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The National Competition Council

The National Competition Council was established on 6 November 1995 by the *Competition Policy Reform Act 1995* following agreement by the Commonwealth, State and Territory governments.

It is a federal statutory authority which functions as an independent advisory body for all governments on the implementation of the National Competition Policy reforms. The Council's aim is to 'help raise the living standards of the Australian community by ensuring that conditions for competition prevail throughout the economy which promote growth, innovation and productivity'.

Information on the National Competition Council, its publications and its current work program can be found on the internet at www.ncc.gov.au or by contacting NCC Communications on (03) 9285 7474.

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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
ACTEW	ACTEW Corporation
agvet	Agricultural and veterinary
AHMAC	Australian Health Ministers Advisory Council
AMA	Australian Medical Association
ANZECC	Australian and New Zealand Environment and Conservation Council
ANZFA	Australia New Zealand Food Authority
ANZFSC	Australia New Zealand Food Standards Council
ANZMEC	Australian and New Zealand Minerals and Energy Council
APRA	Australian Prudential Regulation Authority
ARMCANZ	Agriculture and Resource Management Council of Australia and New Zealand
AWBI	AWB International
CCNCO	Commonwealth Competitive Neutrality Complaints Office
CIE	Centre for International Economics
CMS	Centralised monitoring system
CoAG	Council of Australian Governments
CPA	Competition Principles Agreement
CRR	Committee on Regulatory Reform (CoAG)
CSIRO	Commonwealth Scientific and Industrial Research Organisation
CSO	Community service obligation
CTP	Compulsory Third Party

EWP	Environmental water provision
EWR	Environmental water requirements
FRC	Full retail contestability
FSANZ	Food Standards Australia New Zealand
GBE	Government business enterprises
GPAL	Gas Pipelines Access Law
GPOC	Government Prices Oversight Commission (Tasmania)
HAL	Horticulture Australia Limited
HEC	Hydro Electric Corporation (Tasmania)
IPART	Independent Pricing and Regulatory Tribunal
ICRC	Independent Pricing and Regulatory Commission (ACT)
MDBC	Murray–Darling Basin Commission
NCC	National Competition Council
NCP	National Competition Policy
NEM	National electricity market
NEVDIS	National Exchange of Vehicle and Driver Information System
NT	Northern Territory
OECD	Organisation for Economic Co-operation and Development
ORR	Office of Regulation Review
PAWA	Power and Water Authority
PBS	Pharmaceutical Benefits Scheme
PC	Productivity Commission
RIS	Regulatory/regulation impact statement
ROP	Resource Operations Plan
SCARM	Standing Committee on Agriculture and Resource Management
SEVS	Specialist and Enthusiast Vehicle Scheme

SMA	Statutory marketing authority
TAC	Total allowable catch
TPA	*Trade Practices Act 1974*
VEETAC	Vocational Education, Employment and Training Committee
WEA	Wheat Export Authority
WRP	Water Resource Plan
WSAA	Water Services Association of Australia

Findings and recommendations

Overview of progress

Australia is now in its seventh year of the National Competition Policy (NCP), the most ambitious and comprehensive program of economic reform in the country's history. Agreed to by all Australian governments in response to the Review of National Competition Policy (the Hilmer review), the program is a balanced mix of economic policy and measures to assure the social needs of all Australians, including the protection of the environment. NCP reform objectives and assessment benchmarks and policies are coordinated nationally under the aegis of the Council of Australian Governments (CoAG).

The NCP consists of intergovernmental agreements between the Commonwealth, State and Territory governments. Local governments, while not parties to the NCP agreements (the States and the Northern Territory accepted reform obligations on behalf of local governments within their jurisdiction) are also implementing the NCP.

The NCP agreements oblige governments to introduce specific policy measures in the areas of electricity, gas, water and road transport. Governments have met or significantly progressed obligations in each of these areas. The agreements also contain policy development principles and processes, covering primarily the review and reform of legislation that restricts competition, and government business enterprise reform. In these two areas, governments have discretion in developing policy, establishing reform priorities and determining the pace and timing of reform implementation.

For the legislation review and reform program, the date set by CoAG for completion was 30 June 2002, making legislation review and reform a significant focus of this assessment. Although no government had completed its program at 30 June 2002, progress is substantial. Many laws regulating significant areas of economic activity have been reviewed, and restrictions found not to provide a community benefit have been removed or transitional reform paths have been set in place. Much of the activity still underway at 30 June 2002 is likely to be completed by the next NCP progress assessment in June 2003. That said, at 30 June 2002, several jurisdictions had legislative restrictions in place which, on the evidence available, are not in the public interest.

Electricity

The development of a competitive and efficient electricity industry is one of the key objectives of the NCP. New South Wales, Victoria, Queensland, South Australia and the ACT are now part of a national electricity market featuring an interconnected electricity grid. Tasmania expects to join in 2004, on completion of the Basslink interconnect with Victoria. Significant features of the national market are customer choice of supplier (generator, retailer and trader), capacity for new generation and retail supply companies to enter the national market, and the removal of barriers to interstate and intrastate trade in electricity. Western Australia, while not part of the national market, is proposing to restructure its government-owned monopoly electricity company, Western Power, to increase competition in its electricity industry.

One of CoAG's main objectives for the fully competitive national market in electricity is the ability for customers to choose which supplier (including generators, retailers and traders) they will trade with. This enables consumers to choose the cheapest electricity supplier and/or to base their choice on other factors, such as quality of service or environmental factors (given that the popularity of 'green' electricity is growing rapidly).

Since 2000, all retail customers within the national market consuming more than 200 megawatt hours per year have been contestable: that is, they are able to choose their retailer. Full retail contestability was extended to all New South Wales and Victorian consumers in January 2002, with South Australia and the ACT expected to introduce contestability for all customers in 2003. Queensland decided against full retail contestability but will review its decision in 2004. In the meantime, Queensland will consider making customers in the 100–200 megawatt hour consumption range contestable.

The National Competition Council is concerned with ensuring that all participants in the national electricity market meet their obligations on contestability in a timely manner. The Council expects that relevant governments will reconsider the electricity reform agreements in response to the Energy Markets Review before the 2003 NCP assessment. This will provide the opportunity for governments to revisit obligations for the introduction of contestability. The Council will make its final assessment of the introduction of contestability in 2003.

There have been significant improvements in the performance of the electricity industry in the jurisdictions participating in the national market. The Australian Bureau of Agricultural and Resource Economics (ABARE) estimated that by 2000 (three years after commencement of the national market), the benefits from electricity reform were equivalent to a real increase in Australia's gross domestic product of $1.5 billion (in 2001 prices). ABARE forecast that Australia's gross domestic product will be 0.26 per cent higher by 2010 ($2.4 billion in 2001 prices) than it would have been without reform, estimating the net present value of benefits between 1995 and 2010 at $15.8 billion (in 2001 prices) (Short et al 2001, p.84).

The interconnection of jurisdictions' electricity grids to facilitate wholesale trading in electricity has led to increased cross-border trading. Trading allows jurisdictions to manage peaks in demand by drawing electricity from interstate generators when demand rises beyond the supply capacity of their own generators.

