:

(a) that goods meet certain Australian Standards,

(b) use-by dates on products,

(c) labelling laws.

(iii) schemes, such as the deposit scheme for beverage containers, that impose a cost on market participation. Such a scheme may have the effect of discriminating in an economic sense against firms in other jurisdictions who wish to enter the SA Market - thus, this can also be a market entry issue;

(iv) enabling certain professional or trade organisations to set Codes of Conduct or Ethics, together with some power (official or unofficial) of enforcing them;

(v) rules requiring certain standards of shop fit out (eg, refrigeration for perishables), or standards for the provision of services (eg, that child minding centres have designated "wet areas") - thus imposing additional supply side costs;

(vi) geographic restrictions on the location of particular businesses or on where certain activities can occur (eg, that certain roads are not available to "heavy vehicles", requiring that heavy industries only set up in "industrial sites", etc);

(vii) hours restrictions (eg, retail shopping hours, or time restraints on airport noise);

(viii) advertising restrictions - this may be achieved through Codes of Conduct or Ethics; or

(ix) restricting the types of equipment, appliances, or procedures than can be used.

NOTE: these supply side restrictions on market conduct may also operate as a barrier to entry in particular circumstances.

(f) **exempts certain conduct** engaged in by the Government or private persons **from the application of the *Trade Practices Act, 1974 (C/wth)***, ("the TP Act"), pursuant to section 51 of the TP Act.

NOTES:

1. As with any private organisation, the Government may decide how it wishes to deal in the market with regard to its own products (both goods and services), so long as it does not contravene the *Trade Practices Act*. Thus, it may make certain products available and not others, it may "bundle" products or sell them individually, it may decide to source the goods/services it needs internally or to outsource that supply, it may impose a royalty scheme for access to products that it owns (rights to fisheries and to petroleum in the ground), and it may require a licence or permission (sometimes at a cost) to enter into, or undertake activities on, property that it owns. Unless it contravenes the *TP Act*, these do not amount to restrictions on competition.

2. The National Competition Council has agreed that the following broad category of restrictions on competition does not need to be reviewed:

   Indenture Acts which simply embody contracts or agreements between the Government and a private developer and have no other effect on competition. (Arguably this is not an exemption at all, since the *Indenture Act* must first be examined for "other effects on competition".)