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Injecting the Public Interest into Legislation Reviews Conducted Under the National Reform Agenda

A Discussion - By KM Corke

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A PAPER PREPARED BY K.M. CORKE AND ASSOCIATES FOR THE FAIR TRADING COALITION

The Fair Trading Coalition (FTC)

is an informal grouping of 29 like-minded small business representative organisations, collectively representing some 300 000 small businesses. The FTC was formed for the purpose of presenting a unified small business view to the Dawson Review of the Trade Practices Act on the need for reform of that Act. Members of the FTC are not bound by any rules or constitution and members are free to express their own views on trade practices matters. However, all members of the Coalition are resolute in their view, while acknowledging the recent amendments to sections 46 and 51AC, that further amendments are required in order to secure an environment which fosters fair competition for the benefit of Australian society.

The members of the Fair Trading Coalition are:

1 Apple & Pear Growers Association of SA Inc
2 Australian Automotive Aftermarket Association
3 Australian Automobile Dealers Association
4 Australian Hotels Association
5 Australian Motor Body Repairers Association
6 Australian Newsagents' Federation
7 Australian Petroleum Agents and Distributors Association
8 Australian Private Hospitals Association
9 Australian Service Station and Convenience Store Association
10 Chamber of Women in Business
11 Civil Contractors Federation
12 Council of Small Business Organisations of Australia
13 Drycleaning Institute of Australia
14 Growcom
15 The Horticulture Council
16 Independent Liquor Group NSW
17 Independent Liquor Stores Association
18 Liquor Stores Association of Victoria
19 Motor Trades Association of Australia
20 The Motor Trades Association of the Australian Capital Territory
21 The Motor Traders' Association of New South Wales
22 The Motor Trades Association of the Northern Territory
23 The Motor Trade Association of South Australia
24 The Motor Trade Association of Western Australia
25 National Institute of Accountants
26 The Pharmacy Guild of Australia
27 Service Station Association Limited
28 Victorian Automobile Chamber of Commerce
29 Western Australian Dental Implant Society AOS (WA) Inc

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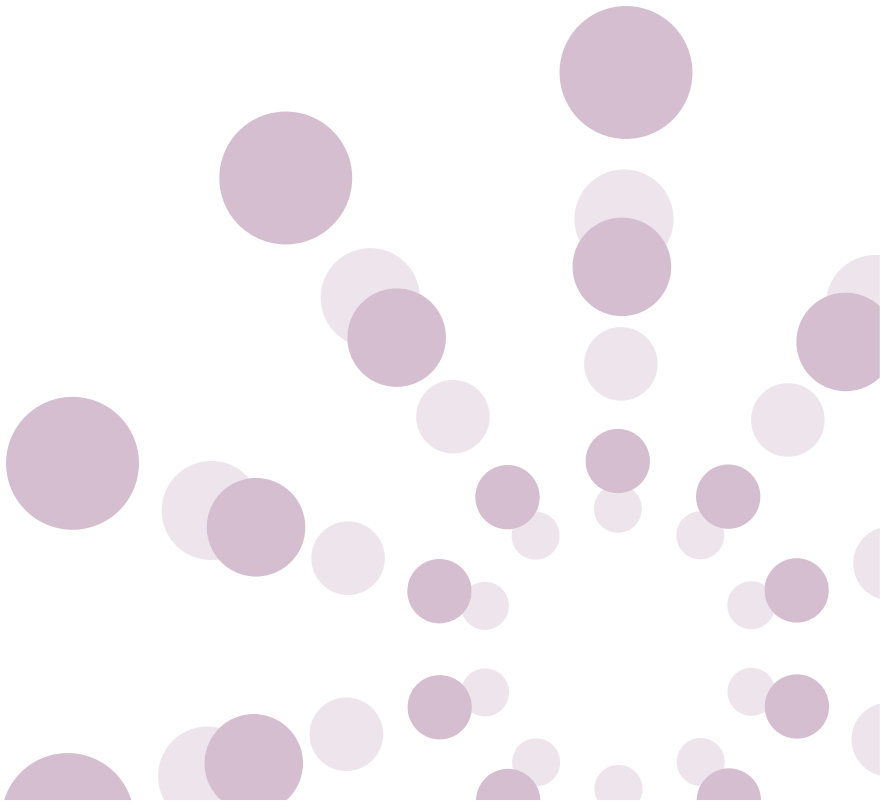


CONTENTS

Executive summary

On 11 April 1995, the Australian Government, the states and territories signed a compendium of agreements to establish national competition policy (NCP) in Australia.

The compendium included the Competition Principles Agreement, which gave effect to the principles of competition policy articulated in the Report of the National Competition Policy Review (the Hilmer Report).

One of the components of NCP required governments to review anti-competitive legislation. In the usual case, these should be removed.

However, the NCP Agreements contain a public interest test, which preserves *prima facie* anti-competitive legislation provided that the test is satisfied.

On 10 February 2006, the Council of Australian Governments (COAG) met and adopted a National Reform Agenda (NRA) which consists of three streams:

- human capital;
- competition, and;
- regulatory reform.

At this meeting, COAG also agreed that:

- all jurisdictions would recommit to the principles contained in the Competition Principles Agreement, and;
- that all outstanding priority legislation reviews from the current NCP legislation review program, in accordance with the current NCP public benefit test, should be completed.

On 13 April 2007, COAG re-confirmed the above decisions and committed all jurisdictions to the establishment and maintenance of 'gate-keeping' mechanisms in order to ensure the quality of legislation.

However, small business remains deeply concerned, as a series of NCP legislative reviews have shown:

- a failure to adequately weight public interest issues that may impact on a conclusion permitting largely unregulated competition, and;
- a fixation with process rather than outcomes.

Similarly, the structure of many government departments charged with 'gate-keeping' arrangements and their interest in 'efficiency' and abstract economic theory, particularly in relation to trade practices matters, illustrate that these economic principles are the key determinants of governments when considering legislation directly affecting small business – rather than the application of the public interest test.

It is hoped that the following recommendations will encourage governments to give full consideration to the public interest when undertaking legislative reviews:

Recommendation 1

Subclause 1(3) of the Competition Principles Agreement contains a number of public interest considerations with regards to the manner in which legislation impacts on competition. The subclause should be amended to ensure that legislation reviews are required to give attention,

in writing, to each of the considerations when deliberating on the public interest test. Furthermore, this rule should be applicable to regulation impact statements prepared for legislation awaiting introduction into Parliament.

Recommendation 2

Subclause 1(3) should be extended to include two additional public interest considerations regarding the:

- the concentration of ownership of Australian business, and:
- whether a change will disproportionately affect a particular sector of the Australian community.

Recommendation 3

Subclause 5(1) of the Competition Principles Agreement should be amended to make manifestly clear the intention of NCP – namely that anti-competitive legislation should be removed *unless* there is a public interest to retain it.