Competition reform is also reducing electricity prices. The Productivity Commission's report on trends in Australian infrastructure prices found that household electricity prices in Brisbane, Melbourne and Sydney fell by 1–7 per cent in real terms between 1990-91 and 2000-01 (PC 2002d). It estimated that this represented total real savings to households in 2000-01 of some $70 million. Finally, competition is resulting in other benefits, including high supply reliability and system security, deeper liquidity of the contracts market, and increased investment and planned investment in generation and network interconnection (NECA 2002).

Gas

CoAG established a program of gas reform comprising three key elements:

- the structural separation of the transmission, distribution, production and retail sectors of the gas industry;
- the introduction by all governments of third party access regulation for natural gas pipelines: the National Third Party Access Code for Natural Gas Pipelines (the National Gas Access Code); and
- the provision for all gas consumers to choose their supplier — that is, full retail contestability.

All governments have met their obligations for the first two elements of reform. Regarding the third element, New South Wales, Western Australia, South Australia and the ACT have removed regulatory barriers to full retail contestability, with New South Wales and the ACT introducing systems to support customer choice. Western Australia is scheduled to introduce systems to support customer choice by July 2003. South Australia is still to introduce such systems. Tasmania's full retail contestability timetable will be governed by the franchising arrangements currently being developed.

Victoria and Queensland have amended their timetables for introducing full retail contestability to October 2002 and January 2003 respectively. Victoria stated that it had amended its timetable in consultation with all jurisdictions but without the formal approval of all Ministers (which is required by the 1997 gas agreement). Queensland did not receive approval from all Ministers before amending its timetable. This means that both Victoria and Queensland have not fully met their national gas reform obligations. The Council will make its final assessment of full retail contestability in 2003.

The reform program has transformed Australia's gas industry. Regulated third party access (particularly in relation to distribution pipelines) and increasing competition in gas exploration have stimulated gas production and pipeline development proposals and activities. Since 1995 more than $1 billion has been invested annually in upstream, transmission and distribution assets. The Australian Pipeline Industry Association (2001) estimates that transmission pipeline infrastructure almost doubled between 1989 and 2001, growing from 9000 kilometres to over 17 000 kilometres. This network expansion includes new pipelines linking processing facilities at Longford in Victoria and consumers in Sydney, Canberra and elsewhere in New South Wales and Victoria. Further network expansion is underway between Tasmania and Victoria, as well as between Victoria and South Australia; while pipelines linking the Northern Territory and/or Papua New Guinea are planned. The Australian Gas Association (1999) expects the proportion of Australia's energy supplied by gas to grow from the current level of 17.7 per cent to 22 per cent by 2005 and to 28 per cent by 2014-15. The electricity generation sector is expected to increase its demand for gas.

Water reform

Water reform is the most complex and challenging of the NCP commitments, but offers the prospect of the most rewards. The water industry makes a significant contribution to the Australian economy: in value added terms, it is more than one quarter the size of the manufacturing and the agricultural sectors, almost half the size of the electricity industry and three times the size of the gas industry. The potential economic gains from improvements in its performance are considerable. Australia's excessive and inappropriate use of water over many years has created severe environmental problems, of which the adverse economic and social impacts are mounting. The CoAG water reforms, which are scheduled to be substantially completed by 2005, aim to achieve an economically viable and ecologically sustainable water industry by changing the way in which Australia manages its urban and rural water systems. Full and timely implementation of the reform framework will bring significant economic and environmental benefits.

The urban water reforms are now almost complete. They include consumption-based pricing of urban water to discourage wasteful use, full cost recovery by water service providers to help ensure appropriate investment in infrastructure, and institutional changes to ensure providers are efficient and accountable for the quality and cost of water and sewerage services. The rural water reforms relate primarily to arrangements for using water for irrigated agriculture. Excessive allocations to irrigation have caused extensive damage to river systems and groundwater resources, and salinity is destroying large tracts of productive land. The water reforms are designed to address these problems by ensuring:

- adequate water is available for the environment;
- water infrastructure is efficiently developed and maintained;

- new dams are economically viable and ecologically sustainable; and
- there is a system of tradeable water rights to help ensure water is used where it is most valued.

The main reform challenge is dealing with the environmental impacts of water use while ensuring effective property rights in water. Tensions from the need to meet the competing demands of irrigators, urban users and stressed rivers must be addressed. Water trading arrangements, based on a system of property rights separate from land title, are not fully implemented. While property rights and trading arrangements are complex and present challenges in implementation, they are essential to achieving governments' water reform objectives.

Governments have accepted the importance of creating an effective system of water property rights. CoAG recently re-affirmed the importance of property rights in addressing salinity and water quality problems. There is growing recognition of the need for water users to have certainty of access and the need to consider the impact of changes on users, particularly farmers. Governments will report to CoAG by September 2002 on the opportunities for, and the impediments to, better defining and implementing water property rights regimes and water trading, including how they are dealing with uncertainties.

This 2002 NCP assessment recognises some of the practical difficulties in delivering effective property rights. It has relied on commitments from the New South Wales, Victorian and Queensland Governments that actions to implement appropriate allocations, in particular allocations to the environment, are imminent.

The Murray–Darling Basin Commission continues to implement water reform across the Murray–Darling Basin. The commission has endorsed the recommendations of an independent audit on means of addressing water pricing, full cost recovery and institutional reforms. The Council will reassess the implementation of the recommendations for institutional reform when considering the commission's institutional arrangements in the 2003 NCP assessment. The Murray–Darling Basin Commission also continues to progress interstate trading arrangements. Further, the commission's Ministerial Council has agreed to determine by October 2003 the appropriate quantity of water (350 gigalitres, 750 gigalitres or 1500 gigalitres) for release into the River Murray for environmental flow purposes. In conducting the 2002 NCP assessment, the Council found that South Australia, unlike other States, does not pass on the costs of the commission's bulk water provider, River Murray Water, to irrigators. While this issue is not one for the commission, the Council will consider it further in 2004 when assessing each State's approach to rural water pricing.

Road transport

The NCP road transport reform program is a package of 31 initiatives covering six areas (registration charges for heavy vehicles, transport of dangerous goods, vehicle operations, heavy vehicle registration, driver licensing, and compliance and enforcement). CoAG endorsed a framework of 19 of the 31 reforms, criteria for assessing implementation and target dates for the 1999 NCP assessment, and another framework of six reforms for the 2001 NCP assessment.

Governments did not endorse any road transport reforms for assessment in 2002. They also have not listed for NCP assessment some of the reforms from the original road transport package (notably, the speeding heavy vehicle policy and the higher mass limits), although some governments have implemented these either in whole or in part. The Council used the 2002 NCP assessment, however, to check progress with the reforms that were not implemented and operational at the time of the 2001 NCP assessment. It found the 1999 and 2001 programs to now be substantially complete. New South Wales, Victoria, Queensland, South Australia and Tasmania have implemented all obligations. Western Australia, the ACT, the Northern Territory and the Commonwealth are continuing to implement their remaining reform obligations. Most outstanding reforms are expected to be in place by the end of 2002. Western Australia and the Commonwealth are expected to have nationally consistent heavy vehicle registration processes and requirements operational by 2003.

