Uniform Commercial Laws: The Merits of Wallis Recommendation 114

Ray Steinwall

Many of the recommendations of the Wallis Financial System Inquiry have now been implemented. In its final report in March 1997, the Wallis committee expressed the view that reform of the regulatory framework could yield significant efficiencies and reduce costs:

> The financial system has entered an era of accelerated change that is likely to continue into the next century. Change in the financial system implies the need to adapt regulations imposed on financial institutions and markets. Regulation must adapt both to facilitate greater competition and efficiency in the financial sector and to secure the integrity and stability of its operation.

There are very large efficiency gains and cost savings which could be released from the existing system through improvement to the regulatory framework and through continuing developments in technology and innovation.

However, what is less publicised and perhaps less appreciated is that these very reforms are also pressingly needed to address the myriad of federal and state commercial laws that operate to the detriment of business and consumers that operate in Australia. Often these laws are inconsistent and complex, creating high compliance costs for business, particularly small business in areas ranging from workers compensation to business registration and licensing.

One of the least publicised recommendations in the Wallis Report is recommendation 114 – the establishment of a panel to pursue uniform Commonwealth, State and Territory commercial laws.

Implementing uniform commercial laws

To date recommendation 114 has received almost no attention. This is possibly because it is not readily identifiable with any of the more specific corporate reform proposals. Alternatively it may be because it is among the recommendations that cannot be effectively implemented without the support of the States and Territories. Such cooperation can be difficult and takes time.

However, there should be no mistake that uniform commercial laws are capable of delivering just as many benefits to business and consumers as any of the recent corporate reforms. The conditions that prompted a reform of the financial system are the very same conditions prevailing in the commercial sector. Intense domestic and international competition encourages firms to exploit all available efficiencies and cost savings. Globalisation and the creation of transnational markets highlight the need for urgent reform.

The Wallis Report did not elaborate on which commercial laws should be targeted for review. At the very least they would include those that impact directly on the financial sector such as the uniform credit code. It is perhaps unfair to suggest that that is all that was proposed. Indeed any serious commitment to reform would require consideration of those laws loosely grouped as business and economic regulation and consumer protection.

Reform would need to address both Commonwealth and State processes. Of highest priority is eliminating the duplication of Federal and State laws that not only add to compliance costs but invariably involve disputes between agencies over regulatory jurisdiction. Even in areas of state regulation alone, there is often little consistency in the form of the legislation or its enforcement. Businesses that operate across state boundaries invariably face delays and risk possible non-compliance with the disparate legislative requirements of the states and territories. The same obstacles are faced by foreign companies wishing to transact business in Australia and who may justifiably expect uniform national laws. For consumers the difficulty is in finding timely and cost effective redress when such regulation fails.

***Ray Steinwall** is Director of Competition and Regulation at PricewaterhouseCoopers and Adjunct Lecturer in Trade Practices Law at the Faculty of Law, University of New South Wales.*

In all jurisdictions a process of legislative review is well under way as part of the National Competition Policy (NCP) initiatives of April 1995. Although the sheer volume of legislation scheduled for review is staggering, the reviews themselves are confined only to assessing whether any inherent restrictions on competition are justified in the public interest. There is every reason to view recommendation 114 as the obvious next step – the harmonisation of Federal and State laws to eliminate inconsistency and wasteful and costly duplication. As a policy matter, it sits neatly alongside the small business reforms introduced by the Federal government last year.

There are potentially many reform options. But likely to be the least palatable to the States and Territories (certainly without some formalised consultation process) is the referral of powers to the Commonwealth in traditional areas of regulation. More realistically, a system of consistent reciprocal laws is likely to be favoured in areas of combined Commonwealth and State responsibility. The passage in 1995 and 1996 of reciprocal State competition laws mirroring those in the Commonwealth *Trade Practices Act 1974*, is a positive and concrete demonstration of how this can best work.

The immediate and pressing need is to harmonise state laws. There are many reasons why this has not occurred to date. State laws have developed in parallel because of their historical antecedents and have been amended from time to time with little regard to whether the conditions justifying regulation still exist or whether the form of regulation is still appropriate. Often this reflects different policy initiatives of the various governments. Although its extent is not known, internal pressures on individual governments and rivalry between jurisdictions account at least for some of the differences between them.

At the very least, there should be consistency in State regulation, administrative procedures and enforcement. National systems for business licensing and approvals (some currently underway in individual States) deserve support.

However, this should be seen as only the first step. If we are sincere about regulation in the twenty first century, we need to consider even more fundamental options. For instance, even in the traditional areas of State jurisdiction, such as contract law and equity, there is scope for achieving greater consistency. Some years ago, the Victorian Law Reform Commission proposed a simple and effective contract code for Australia. It was never adopted. However, the regulatory conditions both here and elsewhere now clearly warrant its re-consideration.

Uniform commercial codes have enormous potential for achieving consistency and for permitting firms to have a clear understanding of the regulations that apply to their business. Even in Australia, it is not without its precedents. The Consumer Credit Code, the Competition Code and the Corporations Law (regardless of the form they take) are concrete examples. There is much to be gained from having National Codes apply to other areas of commercial law.

At the very least, there should be consistency in State regulation, administrative procedures and enforcement.

There are those who will invariably be concerned that such a proposal involves importing European systems of law into what is essentially a common law jurisdiction. But the concepts are not mutually exclusive. Uniform commercial codes need not operate to the exclusion of the common law nor should they stifle its development. They simply provide a more certain and transparent basis on which to proceed.

The Wallis Report was silent on the process for achieving uniformity or on the institutions that should be charged with its oversight. However, it did recognise that the process is unlikely to succeed without agreement through the Council of Australian Governments (COAG). The COAG process has been successful in driving the competition reform since 1995. However, the COAG process has not been favoured by the current Federal government and would need to be placed firmly back on the agenda or replaced by another forum.

There may well be a co-ordination role for the NCP regulator, the National Competition Council. Who should be responsible for enforcement of uniform national laws is an issue for the reform process itself. In areas of economic regulation, fair-trading and consumer protection, there will surely be a role for State Fair Trading authorities.

Those who might be concerned about the difficulties of reaching some consensus should be buoyed by the commitment shown during the NCP process. Nor should they underestimate the potential benefits of reform and the obvious symmetry of the proposals with the corporate law reforms and the NCP process. What the NCP process has clearly demonstrated is that considerable time is needed for implementation. The process should therefore commence sooner rather than later. *Policy*