The amended clause must:

- preserve the removal of anti-competitive legislation as the default provision, yet;
- make clear there is a public interest test that must be applied.

Properly applied, such amendments would lead to the creation of legislation that is of net benefit to the community.

Recommendation 4

Governments must recognise that the concept of 'public interest' in public administration is really an injunction to ensure fairness and equity in decision making.

It is apparent that economists have captured the legislative review process, and it would appear that a significant number of those involved in 'gate-keeping' are either economists, or are deeply influenced by economic theory.

In order to ensure fair and equitable decision making, legislation review committees, or those sections of the Australian Public Service charged with reviewing legislation or performing a gate-keeping function, should ensure that staff engaged in such activities possess a cross-section of skills and experiences that reflect those held by the wider community.

Recommendation 5

Government publications designed to assist decision makers who are responsible for developing legislative structures, should reproduce the public interest test in full. Such publications should also include analysis of matters that must be taken into account when considering whether a particular regulation is in the public interest.

Such information will enable governments and decision makers to fully consider the public interest when undertaking NRA legislative reviews.

Chapter 1 – Introduction

> Despite the wide range of factors that can be taken into account in applying the public interest test, there have been various calls for it to be more broadly based and for better guidance to be provided on the appropriate handling of costs and benefits and the weighting of public interest criteria.
>
> Productivity Commission 2005, Inquiry Report 33, *Review of National Competition Policy Reforms,* p. 138.

On 11 April 1995 the Australian Government, states and territories signed a compendium of agreements to establish national competition policy (NCP) in Australia, thus putting into effect the recommendations of the Report of the National Competition Policy Review (the Hilmer Report).

There were a number of elements to NCP. One was a requirement for states and territories to review legislation ensuring compliance with NCP principles, contained in a document called the Competition Principles Agreement (CPA).

Subclause 5(1) of the CPA reads:

> *(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.*

This clause is read in conjunction with subclause 1(3) of the Agreement. That clause reads:

> *(3) Without limiting the matters that may be taken into account, where in this Agreement calls:*
>
> *(a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action, or;*
>
> *(b) for the merits or appropriateness of a particular policy or course of action to be determined, or;*
>
> *(c) for an assessment of the most effective means of achieving a policy objective;*
>
> *the following matters shall, where relevant, be taken into account:*
>
> *(d) government legislation and policies relating to ecologically sustainable development;*
>
> *(e) social welfare and equity considerations, including community service obligations;*
>
> *(f) government legislation and policies relating to such matters such as occupational health and safety, industrial relations and access and equity;*
>
> *(g) economic and regional development, including employment and investment growth;*
>
> *(h) the interests of consumers generally or of a class of consumers;*
>
> *(i) the competitiveness of Australian businesses, and;*
>
> *(j) the efficient allocation of resources.*

Although the term is not used in the Agreement, when read together, these clauses establish a public interest test, which preserves *prima facie* anti-competitive legislation if the test is satisfied.

This gives effect to the heart of the Hilmer Report recommendations:

> *The Committee has not taken a blinkered or dogmatic view over the role of competition in society; in some cases competitive market outcomes will not meet the national interest, because they fail to deliver either efficiency or some other valued social objective. However, the Committee is satisfied that the general desirability of competition was so well established that those who wish to restrict or inhibit competition should bear the burden of demonstrating why that is justified in the public interest.*[1]

This 'reversal of proof' differs from the usual way in which public policy issues are considered and determined. Normally, when choosing one idea over another, a policy maker will choose the idea that is, on balance, the better idea. The Agreement nevertheless delivers the outcome which was anticipated by parts of the Committee's terms of reference, which read:

> *… national competition policy and law should give effect to the following principles:*
>
> *(a) no participant in the market should be able to engage in anti-competitive conduct against the public interest;*
>
> *(b) as far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership;*
>
> *(c) conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed;*
>
> *(d) any changes to the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms:*
>
> *(i) to develop an open, integrated domestic market of goods and services by removing unnecessary barriers to trade and competition, and;*
>
> *(ii) in recognition of the increasingly national operation of markets, to reduce complexity and eliminate administrative duplication.*[2]

Neither the Hilmer Report nor its terms of reference clarify what is meant by the term 'the public interest' or the extent to which it applies to legislative reviews. Another document in the NCP compendium agreed to, on 11 April 1995, is the *Agreement to Implement the National Competition Policy and Related Reforms.*

The Commonwealth promised to pay the states and territories three tranches of general-purpose payments in the form of Competition Payments, receivable if the states and territories complied with NCP.

The Agreement provides that the National Competition Council (NCC) was to assess whether the conditions for payments to the states, as set out in the Agreement, had been met.

In practice, the NCC provides advice to the Treasurer of the Commonwealth regarding the performance of the states and territories in discharging their NCP obligations. In some circumstances, the Treasurer, based upon on the NCC's recommendation, deducted a component of the Competition Payment if the NCC considered that the state or territory had failed to adequately review legislation. However, there are several instances in which the NCC was somewhat mechanical in its application of the public interest test, which may have adversely affected NCP payments.

Example:

Queensland requires sellers of packaged liquor to hold a hotel licence and provide bar facilities. It also regulates the number of bottle shops per licence and their size. The restrictions apply state wide, even though the objective was to protect country hotels. Because this illustrated a 'lack of progress' in implementing NCP, the NCC recommended to the Treasurer a deduction of 5% of Queensland's Competition Payments in each of the years 2003-04, 2004-05 and 2005-06.[3]

COAG 2006

In February 2006, COAG agreed that all jurisdictions would recommit to the principles contained in the Competition Principles Agreement.

Each jurisdiction agreed to complete outstanding priority legislation reviews from the current NCP Legislation Review Program in accordance with the NCP public interest test.

It was also agreed that each jurisdiction would undertake targeted public annual reviews of existing regulation to identify priority areas where regulatory reform would provide significant net benefits to business and the community, thus giving effect to a recommendation made by the Productivity Commission in its *Review of National Competition Policy Reforms*.[4]

COAG agreed there should be (at least) annual targeted reviews, so as to reduce the burden of existing regulation, where regulatory reform would provide significant gains to business and the community.

Furthermore, each jurisdiction also agreed to continue to strengthen 'gate-keeping arrangements', the administrative procedures designed to prevent the deduction of unwarranted competition restrictions in new and amended legislation and regulations.

COAG 2007

COAG met again on 13 April 2007 and established the COAG Reform Council to monitor the progress of governments in implementing the NRA reforms. The Council was also charged with assessing the costs and benefits of reforms referred to it by COAG.

COAG also confirmed its commitment to review legislation annually, and undertook to maximise the efficiency of regulation.

Relevant extracts from the COAG National Reform Agenda's *COAG Regulatory Reform Plan* are set out in Appendix A.