Legislation review and reform

The legislation review and reform program is an important element of the NCP, particularly for this 2002 NCP assessment. CoAG set a requirement that governments complete all reviews and implement appropriate reforms by 30 June 2002 (the reporting date for this assessment). Each government developed its review program in June 1996, setting an extensive review and reform task. Governments' programs nominated some 1800 pieces of legislation for review over seven years.

While review and reform activity was not complete in any jurisdiction at 30 June 2002, substantial progress has been achieved and much of the activity still underway is likely to be completed by the 2003 NCP assessment. Governments are also more cognisant of the benefits of avoiding unjustified restrictions in new legislation, with each jurisdiction having a formal process for considering the efficacy of legislative proposals before they become law. In addition, the Commonwealth Office of Regulation Review's monitoring of governments' compliance with processes aimed at improving the quality of national standards shows that governments' adherence to good regulatory processes is better than in the past.

Governments have now reviewed and improved their regulation of many significant activities, of which several have been characterised by endemic restriction. These activities include: the professions and occupations; primary industry matters including agricultural marketing, fishing and forestry; retailing matters such as trading hours and liquor licensing; transport matters, including taxi licensing; compulsory insurance matters, including workers compensation and third party motor vehicle insurance; and planning, construction and development activity. All governments have work remaining in one or more of these areas, which the Council will assess in 2003.

Despite recent progress and greater community awareness of the link between micro-economic reform, economic growth and community wellbeing, the reform of restrictive legislation is often contentious. By subjecting all restrictions on competition to public interest tests, the NCP generates opposition from the groups that benefit from protections. This issue-specific opposition, sometimes combined with broader concerns about the pace of economic and social change, creates a political environment that is not always conducive to economic reform. Governments' leadership in explaining their support for change and in removing those restrictions shown not to be in the public interest is critical to achieving outcomes that benefit the community overall.

Governments are also assisting reform by helping the community to adjust to the new environment. This has sometimes meant financial adjustment assistance, as was the case for the dairy industry. More commonly, it has meant the provision of additional time for implementation of reform objectives and change programs. CoAG recognised this approach explicitly, noting that satisfactory reform implementation, other than completion by 30 June 2002, may include (where justified by a public interest assessment) having in place a transitional arrangement that extends beyond this date. This NCP assessment notes several reform implementation strategies extending beyond 30 June 2002.

The co-incidence of the deadline for review and reform completion and the 2002 NCP assessment posed some difficulties for the Council. It was not practical for the Council to report on all activity to 30 June 2002. Further, given the significant resource demand that the review and reform program places on governments, the Council accepted that there is a case for governments prioritising their review and reform activity to reduce delays in considering legislation that contains more significant competition restrictions. The Council believes it appropriate, therefore, to consider some review and reform activity in the 2003 NCP assessment. For the 2002 assessment, the Council regarded a government as failing to meet obligations under clause 5 of the Competition Principles Agreement (CPA) where:

- completed reviews and/or reforms did not satisfy NCP principles; and/or
- inadequate progress was made against significant legislation review and reform matters (in other words, where review and reform progress on significant issues was demonstrably inconsistent with the CoAG deadline).

The Council has found several discrete areas of review and reform activity that are inconsistent with NCP principles. In each of these cases, the Council has engaged the relevant governments in discussions to agree on an appropriate means of dealing with the problem area. All governments have participated in these discussions in a constructive and cooperative manner. Consequently, most of the problem areas have been the subject of an agreement or a shared understanding on remedial action, or at least a shared understanding on an approach to remedial action. In addition, each government has accepted that its entire review and reform program must be completed over the next twelve months. Completing the program (including implementing all appropriate reforms) by the 2003 assessment poses challenges for governments, especially those governments currently less advanced in their programs.

The Council considers that its approach of constructive engagement with governments has resulted in a high level of goodwill between the Council and governments regarding the assessment process and substantial commitment by each government to completing the review and reform program. The Council considers that this maximises the opportunity for pro-competitive legislative reform in the public interest. The Council wants to build on the goodwill and commitment demonstrated by governments during this assessment by accepting governments' assurances on future progress. Consequently, in relation to legislation review and reform matters, the Council has made no adverse recommendations on NCP payments at this time.

The Council does not consider that discussions with the Western Australian and South Australian Governments on remedial legislation review and reform action are sufficiently advanced to complete its recommendations on NCP payments to those States in this assessment. It is optimistic, however, that further discussions with the Western Australian and South Australian Governments will be productive so it has deferred recommendations on NCP payments for 2002-03 for both States until the conclusion of those discussions.

The Council stresses that this is the last NCP assessment for which it will accept assurances on future legislation review and reform action. It does not anticipate addressing review and reform activity in NCP assessments after 2003. The 2003 assessment will consider only completed review and reform activity. Review and/or reform activity that is incomplete or not consistent with NCP principles at June 2003 will be considered to not comply with NCP obligations. Where noncompliance is significant, because it involves an important area of regulation or several areas of regulation, the Council is likely to make adverse recommendations on payments. Governments should ensure they provide adequate reporting in time for the 2003 assessment, to show they have met review and reform obligations.

Professions and occupations

Governments have reviewed the regulation of some 50 professions and occupations including health professionals and para-professionals, legal practitioners, pharmacists, engineers, surveyors, architects, building and planning certifiers, building and related tradespersons, various agents and dealers and teachers. The review and reform of laws regulating professions and occupations is perhaps the most significant element of the NCP legislation review and reform program. When governments signed the CPA, they envisaged that national reviews would be conducted for legislation with national dimensions. National reviews would promote national consistency and more integrated national markets. While regulation of the professions could be considered a prime candidate for national review, few pieces of legislation have been reviewed on a national basis. Even where there has been a national process, nationally uniform implementation of reforms has been slow and problematic. Consequently, reform of regulation of the professions has generally been implemented on a State-by-State basis, which has tended to reduce national consistency in regulation. Mutual recognition legislation (which has also been reviewed under NCP) ameliorates problems in inconsistent regulation of the professions, and individual jurisdiction's reviews have sometimes considered arrangements in other jurisdictions. The Council does not regard this outcome as desirable, however, and has sought to compare States in the assessment process to ensure that the implementation of reform is as consistent as possible.

Review and reform activity by individual governments in many of these areas is now complete and complies with NCP principles. Reviews have been completed but reform outcomes are still to be implemented for some important areas, including pharmacy, architects and legal practitioners. The Council identified potential compliance questions following some governments' reform activity, including ownership restrictions for dental and optometry practices, the registration of occupational therapists and speech pathologists, and restrictions on advertising by lawyers in relation to personal injury services. The Council will monitor these issues over the period to the 2003 NCP assessment.

Primary industry matters

Legislation regulating primary industry activity forms a significant part of governments' legislation review and reform obligations. Governments have had a long history of involvement in the marketing of agricultural products, particularly via Commonwealth Government underwriting of export receipts and domestic price setting. Some arrangements were phased out in the 1970s and 1980s following evidence that they contribute to production inefficiencies and impose significant costs on taxpayers and domestic consumers.