The future application of the public interest test

NCP is now a mature policy, and key goals such as ensuring Australia has competitive energy, water and transport markets are well on the way to being delivered.

Other legislative schemes that were clearly anti-competitive, or for which market-based policy initiatives recommend themselves, have been amended or repealed.

However, the issue that remains is the one that is the most difficult for many; that is the acknowledgement of a real and arguable public interest case for retaining existing legislative schemes, or alternatively, the development of new legislative schemes that recognise the role of small business in Australia.

Unfortunately, much of the literature that is available to Committees undertaking legislative reviews fails to provide a framework that adequately encompasses and expresses the need for public interest. Both the Australian Government's *Best Practice Regulation Handbook* and COAG's *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*, refer to the public interest test without reference to matters listed in subclause 1(3) of the Competition Principles Agreement, referred to earlier.

Similarly, the terminology of the *COAG Regulatory Reform Plan*, with its emphasis on efficiency and the complete absence of the term 'public interest' suggests that the absence of balance when considering whether administrative schemes are in the public interest will remain.

The Fair Trading Coalition (FTC) is a group of 29 small business organisations that seeks to secure an environment which fosters fair competition for the benefit of the Australian public. In recent years the FTC has seen the erosion of the public interest as legislation designed to promote allocative efficiency has seen the demise of small businesses in areas such as liquor and petroleum, leading to significant imbalances within the marketplace.

The consequences of market concentration and predatory behaviour include the lack of competition and choice and higher prices for retail goods and services which, singularly and collectively, negatively impacts the Australian consumer.

It is imperative that governments recognise the need to apply the public interest test in its review of existing or proposed legislation so that the negative impacts can be avoided.

The purpose of this publication is to encourage balance when considering schemes that impact on small business and to stimulate a public debate regarding the future application of the public interest test.

Chapter 2 – What is the 'public interest'?

The concept of 'public interest' has been discussed in a number of different ways by academics, bureaucrats and members of the legal fraternity.

The Australian Law Reform Commission eloquently elucidates the complexities facing governments seeking to apply the public interest test:

> *The determination of public interest is essentially non-justifiable and depends on the application of a subjective rather than an ascertainable criterion. The origins of the public interest test also create uncertainty. The public interest has been described as something that is of serious concern or benefit to the public not merely of individual interest. It has also been held that public interest does not mean 'of interest to the public' but 'in the interest of the public' ... The public interest will change over time and according to the circumstances of each situation. It would be impossible to define the public interest yet allow the necessary flexibility.*[5]

The new discourse on 'public interest' is emerging in two forms; the first claims normative status for public interest that is seen as representative of the good of 'society as a whole' and the second locates public interest within the policy process itself, or in simpler terms, that 'due process' ensures that policy outcomes will accord with public interest.[6]

Typical of the former is the framing of the contemporary form of public interest in the formal and normative economic terms, often accompanied by a disclaimer of this narrow intention. The characteristic assumptions here are: the public interest can be quantitatively valued, that this evaluation may best be done through costing and that the results can be universally applied in the interests of 'society as a whole'. This approach is evident in the way policy documents apply the 'public benefit test' to achieve the aims of NCP.

For example, the Queensland Treasury guidelines for competition policy implementation specify that the public benefit test:

> *…Will not be restricted to issues of economic efficiency. Assessments will also outline the likely distribution impacts among individuals and groups of individuals within society. This approach requires the identification and measurement of the impacts of a change (positive or negative) on any affected individual or group, in addition to the determination of the net change in society's economic welfare, defined as the Net Impact of the change.*[7]

In this case, the attempt to reconstruct public interest within an economic rationality not only reduces it to those factors that can be measured, but is simply incomprehensible as a guide to policy activity.

There is also a formulation of a normative position in which the use of public interest is used as a normative response to the perceived excesses of economic rationalism. In this approach *the* public interest is being invoked as a universally applicable benchmark to oppose the market orientation of economic rationalism. Within this construct, normative claims regarding the often complex loss of equity and justice may be coupled with specific empirical examples of social costs associated with reform implementation. Thus the use of public interest in this context enables the creation of a more diverse discourse based upon social capital, social cohesion and community building which provides an alternative framework of ideas for the role of government and the relations between governments, communities and markets.

The current debate examines the public interest as a consequence of procedural justice. Under this rationale, provided due process is followed it can be assumed that outcomes may be compatible with public interest. Thus in this sense, public interest becomes a situational and utilitarian idea rather than an *a priori* idea. An interesting aspect of this consequence is the interpretation of the *Trade Practices Act1974* public benefit test to define public interest as:

> *Anything of value to the community in general, any contribution to the aims pursued by society including, as one of its principal elements … The achievement of the economic goals of efficiency and progress.*[8]

This reduction of the public interest to the outcomes of 'due process' removes any reference to the distinction between private and public interest and any reference to underlying 'common values'. There is a potential here that the quantitative processes will so completely capture decision-making that the traditional social goals of policy are lost. Should decision makers continue to implement NCP based upon the cost benefits of legislation, there is a real concern that economics and due process may be regarded as compatible with the public interest regardless of their actual social impacts.

Chapter 3 – How well has the concept of 'public interest' been applied to NCP reviews?

> A central tenet of competition policy reform is that competition is not an end unto itself and while in general introducing competition will deliver benefits to the consumer, there are situations where community welfare is judged best served by not effecting particular competition reforms. Thus in the implementation of the reforms spelt out in the Competition Principles Agreement, governments have recognised the importance of the concept of a 'weighing up' process of costs and benefits to the community. Competition is to be implemented to the extent that the benefits to be realised from competition outweigh the costs.
>
> House of Representatives Standing Committee on Financial Institutions and Public Administration, *Cultivating Competition - Report of the Inquiry into the Aspects of the National Competition Policy Reform Package*, June 1997, p.9.

The public interest test: – a historical review

The NCC was created under NCP and was charged with the responsibility of assessing how well states and territories conducted legislation reviews against NCP competition principles.

Under these arrangements, if the NCC judged completed legislative reviews to be satisfactory, the states and territories received National Competition Payments from the Commonwealth.

In November 1996 the NCC published *Considering the Public Interest Under the National Competition Policy,* which examined how the issue of public interest was to be approached at the introduction of NCP.

It said:

> *Australians are increasingly recognising that improvements in the competitiveness of the Australian economy will improve economic efficiency and play a vital role in enhancing overall community welfare by increasing the productive base of the economy. Governments endorsed this view in signing the intergovernmental competition policy agreements in April 1995.*
>
> *Nonetheless, while competition is generally consistent with economic efficiency goals and the interests of the community as a whole, there may be situations where there is conflict with certain social objectives. For example, governments may wish to confer benefits on a particular group for equity reasons. Governments also implement restrictions on competition*

for reasons of 'market failure'. This occurs where special features of a market mean that unfettered competition reduces the welfare of the community. Governments argue that it is in the 'public interest' to restrict competitive outcomes in such instances.