When governments began to review their legislation under the NCP program, there were statutory marketing authorities (or 'single desks') for many

agricultural products, including wheat, coarse grains and oilseeds, dairy, horticulture, rice, potatoes, eggs, poultry meat and sugar. All governments repealed arrangements controlling the pricing and supply of drinking milk from 30 June 2000, following the national agreement on dairy industry deregulation supported by a financial adjustment assistance package. Queensland removed supply and marketing restrictions for eggs in 1998. It also ended its export marketing monopoly for wheat and barley on 30 June 2002. Victoria deregulated its barley marketing arrangements from July 2001. Industry-wide poultry meat pricing and supply arrangements have been replaced in several jurisdictions by arrangements providing for growers to negotiate collectively with individual processors under either authorisation by the Australian Competition and Consumer Commission (ACCC) or specific regulation.

The relevant NCP feature of most single desks is the monopoly (a domestic sales monopoly, an export sales monopoly) they hold on selling an agricultural product grown within their jurisdiction. A single desk with a domestic sales monopoly usually has rights to acquire produce from farmers to prevent them selling their produce interstate. It generally pays farmers the average price it receives less its marketing and transport costs. It also usually determines such matters as crop varieties planted and quality grades. Single desks thus require individual farmers to give up a considerable degree of choice in how they operate their business, what they produce and how they market their production.

A prominent issue in reviews of State agricultural marketing arrangements is the review of the Commonwealth wheat marketing arrangements and the Commonwealth Government's response to that review. The Commonwealth did not implement recommended reforms to partly liberalise restrictions on exports. Further, the Commonwealth has said that a further review in 2004 will not apply NCP principles. Some State reviews and some government responses have drawn a link between the reform of State marketing arrangements and the reform of wheat marketing arrangements. Consequently, inadequate application of NCP obligations by the Commonwealth to wheat marketing arrangements has not merely meant a lack of reform in the public interest for these arrangements; it has also meant that some State reforms in the public interest also have not proceeded. Despite the apparent Commonwealth reluctance to apply NCP principles to wheat marketing arrangements, the Council does not consider that inappropriate retention of these restrictive arrangements is a reason to delay reform in relation to State marketing arrangements.

Governments are also using the NCP program to evaluate the merits of legislative restrictions on agriculture-related matters, including agricultural and veterinary chemicals, bulk handling and storage, food standards, quarantine arrangements and veterinary services. They are also using the NCP program to consider how best to improve the efficiency of activities such as mining, fishing and forestry, and in the case of forestry and fishing, how best to achieve the sustainable development of the resource.

While the review and reform of legislation that restricts competition is the major NCP obligation relevant to primary industries, governments also face other obligations for some primary industries. Governments' operation of forestry businesses means that the application of competitive neutrality principles is important in that sector. The structural reform obligation is relevant where governments privatise former publicly owned bodies. Queensland, for example, has met its structural reform obligations in relation to the privatisation of the Queensland Sugar Corporation, particularly by devolving the corporation's former regulatory functions to local cane production boards and the Sugar Industry Commissioner.

Retail and related matters

Governments have considered under the NCP a number of restrictive regulations relating to business conduct (including restrictions on the ability of businesses to enter new markets).

- Prescribed shop trading hours prevent sellers from trading at the times they consider appropriate. Trading hours arrangements also discriminate among sellers on the basis of location, size or product sold. Most governments have now deregulated trading hours arrangements, either by removing restrictions from relevant legislation or by providing broad exemptions from existing legislative restrictions. Significant restrictions now remain only in Western Australia and South Australia.

- Liquor licensing laws frequently preclude entry by responsible sellers and favour some sellers at the expense of others. In some jurisdictions, new entry is frustrated because incumbents are able to claim that they already provide an adequate service to the local area. Licensing tests that focus on the public interest via nondiscriminatory provisions aimed at harm minimisation and community amenity, without references to outlet density or competitive effects on incumbents, are unlikely to contravene NCP principles and should provide considerable freedom to address social concerns. Liquor licensing legislation was still under review in several jurisdictions at the time of this 2002 assessment.

- Legislation governing petrol retailing restricts entry and reduces the ability of sellers to raise and lower prices.

- Fair trading and consumer protection legislation regulates aspects of business conduct, including advertising, dealings with customers and information provision. Fair trading restrictions are in the public interest where they reflect provisions of the *Trade Practices Act 1974*.

Transport (including taxis)

Review and reform of transport regulation forms a significant proportion of governments' legislation review and reform activity. The regulation of road

transport, rail (mainly rail safety), sea transport (and port regulation) and air transport and related services has been tackled under the NCP. Taxi and hire car licensing has been perhaps the most difficult transport regulation matter. The significant competition issue here is the restriction on supply imposed by the strict regulation of taxi and hire car licence numbers. In recent years, the release of new licences in all jurisdictions has been limited (even zero in some jurisdictions). Restricting the number of providers in a consumer service industry, which the licensing restrictions do, is an unusual legislative approach. The result in this case has been a long-term decline in the number of licences relative to population, a steady increase in the real value of taxi licences and, consequently, a rise in costs to passengers. Evidence from NCP reviews of taxi licensing confirms that supply restrictions are not in the public interest.

No government has made major progress in addressing this issue, although some have begun to tackle licensing restrictions. The Council will further consider governments' progress in this area in the 2003 NCP assessment. It will look for governments to address supply restrictions by the time of the 2003 assessment, such that the regulatory arrangements in place deliver the best outcome for the community.

Compulsory insurance

Governments have considered under the NCP their approaches to regulating compulsory insurance activity, including arrangements for workers compensation, third party motor vehicle and professional indemnity insurance. The major NCP question is the means of provision of these types of insurance: either statutory monopoly underwriting by a government-owned body, or competitive provision via private underwriters. Insurance markets are experiencing considerable uncertainty and governments are introducing or considering introducing regulatory changes to reduce uncertainty and to slow the growth in premiums. In some cases, these changes are impinging on related activity such as personal injury services provided by the legal profession.

Changes in the insurance industry and its regulation are continuing in 2002-03. These changes will have ramifications for the entire insurance sector, including insurance provided by statutory monopoly (which is the Council's major interest). This environment of change is not conducive to finalising the NCP assessment of the arrangements for delivering workers compensation, third party motor vehicle and professional indemnity insurance at this time. The Council will therefore assess governments' compliance in these areas in 2003.

The Council believes that jurisdictions' consideration of the appropriate means of regulating insurance would be assisted if governments were to undertake a comprehensive national review of the economics of insurance markets and the regulation of the various insurance activities. The Council considers such a review would assist understanding of the links between

insurance markets and of the reasons for the recent premium increases, and would also help assessment of the effects of reforming tort law. Such an inquiry would further enable all jurisdictions to contribute to a better understanding of the merits of monopoly and private provision of workers compensation, third party motor vehicle and professional indemnity insurance.