… CPA subclause 1(3) provides for examination of the relationship between the overall interest of the community, competition and desirable economic and social outcomes. It allows governments to assess the net benefit of different ways of achieving particular social objectives.

… The CPA states that these factors (and any others) may be considered in balancing the benefits of a particular policy or course of action against the costs, to determine the appropriateness or most effective means of achieving a policy objective. In this respect, subclause 1(3) provides governments with a consistent approach to assessing whether the commitments to reform contained in the intergovernmental agreements threaten desired social objectives. The inclusion of the subclause in the CPA reflects the desire of governments to make clear their view that competition policy is not about maximising competition per se, but about using competition to improve the community's living standards and employment opportunities.[9]

It also said:

Australian policy makers have left defining the 'public interest' for trade practices purposes to case-by-case assessment rather than trying to be prescriptive. In this respect, anything deemed to be of value to the community could be judged to be in the public interest. Consistent with this approach, subclause 1(3) is not exclusive or prescriptive. Rather, it provides a list of indicative factors a government could look at in considering the benefits and costs of particular actions, while not excluding consideration of any other matters in assessing the public interest.[10]

However, there are a series of critical issues weighting the manner in which governments apply those factors listed in subclause 1(3); including the extent to which the interests of the whole community should be dismissed against interests of particular groups. Governments must undertake difficult judgments in such matters when weighing the benefits and costs involved as outcomes will be determined, to some degree, by the subject matter of the review, and it is appropriate that such matters be assessed on a case-by-case basis.

However, despite the wide terms of subclause 1(3) of the CPA, it would appear the NCC as well as those conducting NCP legislation reviews applied the public interest test in an unnecessarily narrow application. It appears that the methodology behind such application is driven by economic theory, namely the efficient allocation of resources and a preference for cost benefit analysis, which undoubtedly makes the quantifiable analysis of social factors difficult.

This direction has not gone unnoticed. In 2004, Gary Banks, Chairman of the Productivity Commission noted that:

Officials charged with responsibility for the application of NCP are overwhelmingly drawn from economic backgrounds. Whilst this provides excellent training for the assessment of the financial or efficiency benefits of NCP there is a gap in the determination of the wider issues that can, should and do, arise under the public interest test.[11]

Notwithstanding all that was said in *Considering the Public Interest Under the National Competition Policy*, other NCC literature appears to lead one to the conclusion that anything other than a *laissez-faire* approach would, more than likely, fail the public interest test.

Similarly, submissions to the Senate Select Committee on Socio-Economic Consequences of the National Competition Policy said:

> *It is the principle of NCP that a balance be struck between economic efficiency and social responsibility... However, the NCC has not provided adequate guidance or frameworks for achieving such a balance. For example, the National Competition Council retained the Centre for International Economics to produce a paper on legislative review under NCP. Furthermore any analysis of advantages and disadvantages associated with various restrictions on competition, disadvantages associated with various restrictions on competition, are countered with general and not necessarily applicable responses. For example, the funding of non-rival and non-excludable goods (e.g. footpaths, parks) through compulsory levies is considered to be a problem because it 'may crowd out new initiatives'. It becomes apparent later in the document that 'new initiatives' include 'private toll gates to be erected in public places' and the deregulation may 'encourage and facilitate new technologies which enhance charging'. The entire process appears to give no consideration or weight to values of social cohesion, and the equality of access to certain services, particularly public services.*[12]

In February 1999 the NCC published a document prepared for the NCC by the Centre for International Economics (CIE) called *Guidelines for NCP Legislation Reviews*. It contains the following observation:

> *Where the political sensitivities to implementation are strong, a comprehensive process of public debate may be crucial to educate the electorate of the need to change and to counter the resistance from vested interests.*[13]

It is clear that the authors of the document are suggesting a crossover between genuine debate about the wisdom of a particular set of reforms, and using the so-called debate to convince the electorate of the need for those reforms. This is untenable. The sentiments expressed above probably influenced the Senate Committee to conclude in its report:

> *The committee continues to be concerned about the application of 'public interest' given the confusion that exists over what the term means or allows under NCP. The confusion, when combined with the administrative ease of simply seeking to measure outcomes in terms of price changes, encourages the application of a narrow, restrictive definition. The Committee considers that it is important to devise a method of assessment of the policy, which contributes a numerical weighting to environmental and social factors to avoid the overemphasis on dollars merely because they are easy to measure.*[14]

Given the level of public debate about the increasing reliance upon economics in determining the public interest, it is deeply concerning that the *Guidelines for NCP Legislation Reviews* remains available as a resource on the NCC website for use by those reviewing legislation given that the following statements appear within the text:

- *'in all likelihood restrictions to competition impose large net costs on the community...' and;*
- *'restrictions to competition are guilty until proven innocent...'*[15]

Clearly, the language within the *Guidelines* infers that a review of legislation should be approached from an economist's perspective and with a healthy, if not biased predilection towards the abandonment of any restriction in competition.

An extract from the *Guidelines* appears in Appendix B.

The following examples are excellent illustrations of instances in which legislative reviews have determined public interest based upon cost benefits, rather than the often significant social benefits available:

Example 1: Pharmacy laws (ACT)

A combination of ACT and Commonwealth legislation ensures that community pharmacies are owned and operated by pharmacists in order to ensure that the health of the community is not prejudiced.[16]

At the request of the ACT Government in 2005, a study was conducted to examine the pharmacy laws of the ACT against NCP principles. The reviewers admitted:

> *A difficulty with many cost benefit assessments is that it is necessary to consider a wide range of social, economic and other costs and benefits associated with different service delivery models. As the models target more than one objective, it is likely that each model will have a positive impact on some of the objectives, and negative effects on others. Even in the rare event that this were not the case, and that all the models had universally positive or negative impacts on all the objectives, it would still be necessary to gauge the extent to which one model was better than another, or the extent to which one objective was more or less important than another.*[17]

They went on to say:

> *It is important to acknowledge that the competition test does not require that all restrictions on competition be unilaterally removed. Rather, it requires consideration of the net public benefits, with a presumption that the restrictions will be removed unless the benefits to the community as a whole outweigh the costs. The burden of proof is on those who benefit from competitive restrictions, to establish the public interest case of the retention or enactment of legislation which restricts competition.*[18]

The Report conceded the ACT was apparently well served by community pharmacy, and that there were no unmet needs in the delivery of community pharmacy services. However, as the *status quo* didn't provide a net benefit greater than the possible alternatives, the public interest case for retaining it was not met.

One of the advantages of ACT pharmacy is the fact that pharmacies are located in almost every shopping centre in Canberra. It therefore provides a ready infrastructure to allow, for instance, the deployment of the National Medicines Stockpile (NMS) to the community in the event of a bird flu pandemic, thus permitting elderly and disadvantaged people significant access and convenience to medical assistance.[19]

Surely, ready access to the NMS constitutes a public benefit that should not be traded away simply because of a mechanical application of abstract economic principle.

Example 2: Retail trading hours (WA)

The NCC has consistently criticised jurisdictions that retain trading restrictions. However, Western Australia retains restrictions on the hours that shops are permitted to trade - especially on Sundays.

In 2005, Western Australia held a referendum on whether to extend trading hours. Voters were asked to assess separately whether the Western Australian community would benefit if general retail trading hours in the Perth metropolitan area were extended to allow trading until 9pm on weeknights, and for six hours on Sundays. Before the referendum the Western Australian Electoral Commission prepared and published comprehensive arguments supporting the 'yes' and 'no' cases. This was the question, and the results:

Polling Day: 26 February 2005

Question 1: Extended weeknight shopping.

Do you believe that the Western Australian community would benefit if trading hours in the Perth metropolitan area were extended to allow general retail shops to trade until 9pm Monday to Friday?

Question 2: Extended Sunday shopping.

Do you believe that the Western Australian community would benefit if trading hours in the Perth metropolitan area were extended to allow general retail shops to trade for 6 hours on Sunday?

Outcome:							
Question 1.	Yes	457,183	40.49%	**Question 2.**	Yes	422,942	37.46%
	No	648,860	57.46%		No	672,478	59.56%
	Informal	23,158	2.05%		Informal	33,644	2.98%
	Total	**1,129,201**	**100%**		**Total**	**1,129,064**	**100%**

The proposal to extend trading hours in the Perth metropolitan area to allow general retail shops to trade until 9pm Monday to Friday was rejected, as was the proposal to extend trading hours within the Perth metropolitan area to allow general retail shops to trade for six hours on Sunday.[20]

The NCC's annual report included an assessment of the referendum, and noted that:

> *The Treasurer of Western Australia subsequently wrote to the Council, advising that Western Australia had decided not to address restrictions in the state's retail trade legislation because the referendum had established the public interest for the restrictions, thereby fulfilling the requirements of CPA clause 5. The letter advised that the Council, to conclude otherwise, would have to assume that it knows more than the public about Western Australia's public interest.*
>
> *Clause 5 of the CPA obliges governments to review and, where appropriate, reform all existing legislation (at June 1996) that restricts competition. It requires governments to remove restrictions on competition unless they can demonstrate that the restrictions are warranted—that is, that restricting competition benefits the community overall (being in the public interest) and that the restriction is necessary. The Council has consistently stated that it considers that independent, transparent and objective reviews provide the best opportunity to assess all costs and benefits of restrictions on competition.*
>
> *The Council is also mindful of COAG's (2000) directive to consider whether review conclusions are within a range of outcomes that could reasonably be reached based on the information available to a 'properly constituted review process'. Any public interest case for competition restrictions thus needs to be supported by relevant evidence and robust analysis. Where a government introduces or retains competition restrictions, and this action was not reasonably drawn from the recommendations of a review, the Council looks for the government to provide a rigorous supporting case, including a demonstration of flaws in the review's analysis and reasoning.*
>
> *The Council considers that conducting a referendum does not absolve a government from its NCP legislation review obligations. The Council thus retains its previous assessment that Western Australia has not met its CPA clause 5 obligations in relation to the regulation of shop trading hours.*[21]

In this case, all Western Australians were informed of the issues and voted to retain retail trading restrictions. The referendum was conducted by an Electoral Commission and the electorate received information canvassing the issues from that body.

Undoubtedly, voters considered issues such as the convenience of shopping over extended hours and the effect of longer hours on workers, and the desirability of retaining the option of

shopping with small businesses as well as with larger corporations. One assumes the information provided by the Commission was adequate; otherwise the NCC would have referred to it in its assessment, which it did not. Within this context, it is difficult to see how:

- the outcome was not within the range of outcomes that could reasonably be reached based on information available to a properly constituted review process, and;
- a referendum of properly informed electors is not a 'properly constituted' review process.

Given the provision of referendum material provided to the Western Australian electorate, the NCC's retention of its assessment and its cavalier contempt of the properly advised democratic process identifies that the document constituting NCP is flawed and should be reviewed.

Example 3: Liquor (NT)

In 2004, the Northern Territory Government acted to completely overhaul its liquor legislation.

One of the big issues in this exercise was to ensure that harm caused by alcohol to members of the Territory community was minimised.

NT liquor legislation previously only permitted the granting of a liquor license if a 'needs test' was satisfied – whether or not there was a community need for an additional liquor license.

The NCC has consistently criticised such discretionary grounds for the granting of licences, such as on the basis of 'need', as being anti-competitive.

As part of the overhaul, the Territory removed the needs test from legislation. However, whilst the overhaul continues, a restriction on take-away sales from liquor shops (although not clubs and taverns) on Sundays remains. This is to minimise the harm to the community caused by alcohol during the overhaul.

The NCC said:

> *In August 2004, the government reaffirmed its decision to retain the Sunday trading restriction. For the 2004 NCP assessment, the Territory provided a public benefit case supporting the restriction on packaged liquor sales. The Council, however, found that the Territory had not provided a credible justification to restricting packaged liquor sales in a manner that discriminates between types of liquor outlet. The Council recommended that the public interest assessment should also have considered a range of alternative approaches, including:*
>
> - *banning all packaged liquor sales on Sundays, regardless of outlet type;*
> - *instituting bans on particular beverages considered to cause harm;*
> - *instituting a roster system that retains the current number of sellers on Sundays but allows all incumbents the opportunity to trade, and;*
> - *allowing all liquor outlets to trade on Sundays but for a more restricted period in the current 12 hours.*
>
> *Alternatively, the Council requested the Northern Territory Government to develop additional policy options that promote harm minimisation objectives in a nondiscriminatory manner, or to provide an analysis demonstrating why the suggested options are inconsistent with public benefit objectives.*
>
> *However, the Northern Territory continued to discriminate between sellers in relation to Sunday trading hours, without providing a convincing public interest case.*[22]

As a result, the NCC recommended that 5% of the Northern Territory's competition payments be deducted for not complying with competition policy.

The Northern Territory submission to the Productivity Commission's review of NCP appears to make a very good point when it argues:

> *(With respect to liquor regulation) the substantial intractable social impacts associated with the consumption of alcohol in the Northern Territory, relative to other jurisdictions, and the comprehensive measures being developed by the Territory Government to ameliorate these effects, was not adequately recognised (by the NCC).*[23]

This appears to be a classic case in which an economist's wish for market efficiency has overridden a *bona fide* attempt to limit the effect alcohol has on the socially disparate Northern Territory community in the way that best suits that community – that is, to the public benefit of the people of the Northern Territory.