National reviews

Where a review raises issues with a national dimension or effect on competition (or both), the CPA provides that the government responsible for the review will consider whether the review should be undertaken on a national (interjurisdictional) basis. There are currently 12 national reviews, encompassing some significant areas of regulation. Nine reviews have been completed, with the remaining three in progress. In several cases, however, governments are still to complete the implementation of reforms recommended by the national reviews.

Delays in completing national review and reform activity often arise as a result of drawn-out interjurisdictional consultation. Further, sometimes State and Territory reform activity is delayed by having to wait for the conclusion of the national process. The Council accepts there is benefit in thorough investigation of relevant issues and adequate interjurisdictional consultation. Moreover, the national focus has improved the consistency of regulation among jurisdictions. The Council would be concerned, however, if the current processes were not concluded within a reasonable period to enable reform of State and Territory legislation to proceed.

The Council considers that reform activity in relation to five national reviews is substantially complete. First, the review of the Mutual Recognition Agreement found the scheme is working well. It made 30 recommendations, which jurisdictions substantially support. Second, the review of food regulation led to the development of model food legislation, which has now been adopted in most jurisdictions and will be introduced in the remaining jurisdictions in 2002. Lastly, governments have agreed to firm transitional arrangements for completing the reform of radiation protection legislation, architects regulation and petroleum (submerged lands) legislation. In each case, the transitional reform path extends beyond 30 June 2002. In the 2003 NCP assessment, the Council will consider governments' progress with implementing reform outcomes arising from the remaining national reviews. It will also monitor adherence to the transitional implementation arrangements in 2003.

Reform of government businesses

Governments are continuing to reform their business activities under the NCP. This is occurring via the application of competitive neutrality

principles, the structural reform of public monopolies and monopoly prices oversight arrangements. Significant publicly owned businesses in all jurisdictions apply competitive neutrality principles. Each government also has a mechanism for investigating complaints that their businesses (and those of local governments within their jurisdiction) are not implementing appropriate competitive neutrality arrangements. These bodies receive few complaints about competitive neutrality implementation.

Most governments are continuing to address business structure issues. Victoria released a policy statement on forests in which it undertook to establish a new commercial entity (VicForests) applying competitive neutrality principles, including the identification and direct funding of community service obligations and market-based sawlog pricing and allocation. Western Australia is considering a consultant's review of competitive neutrality in native forest timber operations. Queensland is establishing a new statutory authority to undertake the regulatory functions currently administered by WorkCover Queensland, to enable WorkCover Queensland to more effectively apply competitive neutrality principles.

Some significant government business activities do not apply competitive neutrality principles, however. Some businesses (such as universities), while government owned, are not subject to direction by government; the NCP obligation in these cases is for governments provide a statement of competitive neutrality obligations to the business to encourage application of the principles. Additional measures that governments could take to enhance competitive neutrality implementation by universities include staff and information assistance. Western Australia does not require its health businesses to apply competitive neutrality principles, which is consistent with the NCP to the extent that the costs of implementation outweigh the benefits. The Productivity Commission's monitoring of the financial performance of a range of Commonwealth, State and Territory government trading enterprises revealed that some businesses are not earning commercial rates of return. This monitoring work also raised questions about the costing, funding and transparency of arrangements for delivering community service obligations and those for estimating debt guarantee fees. The Council will monitor governments' progress in these areas in future NCP assessments.

The Council's approach to recommending competition payments

Under the Agreement to Implement the National Competition Policy and Related Reforms, the Commonwealth Government makes payments to the States and Territories as a financial incentive to implement the NCP and related reform program. The payments recognise that the States and Territories have responsibility for significant elements of the NCP, yet much

of the financial dividend from the economic growth arising from the NCP reforms accrues to the Commonwealth through the taxation system.

Competition payments in 2002-03 are approximately $740 million, distributed to the States and Territories on a per capita basis. The Federal Treasurer decides on the level of payments to each State and Territory after considering advice from the Council on jurisdictions' progress in implementing the NCP and related reform program. The Council may recommend a reduction or suspension of payments where it assesses that governments have not implemented the agreed reform program. The Council also assesses the Commonwealth's progress, but the Commonwealth does not receive payments.

The Council is independent of governments, but works with them closely in interpreting reform obligations and assessing progress. The Council's focus is on encouraging implementation of beneficial change, rather than on recommending reductions in competition payments. Even if the evidence at the time of each NCP assessment shows that a reform is not fully implemented, the Council does not make adverse payments recommendations if the relevant government is moving towards implementation or has a viable and timely proposal for addressing the noncompliance. The Council will tighten this approach for the 2003 NCP assessment, however, reflecting the need to finalise legislation reviews and implement appropriate reforms by June 2003.

Following CoAG's review of the NCP in 2000, Heads of Governments provided guidance to the Council on how it should approach recommendations on competition payments for each State and Territory. They directed the Council, when assessing the nature and level of any financial penalty or suspension, to take into account:

- the extent of the relevant State or Territory's overall commitment to the implementation of the NCP;
- the effect of one State or Territory's reform efforts on other jurisdictions; and
- the impact of a State or Territory's failure to undertake a particular reform.

Where the Council recommends a penalty, it must publish its reasons in the assessment report.

The Council interprets this guidance as meaning that individual minor breaches of reform obligations should not necessarily have adverse payments implications where the responsible government has generally performed well against the total NCP reform program. Nevertheless, a single breach of obligations in a significant area of reform may be the subject of an adverse recommendation, especially where the breach has a large impact and/or an adverse impact on another jurisdiction. Further, the Council interprets the CoAG guidance as suggesting that the quantum of any payments recommendation should bear some relationship to the responsible

government's overall performance in reform implementation, the impact of the breach of reform obligations and whether there are adverse impacts on other jurisdictions.

Progress by each jurisdiction

New South Wales

- New South Wales has been a leading State in NCP energy markets reform and, with one exception, has met all obligations relating to national electricity and gas reform for this 2002 assessment.

  In 1996, New South Wales provided stimulus to national gas reform by legislating consistently with the work undertaken by the Gas Reform Task Force on developing a gas access code. Subsequently, all governments agreed to adopt this code with some refinements. New South Wales has:

  – implemented and applied the National Gas Access Code and associated legislation;

  – removed significant barriers to national free and fair trade in gas;

  – removed regulatory restrictions on the use of gas;

  – adopted uniform national pipeline construction standards; and

  – introduced contestability down to the household level, allowing customers to choose their gas supplier.

  One outstanding issue is that New South Wales has extended a derogation from the National Gas Access Code relating to the treatment of some transmission pipelines as distribution pipelines for the purposes of the code. New South Wales did not secure Commonwealth agreement (as one party to the code) to continue the derogation. (The Commonwealth supported a three year extension rather than the five years proposed by New South Wales.) The Council understands that New South Wales and the Commonwealth are continuing to discuss this matter.

  Regarding electricity reform, New South Wales has taken all actions necessary to introduce the national electricity market and has extended contestability down to the household level, allowing customers to choose their electricity supplier. New South Wales is participating with other relevant governments in a review of energy markets, to address outstanding issues identified by the Council in previous NCP assessments. These issues include developing a truly national grid, implementing full retail contestability and sunsetting derogations to the National Electricity

Code. Other reform issues include streamlining national market institutional arrangements, improving the wholesale market pricing mechanism and introducing effective demand management mechanisms. The Council is concerned with ensuring New South Wales' Electricity Tariff Equalisation Fund is a transitional measure only and does not become a permanent feature of the national market. The Council will revisit all remaining issues in the 2003 NCP assessment in the light of the recommendations of, and governments' responses to, the Energy Markets Review.

- While progress by New South Wales on its water reform agenda is slower than expected, its efforts are generally satisfactory given the State's extensive consultation processes on environmental issues and its many stressed and overallocated river systems. A particular achievement is the move to independent price regulation for large parts of the urban and rural water industries. Urban two-part tariff reform for metropolitan service providers and most nonmetropolitan urban providers should be substantially complete by the time of the 2003 assessment. Water allocations (including for the environment) for most stressed and over-allocated systems will be in place in 10-year water sharing plans by December 2002. New South Wales will adopt a register of water allocations based on the land title register and run by Land and Property Information NSW.

  The State's progress in adopting cost-reflective rural water pricing is satisfactory, although apparently slower than that of other jurisdictions because a date for achieving full cost recovery is not yet available. Nonetheless, New South Wales is adopting a transparent and independent process to ensure water prices reflect the costs of rural water supplies, including environmental costs. This approach to addressing environmental costs is more robust than in other jurisdictions. Assessment of progress is made complicated, however, because some costs of supplying water appear to be mixed with costs to the environment. The Council regards the separation of these costs (partly a matter of institutional reform) as a key next step in this area. The Council will assess progress in institutional reform in relation to the Department of Land and Water Conservation and State Water in 2003. The Council will reassess all aspects of cost-reflective rural water pricing in 2004.

- New South Wales has completed its national road transport reform agenda.

- New South Wales has a comprehensive legislation review program and has completed almost 80 per cent of its reviews of significant existing legislation. Reforms have been implemented for almost half of these priority reviews. All proposals for new legislation are tested for compliance with competition principles through a formal Cabinet Office process.

  – New South Wales has made good progress applying NCP reforms to the professions. New South Wales has completed review and reform activity in relation to the regulation of doctors, chiropractors,

osteopaths, physiotherapists, psychologists, security guards, motor vehicle dealers, property agents and hawkers. Reviews have been completed and reform activity appears to be on track in relation to the regulation of lawyers, nurses, commercial agents, conveyancers, employment agents, private inquiry agents, second-hand dealers, driving instructors and other occupations.

New South Wales has retained restrictions that mean only registered dentists can own dental practices and only registered optometrists can own optometry practices. The Council considers that these restrictions do not meet NCP obligations. It acknowledges that in both cases, however, there is a process for granting exemptions to these restrictions and that New South Wales has provided assurances that it will not use the requirement to obtain an exemption to protect incumbent business owners. The Council also has questions about restrictions imposed by New South Wales on advertising by lawyers in relation to personal injury services. The Council acknowledges this issue is related to ongoing work on insurance, and the Government's view that the restriction on legal advertising is necessary to ensure public liability insurance premiums are affordable. The Council will continue to monitor the impact of these restrictions and will consider them further in 2003.

– New South Wales has completed a review of its planning legislation and is progressing an extensive reform program. It has completed its review and reform of building legislation, while its review and reform activity relating to building trades and associated professional services (architects, surveyors and valuers) is near completion. The Council will finalise its assessment of the New South Wales Government's compliance with its NCP obligations in these areas in 2003.

– New South Wales has substantially reformed retail trading arrangements. Shop trading hours are effectively deregulated via a wide application of exemptions from the legislative restrictions. A review of a public needs test for new liquor outlets is underway, and assessment of review and reform progress in this area will be finalised in 2003. New South Wales has no other significant regulatory restrictions on retail trading.

– New South Wales did not include education legislation in its legislation review program. It has advised the Council, however, that its education legislation is subject to extensive alternative review processes that are either underway or have been recently completed.

– The Council questions the strength of the public interest case provided by New South Wales in support of racing industry legislation that requires bets with licensed bookmakers to be a minimum of $200 and that also imposes restrictions on advertising by licensed bookmakers. The Council accepts, however, that the impact of the two restrictions is likely to be limited.

  - The Council has identified some problems with New South Wales' legislation review and reform performance in primary industries. The Council does not consider that review and reform activity relating to grain marketing arrangements meets NCP obligations. The Council notes that New South Wales has legislated the removal of restrictions on vesting powers in September 2005, but considers that the processes involved and the delays in achieving these reforms are not consistent with the interests of the community or producers. Similarly, the Council considers that the New South Wales response to the review of poultry meat marketing arrangements does not meet NCP obligations. Review and reform activity for the rice industry has been prolonged, although the Council accepts that, at the time of this assessment, the Commonwealth has responsibility for progressing reform in this area. On the other hand, reform of the dairy industry was a considerable achievement, review and reform activity for agriculture-related products appears to be progressing well, and review and reform of regulations governing veterinary surgeons also appears to be on track. The Council will finalise assessment of the application of NCP principles to the fishing and forestry sectors in 2003.

  - The review of taxi and hire car regulation in New South Wales made recommendations that favour a phased approach to reform, recognising the close relationship between taxi and hire car services. There is a question about whether these recommendations constitute sufficient reform in the community interest, because the recommendations, even if fully implemented, may do little more than address future demand for taxi services. In any case, New South Wales is yet to implement the recommendations fully. It has agreed to re-examine taxi and hire car regulation over 2002-03, and the Council will revisit this issue in the 2003 assessment.

- New South Wales continues to meet its obligations under the Conduct Code Agreement.

- New South Wales implements its prices oversight obligations through the Independent Pricing and Regulatory Tribunal (IPART) established in July 1996 as the successor to the New South Wales Government Pricing Tribunal. IPART is empowered to determine maximum prices and/or periodically review the pricing policies of declared government-owned monopoly services. IPART also regulates gas and electricity tariffs and third party access to networks in New South Wales, and advises the Government regarding complaints that significant government businesses are not applying competitive neutrality principles.

  New South Wales is promoting competitive neutrality reform. It expects all government businesses that undertake significant business activities within the general Government sector to implement competitive neutrality principles. Individual government businesses seeking exemptions from implementing competitive neutrality requirements bear the onus of demonstrating that the costs would exceed the benefits.

New South Wales has corporatised many public trading enterprises and applied a comprehensive Commercial Policy Framework designed to mirror the disciplines faced by a private sector firm in a competitive market. The commercial activities of general Government sector agencies are required to adopt competitive neutrality pricing principles, unless a net community benefit for doing otherwise can be demonstrated.

For the purposes of the 2002 assessment, New South Wales has not met NCP obligations in relation to:

- an extension for five years of a derogation against the National Gas Access Code;
- ownership restrictions in dental and optometrist regulation;
- vesting arrangements for grains;
- arrangements regulating the poultry meat industry;
- provisions affecting activity by bookmakers; and
- taxi and hire car regulation.