The mechanical application of the NCP public interest test appears to be at odds with the way in which the Australian Competition and Consumer Commission (ACCC) applies the 'net public benefit test'.

This is the test used to assess whether someone should have authorised contracts, agreements or understandings which may have the (otherwise illegal) purpose or likely effect of substantially lessening competition within the meaning of section 45 of the *Trade Practices Act 1974*.

On 30 May 2005, Graeme Samuel, the Chairman of the ACCC delivered a speech entitled *Competition with Compassion: Australia's Economic Success Story*. He said, in part:

> *Now, I do not claim here that every proposal for reform that improves business competitiveness is desirable, or that every suggestion by an economist should be given credence. It is true that competition will generally improve economic efficiency and community welfare. But this does not mean that considerations of equity, which sometimes are to be addressed at the cost of efficiency, should be ignored.*
>
> *Nor does it mean that the benefits of reform will never be outweighed by associated costs, or that market failure does not exist or that it never warrants regulation by governments.*
>
> *Certainly the role of the Australian Competition and Consumer Commission would be far simpler if this were the case.*
>
> *So an important task for governments is to determine whether or not economic reform brings a net community benefit, and is not just reform for the sake of reform.*
>
> *In doing this, governments must consider an array of community interest matters, including the environment, employment, social and welfare, regional development and consumer interests as well as business competitiveness and economic efficiency.*[24]

And so the ACCC does. As an example, The Showmans' Guild of Australasia was successful in obtaining from the ACCC an Authorisation to (amongst other things):

- *allow members of the Guild to deal collectively with show societies around the country, and;*
- *allocate the members who would provide services to a particular show.*[25]

While imposing a number of conditions, the ACCC decided, amongst other things, that there was a net benefit in giving the Authorisation as the collective bargaining provision would likely assist small show societies organise their sideshow areas and therefore attract showmen to their shows. This in turn is likely to provide economic and social benefits to rural communities and produce some benefits to the public.

It is a shame the NCC didn't appear to show the same sort of approach when considering NCP reviews of legislation.

A HANDY SUMMARY OF THE ISSUES

The new discourse on 'public interest' is emerging in two forms. The first claims normative status for public interest that is seen as representative of the good of 'society as a whole'. The second locates public interest in the proper functioning of the policy process itself, implying that as long as the process is followed outcomes will accord with public interest.

Typical of the former is the framing of the contemporary form of public interest in the formal and normative economic terms, often accompanied by a disclaimer of this narrow intention. The characteristic assumptions here are: the public interest can be quantitatively valued, that this may best be done through costing and that the results can be universally applied in the interests of 'society as a whole'. This approach is evident in the way policy documents apply the 'public benefit test' to achieve the aims of NCP.

So the Queensland Treasury guidelines for competition policy implementation specify that the 'public benefit test':

…Will not be restricted to issues of economic efficiency. Assessments will also outline the likely distribution impacts among individuals and groups of individuals within society. This approach requires the identification and measurement of the impacts of a change (positive or negative) on any affected individual or group, in addition to the determination of the net change in society's economic welfare, defined as the Net Impact of the change (Queensland Treasury, *Public Benefit Test Guidelines*, 1999, p.40.)

Here the result of the attempt to reconstruct public interest within an economic rationality not only reduces it to those factors that can be measured, but is simply incomprehensible as a guide to policy activity.

There is also a formulation of a normative position, which may be seen as the other side of this economic rationalist approach: using public interest as a normative response to the perceived excesses of economic rationalism. In this approach *the* public interest is being invoked as a universally applicable benchmark to oppose the market orientation of economic rationalism. Here normative claims about the loss of equity and justice may be coupled with specific empirical examples of social costs associated with reform implementation. The use of public interest in this sense can be seen as part of a more diverse discourse emerging around social capital, social cohesion and community building as alternative framing ideas for the role of government and the relations between governments, communities and markets.

A second use of public interest in the current debate defines it as a consequence of procedural justice. Under this rationale, as long as due process is followed it may be assumed that outcomes will be compatible with public interest. In this sense public interest becomes a situational and utilitarian idea rather than an *a priori* idea. An interesting aspect of this is the use of the Trade Practices Act public benefit test to define public interest as:

Anything of value to the community in general, any contribution to the aims pursued by society including, as one of its principal elements … The achievement of the economic goals of efficiency and progress (*Considering Public Interest Under the National Competition Policy*, 1996, p.8).

This reduction of the public interest to the outcomes of 'due process' removes any reference to the distinction between private and public interest and any reference to underlying 'common values'. There is a potential here that the quantitative processes will so completely capture decision-making that it loses sight of the social goals of policy. Thus, for example, if NCP is implemented in accordance with due process in which the emphasis is on costing, its outcomes may be regarded as compatible with the public interest regardless of their actual social impacts (Hess, M and Adams, D, *National Competition Policy and (the) Public Interest*, National Centre for Development Studies Briefing Paper No.3, April 1999, pp.5-6).

Chapter 4 – Public interest and competition policy: the way forward

> Greater clarity, greater normative specificity is necessary in usage of the term 'the public interest', as otherwise the (too) malleable concept may fail to serve any useful function in the name of the public interest. It will be a straw in the wind, rather than a force of resistance.
>
> Feintuck, *The Public Interest in Regulation*, 2004, p.152.

As illustrated in previous chapters, it appears that NCC assessments of NCP reviews, as well as state and territory legislation reviews suffer from:

- a failure to adequately weight public interest issues that may impact on a conclusion permitting largely unregulated competition, and;
- a fixation with process rather than outcomes.

Such failures negatively affect the consideration of the public interest by review committees during the application of public interest test.

COAG has reaffirmed the need to review Australia's legislative stock to ensure that it satisfies competition principles. However, in determining the future application of public interest and competition policy, there is an urgent need to ensure that abstract economic theory is not applied to the design of Australian legislation, to the detriment of Australian small business.

There is some evidence to suggest that there is growing recognition that issues relating to small business should be considered when dealing with legislation affecting competition. For instance, the Australian Government's *Best Practice Regulation Handbook* requires regulatory impact statements to examine the effect the proposed regulation would have on small business.

Whilst regulatory impact statements are a positive step, legislation is still required to pass the gauntlet of 'gatekeepers' and committees who are focused upon efficiency and costings. Sadly, many fail to give full regard to the overall public interest when undertaking such reviews.

In order to ensure that the public interest is taken into account when committees conduct NCP reviews of legislation or alternatively during deliberations by the COAG Reform Council, subclause 1(3) of the CPA should be amended.

The amendments should require reviewers and drafters of regulatory impact statements to consider each of the public interest considerations and record their conclusions in writing.

Additionally, so as to recognise the concerns raised by the South Australian House of Assembly Economics and Finance Committee in its *Final Report: National Competition Policy*, the concentration of ownership of Australian business should be included on the list of issues, as should be the consideration of whether legislative change will disproportionately affect a particular sector of the Australian community.[26]

In order to realise the intention of NCP; namely, that anti-competitive legislation should be removed *unless* there is a public interest to retain it, subclause 5(1) should be amended in a manner which:

- preserves the removal of anti-competitive legislation as the default provision, yet;
- makes clear there is a public interest test.

Properly applied, such amendments would lead to legislation that is of significant net benefit to the community.

COAG should approach this matter with great urgency and ensure that the amended principle is reflected in all reference and guiding documentation referred to by reviewers. Publications requiring updating include: the *COAG Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*, the *Best Practice Regulation Handbook*, as well as similar publications produced by the states and territories.

It is crucial that decision makers recognise the imbalance that exists, in the review process, between economic considerations and that which is in the public interest. The prevalence of economists within the NCC means the absence of alternative or opposing voices from other academic and professional fields. Naturally, an economist's training is specifically focused on financial concerns. In determining the 'public interest', this focus does not necessarily ensure fairness and equity.

Indeed, in working out overall fairness, it is beneficial to have people drawn from a number of different environments who bring different sets of skills and perceptions to the decision-making process. This is the basis on which juries and parliaments work.

There is no reason to conclude why the body making final decisions as to whether the retention of competitive restrictions in legislation is in 'the public interest' should not be similarly constituted.

The Productivity Commission, NSW Independent Pricing and Regulatory Tribunal, Victorian Competition and Efficiency Commission, as well as the areas in Premiers and Chief Minister's Departments charged with gate-keeping responsibilities are similarly structured.

However, it is noted that there are occasions where there is an attempt to balance the apex of administrative structures. For example, when appointing people to the Productivity Commission, the Government must make sure that at least:

- *one Commissioner has extensive skills and experience in applying the principles of ecologically sustainable development and environmental conservation;*
- *one Commissioner has extensive skills and experience in dealing with the social effects of economic adjustment and social welfare service delivery, and;*
- *one Commissioner has extensive skills and experience acquired through working in Australian industry.* [27]

Jurisdictions should ensure that staff undertaking gate-keeping activities are representative of the wider professional community in order to ensure a mix of experience and approaches in dealing with these issues.

It is imperative that governments reverse the current fixation upon process and efficiency, by adequately weighting outcomes when determining competition and public interest matters. Only by agreeing to the above recommendations will COAG ensure that the public interest will be reinstated into the review of legislation against competition principles.

Appendix A – Extract from COAG National Reform Agenda / COAG Regulatory Reform Plan, April 2007

Maximising the efficiency of regulation

COAG has agreed that all Governments will establish and maintain effective arrangements at each level of government that maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition by:

(a) establishing and maintaining 'gate keeping mechanisms' as part of the decision-making process to ensure that the regulatory impact of proposed regulatory instruments are made fully transparent to decision makers in advance of decisions being made and to the public as soon as possible;

(b) improving the quality of regulation impact analysis through the use, where appropriate, of cost-benefit analysis;

(c) better measurement of compliance costs flowing from new and amended regulation, such as through the use of the Commonwealth Office of Small Business' costing model;

(d) broadening the scope of regulation impact analysis, where appropriate, to recognise the effect of regulation on individuals and the cumulative burden on business and, as part of the consideration of alternatives to new regulation, have regard to whether the existing regulatory regimes of other jurisdictions might offer a viable alternative, and;

(e) applying these arrangements to Ministerial Councils.

Regulation refers to the broad range of legally enforceable instruments which impose mandatory requirements upon business and the community as well as to those government voluntary codes and advisory instruments, for which there is a reasonable expectation of widespread compliance.

In keeping with this commitment to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition, COAG agrees that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles:

(1) establishing a case for action before addressing a problem;

(2) a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;

(3) adopting the option that generates the greatest net benefit for the community;

(4) in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:

  (a) the benefits of the restrictions to the community as a whole outweigh the costs, and;

  (b) the objectives of the regulation can only be achieved by restricting competition

(5) providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;

(6) ensuring that regulation remains relevant and effective over time;

(7) consulting effectively with affected key stakeholders at all stages of the regulatory cycle, and;

(8) government action should be effective and proportional to the issue being addressed.

Having regard to the above principles, the parties have agreed that regulation impact analysis of the feasible policy options, will, among other things, include an assessment of whether:

(a) an existing regulatory model is in place outside the jurisdiction that would efficiently address the issue in question, and;

(b) a uniform harmonised or jurisdiction-specific model would achieve the least burdensome outcome (or generate the greatest net benefit for the community).

In deciding on whether to adopt a uniform, harmonised or jurisdiction-specific model, governments will have regard to:

» the potential for better regulatory practices to be developed through regulatory competition, innovation and dynamism;
» the relative effectiveness and efficiency of the alternative models, including regulatory burdens and any transition costs, and;
» whether the issue is state-specific or national, and whether there are substantial differences that may require jurisdiction-specific responses.

The parties have committed to the actions specified in Appendix C to give effect to the commitments made by COAG and to ensure that the agreed principles flow through into practice.

Annual Reviews

COAG has agreed that each jurisdiction will review existing regulations with a view to encouraging competition and efficiency and streamlining and reducing the regulatory burden on business by:

(a) initiating at least annual targeted reviews to reduce the burden of existing regulation in its own jurisdiction through a public inquiry and reporting process that provides opportunities for input from a range of stakeholders including business groups, with each review to identify priority areas where regulatory reform could provide significant gains to business and the community, and;

(b) acting on the recommendations of the reviews referred to above, and coordinating reform measures with other jurisdictions if appropriate.