Further, in the area of water reform, New South Wales is in the process of finalising 39 water sharing plans that will set water property right entitlements and environmental allocations for the next 10 years. The Council has obtained significant assurances from New South Wales regarding implementation of the water sharing plans and will conduct a NCP supplementary assessment before the end of 2002 to assess compliance of these plans with CoAG commitments. The supplementary assessment may have implications for NCP payments for New South Wales in 2002-03. In all other areas, completed reform activity has met NCP obligations and New South Wales has made substantial progress against the overall NCP reform agenda.

In making its recommendations on competition payments, the Council has taken account of the State's considerable reform progress and successes, as a reflection of a commitment to NCP reform, and the likely impact of reform failures. Balanced against this progress, and given the Government's assurances on the significant areas of noncompliance, the Council considers that the noncomplying matters identified in this assessment do not warrant an adverse recommendation on payments for 2002-03 (noting the supplementary water reform assessment above). The Council will consider these areas of NCP noncompliance again in 2003, along with any further reform failures and the State's overall progress with reform implementation. The Council notes that New South Wales faces a difficult challenge in completing reform implementation for its legislation review and reform program by 2003.

Victoria

- Victoria has been a leading state in NCP energy markets reform and, with one exception, has met all obligations under the national electricity and national gas reform agreements for the purposes of this assessment.

  Victoria has now almost completed reform of its gas industry. It divided the then state-owned gas transmission, distribution and retailing activities into separate corporations, and privatised the three stapled gas distribution/retail businesses. The former gas transmission corporation became Transmission Pipelines Australia (and was privatised in 1999) and the independent system operator VENCorp. Victoria has:

  – implemented and applied the National Gas Access Code and associated legislation;

  – removed significant barriers to national free and fair trade in gas; and

  – adopted uniform national pipeline construction standards.

  Victoria deferred full retail contestability from 1 September 2001 to 1 October 2002. According to the Government, the deferral is the result of delays in the development of systems and processes necessary to manage customer transfers and metering data. Victoria stated that it amended its timetable following consultation with all jurisdictions but without the formal approval of all Ministers as required by NCP gas reform agreements. The Council considers that Victoria has not fully met its national gas reform obligations.

  Victoria has taken all actions necessary to introduce the national electricity market and has extended contestability down to the household level, allowing customers to choose their electricity supplier. Victoria is participating with other relevant governments in a review of energy markets, to address outstanding issues identified by the Council in previous assessments. These include the development of a truly national grid, the implementation of full retail contestability and the sunsetting of derogations to the National Electricity Code. Other reform issues include streamlining national market institutional arrangements, improving the wholesale market pricing mechanism and introducing effective demand management mechanisms. The Council will revisit all of these outstanding issues in the 2003 NCP assessment in the light of the recommendations of, and governments' responses to, the Energy Markets Review.

  Victoria's approach to meeting community service obligation objectives by providing rebates for regional customers faced with higher distribution charges minimises adverse impacts on competition and provides a lead to other governments in implementing policies to achieve social objectives that are compatible with national electricity market objectives. Victoria's approach to the regulation of retail prices, which recognises the need to

provide 'headroom' in regulated prices to facilitate new entry, should promote competition over time.

- Victoria has a strong record in property rights and most pricing aspects of water reform. Key advances include the separation of bulk and retail water suppliers in Melbourne, and the replacement of water charges based on property valuations with two-part charges comprising a fixed fee per property and a water usage-based charge. Victoria's water reforms have delivered significant benefits, particularly to small businesses, with water bills decreasing by as much as two-thirds after pricing based on property value was replaced with consumption-based pricing. Victoria has effectively implemented cost-reflective pricing in rural water supplies, has had properly assigned property rights (separate from land title) in rural water in place for some time and is progressively removing impediments to trade in water rights. The Victorian Government has made progress in defining the involvement of the Essential Services Commission in water issues: key objectives include a financially viable water industry, and the consideration of environmental and social obligations.

  The Council is concerned, about Victoria's approach to ensuring adequate allocations of water for the environment, especially for stressed and overallocated systems. Victoria has made progress on this issue for this 2002 assessment and is beginning to deliver significant outcomes for the environment. The 2002-03 State Budget provided $10.6 million over three years for the Victorian River Health Strategy. Victoria provided $15 million in a joint fund with South Australia to achieve an additional 30 gigalitres of environmental flow for the River Murray. It has budgeted $77 million for the Wimmera–Mallee pipeline to deliver environmental flows for the Wimmera and Glenelg rivers, and $12.8 million to address the health of the Gippsland Lakes. In addition, Victoria and the Council have agreed to a set of measures that will ensure a better approach to environmental allocations in the future.

- Victoria has completed its national road transport reform agenda.

- Victoria has a comprehensive legislation review program. It has completed all of its reviews of significant existing legislation, and implemented reforms for almost 60 per cent of these priority reviews. All proposals for new legislation are tested for compliance with competition principles via an NCP impact assessment. The Department of Treasury and Finance advises the Cabinet on NCP issues and assists Victorian Government agencies with NCP implementation.

  – Victoria has made excellent progress in applying NCP reforms to the professions, having made substantial progress early in the NCP program. Early reforms in the health sector included the removal of unnecessary restrictions on commercial operation (including restrictions on advertising and ownership of practices). Reforms were completed for chiropractors and osteopaths in 1996, optometrists and chiropodists in 1997, and physiotherapists in 1998. Legal professional regulation was the subject of new legislation that removed many

barriers to competition, including the distinction between solicitors and barristers, and the prohibition on non-lawyer conveyancers. Victoria has since completed satisfactory review and reform activity in relation to the regulation of dentists, doctors, nurses, psychologists, traditional Chinese medicine practitioners, driving instructors, motor vehicle dealers, second-hand dealers, employment agents and commercial agents. Reviews have been completed and reform activity appears to be on track in relation to the regulation of security guards, property agents and private inquiry agents.

- Victoria has satisfactorily completed review and reform of regulation of electricians and refrigeration mechanics. Review and reform of its planning and environmental legislation, building regulation, the regulation of associated professional services (architects and surveyors) and the regulation and other building trades appears to be progressing well and will be assessed again in 2003.

- One of Victoria's notable achievements is the removal in 1996 of restrictions on shop trading hours. This change has provided greater flexibility to businesses and choice to consumers. There has also been extensive change to liquor licensing regulations, with significant streamlining of on-premises licensing requirements and the phasing out of the limit on a single licence holder to a maximum of 8 per cent of the total number of licences.

- Victoria has also completed review and reform activity for education, vocational training and child care services.

- Victoria reviewed the *Club Keno Act 1993* in 1997 but has not yet announced its response. Victoria is to review its gambling legislation in 2003, which should provide an opportunity to address this matter. Victoria will need to finalise its approach to this legislation by the 2003 NCP assessment to comply with its NCP obligations.

- Victoria's barley industry review and associated reform placed it at the forefront of applying NCP principles to statutory marketing arrangements. Together with South Australia, it reviewed arrangements for barley marketing, finding no community benefit case to support the requirement that growers sell their produce through a statutory marketing authority. Following consultation with the industry, the review process culminated in deregulation of the domestic barley market in July 1999 and the export market in July 2001. Victoria also played a leading role in the national reform of the dairy industry. Review and reform activity for agriculture-related products appears to be progressing well, while review and reform of the regulation of veterinary surgeons also appears to be on track.