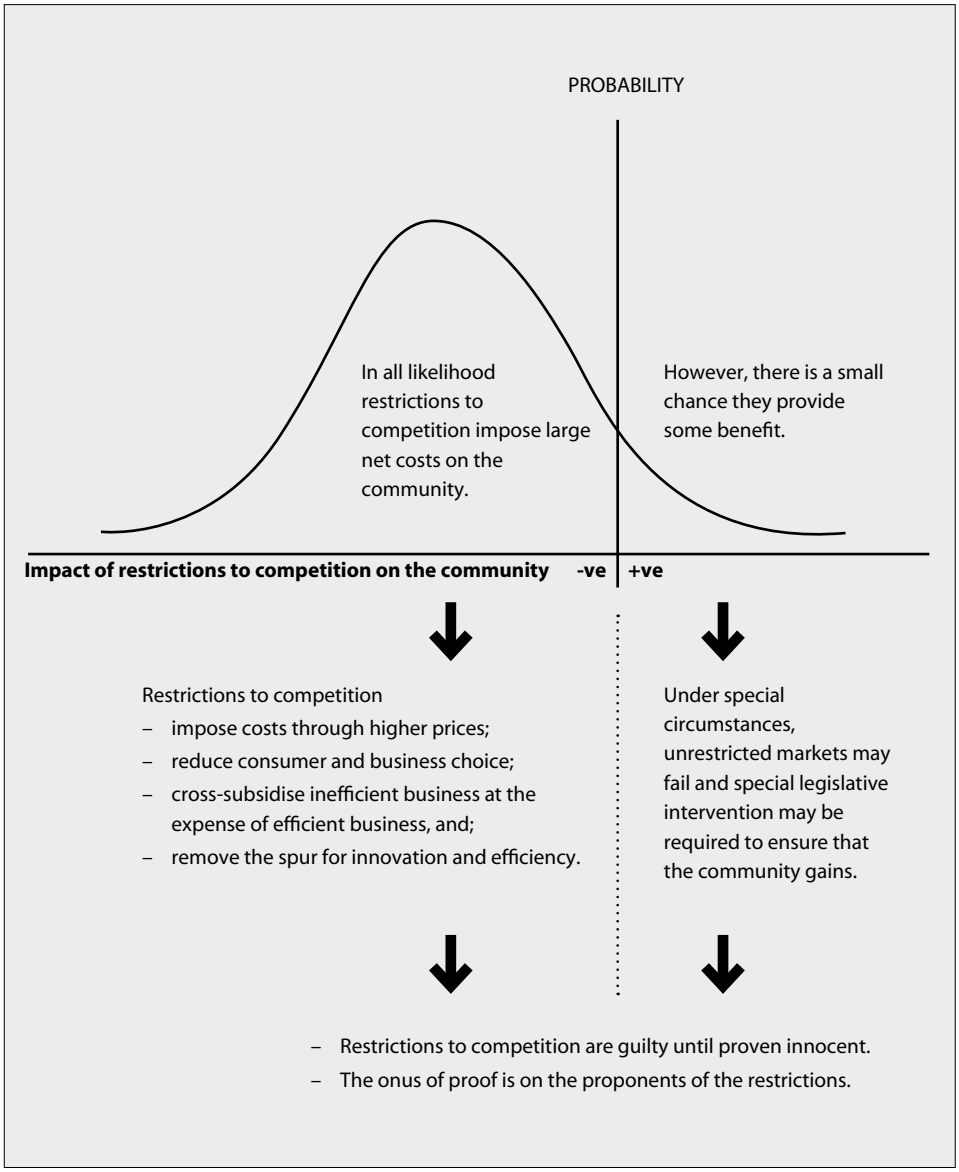
Legislation Review

COAG agreed that each jurisdiction will complete outstanding priority legislation reviews from the current National Competition Policy (NCP) Legislation Review Program in accordance with the NCP public benefit test. Governments will report annually to COAG on their progress in meeting this commitment.

Appendix B – Extract from CIE Guidelines for NCP Reviews

The presumption of NCP legislation reviews

Although restrictions to competition usually impose costs on the community, it is acknowledged that under special circumstances they may provide benefits. Nonetheless, as shown below, the NCP presumption is that restrictions will be removed unless proven to be beneficial.



Appendix C – Amendments to the Competition Principles Agreement

1. Subclause 1(3) should be amended, and subclause 1(3A) added, to the Conduct Code Agreement, as follows:

   (3) Without limiting the matters that may be taken into account, where in this Agreement calls:

   (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action, or;

   (b) for the merits or appropriateness of a particular policy or course of action to be determined, or;

   (c) for an assessment of the most effective means of achieving a policy objective; or;

   (ca) whether something is in the public interest;

   the following matters must be addressed:

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

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

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

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

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

   (i) the competitiveness of Australian businesses;

   (ia) the possibility of an increased concentration of ownership of Australian business;

   (ib) whether change will disproportionately affect a particular sector of the Australian community, and;

   (j) the efficient allocation of resources.

   (3A) Where one of the factors referred to in paragraphs (3)(d) – (j) is not considered relevant when making one of the judgments contained in paragraphs (3)(a) – (ca), evidence must be provided showing why this is the case.

2. Subclause 5(1) of the Conduct Code Agreement should be amended as follows:

   (1) The guiding principle is that legislation (including acts, enactments, ordinances or regulations) should not restrict competition unless the restriction is in the public interest.

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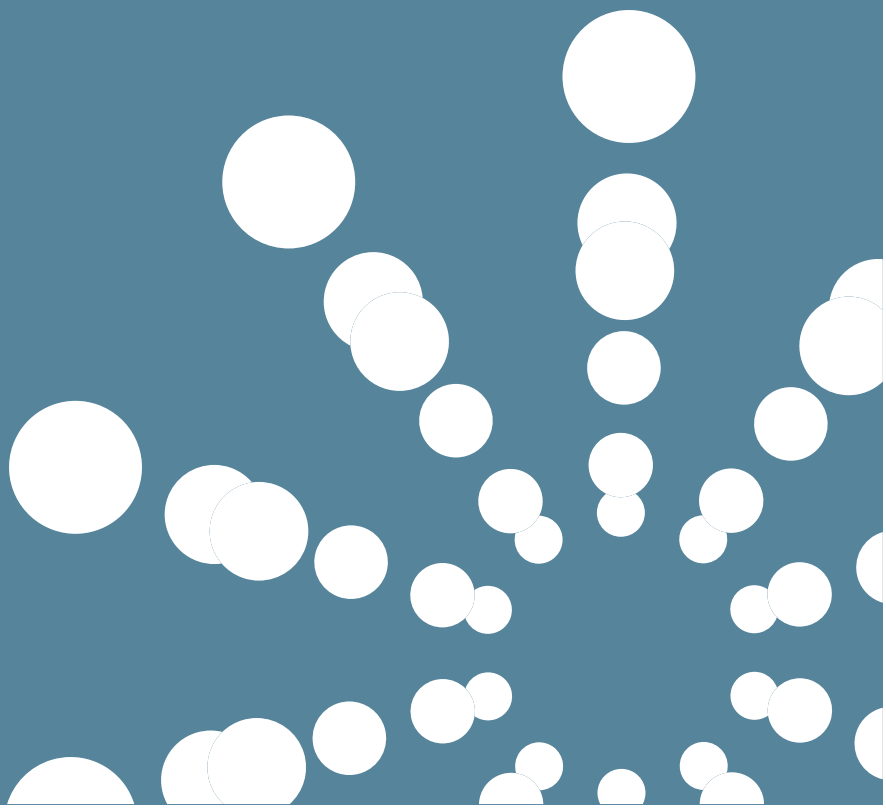

Contact Us

for general enquires email us at
info@fairtradingcoalition.org.au

PO BOX 6273
Kingston ACT 2604

P: (02) 6273 4333 F: (02) 6273 2738
www.fairtradingcoalition.org.au

Injecting the Public Interest into Legislation Reviews Conducted Under the National Reform Agenda
A Discussion By KM Corke