- Victoria has subjected its fisheries regulation to NCP review. This review made recommendations that are generally applicable to all Victorian fisheries as well as recommendations for specific fisheries.

The recommendations involve continuing work on fisheries matters, which the Council will monitor in the 2003 NCP assessment.

– Victoria's forestry policy statement released in February 2002 signals the Government's intention to separate forest policy, regulatory and commercial functions. The Government undertook to create VicForests as an independent commercial entity applying competitive neutrality principles, with sawlog prices set transparently using market processes. The Council will review Victoria's progress in forestry in the 2003 NCP assessment.

– The review of taxi and hire car regulation in Victoria recommended deregulation facilitated by the buy-out of existing licences. Instead, Victoria is favouring a phased approach to reform, recognising the close relationship between taxi and hire car services and considering that a more gradual approach will help the taxi industry adjust to change. Measures include the introduction of new peak-period licences, progressive increases in the number of general licences and an independent review of hire car regulation. Apart from the Northern Territory, Victoria is the only jurisdiction which has as yet proposed a substantial reform package. The Council questions whether Victoria's reforms are sufficient to address the community interest however, and will revisit this issue in the 2003 NCP assessment. Victoria also has restrictions on the licensing of tow truck operators, which it is considering via the NCP program.

- Victoria continues to meet its obligations under the Conduct Code Agreement.

- Victoria has actively promoted competitive neutrality reform for some time. It has corporatised or commercialised many of its government businesses and is ensuring the competitive neutrality elements are addressed in pricing and regulation. Victoria requires competitive neutrality principles to be applied to all government business activities where the benefits are expected to exceed the costs. The State has a good record in handling allegations that competitive neutrality principles are not being appropriately applied. Its complaints-handling body, the Competitive Neutrality Complaints Unit, has instituted processes to follow up complaints already upheld, to assist the implementation of remedies.

For the purposes of the 2002 assessment, Victoria has met all of its NCP obligations with two exceptions:

- the review and appropriate reform of taxi and hire car regulation (although Victoria has made a start with its 2002 reform package); and

- the deferral of retail contestability in gas without all other governments' formal approval.

These issues aside, Victoria has substantially completed the total NCP reform agenda and its overall progress has been impressive.

Following some initial concerns about the area of water reform, the Council is now satisfied that the State's river health strategy provides the tools for Victoria to meet its water reform commitments in relation to environmental reforms for stressed rivers. The Council has obtained significant assurances from Victoria that key reforms will occur in this area by the time of the 2003 assessment. In 2003, the Council will assess Victoria's application of the river health strategy to a first round of five stressed river plans. To prepare for that assessment, the Council will work with Victoria to ensure these plans are developed in accordance with the proposed reform path.

The Council expects to be able to work with Victoria to resolve outstanding reform issues in taxi and hire car regulation, and anticipates that the Government will satisfactorily complete its remaining legislation review and reform obligations by the 2003 assessment. The Council also expects to be able to resolve the outstanding gas reform issue before the 2003 assessment.

In making its recommendations on competition payments, the Council has taken account of Victoria's considerable reform progress and successes as a reflection of a commitment to NCP reform, and the likely impact of reform failures. While the Victorian Government is still to fully address its NCP obligations relating to taxis and hire cars and to gas reform, the Council considers this does not warrant an adverse recommendation on payments for 2002-03.

Queensland

- Queensland has made substantial progress with energy reform. With two exceptions, Queensland has met all obligations under the national electricity and national gas reform agreements for the purposes of this 2002 NCP assessment.

  Queensland has:

  – implemented and applied the National Gas Access Code and associated legislation;

  – removed significant barriers to national free and fair trade in gas;

  – removed regulatory restrictions on the use of gas; and

  – adopted uniform national pipeline construction standards.

  One outstanding issue is that Queensland deferred the introduction of full gas retail contestability from 1 September 2001 to 1 January 2003 without the consent of all governments, which is required by the NCP gas reform agreements. Queensland sought the consent of each government to this deferral and advised that all governments other than the Commonwealth have approved the amendments to its full retail contestability timetable.

The Council considers that Queensland has not fully met its national gas reform obligations.

Queensland joined the national electricity market by bringing forward the date for interconnection with New South Wales (via the Powerlink/Transgrid interconnector) to January 2001. Queensland has taken all other actions necessary to introduce the national market with one significant exception in relation to the implementation of full retail contestability. Queensland is participating with other relevant governments in a review of energy markets, designed to address outstanding issues identified by the Council in previous assessments. These include the development of a truly national grid, the implementation of full retail contestability and the sunsetting of derogations to the National Electricity Code. Other reform issues include streamlining national market institutional arrangements, improving the wholesale market pricing mechanism and introducing effective demand management mechanisms. The Council will revisit all of these outstanding issues in the 2003 NCP assessment in the light of the recommendations of, and governments' responses to, the Energy Markets Review.

The electricity reform agreements include a firm commitment to allow all customers the choice of electricity supplier. Following analysis by PA Consulting and Queensland Treasury, Queensland has decided not to implement full retail contestability, at least for now. After revising its calculations following discussions with the Council, Queensland Treasury estimates that the costs of implementation (for the five-year period commencing 1 January 2003) will be $141 million, with estimated benefits of $52 million.

The Council considers, however, that the Queensland Treasury's estimate of the benefits of full retail contestability is grossly understated, principally because the final quantitative cost/benefit calculation does not account for the dynamic benefits of full retail contestability. While the Council accepts that it is difficult to estimate these benefits, it considers that the value of the dynamic benefits would be greater than $89 million over five years (which is difference between costs and benefits according to the Treasury analysis). On this basis, the Council considers that the Queensland Government has not demonstrated that the costs of implementing full retail contestability outweigh the benefits. Accordingly, the Council considers that Queensland has failed to satisfy its NCP assessment obligation to implement full retail contestability. The Council considers this failure to be serious: full retail contestability is an important component NCP reform in the electricity sector. The Council notes that Queensland will consider over the next six months whether to extend contestability. The Council will address this issue for the final time in the 2003 NCP assessment, taking into account Queensland's and other governments' responses to the Energy Markets Review.

- Queensland's progress with water reform was slow early in the NCP program. The Government has made rapid progress more recently, however, and is on track with the CoAG timetable for reform. In some

areas, such as implementing full cost recovery among smaller local government water businesses, Queensland is ahead of other States. Queensland has adopted independent price regulation for parts of the urban water industries, although there are some gaps in coverage that need to be addressed. Queensland has made good progress in cost recovery in urban water and trade waste pricing. Urban two-part tariff reform is being applied progressively and is likely to take several years. The Townsville City Council, however, has not introduced two-part pricing. Queensland is making good progress in adopting cost-reflective rural water pricing.

Queensland has one stressed river system, the Condamine–Balonne Basin. Progress in addressing the basin's problems is extremely important and overdue. Queensland has commissioned a six-month independent review of the science of the Condamine–Balonne region, focusing on environmental allocations and salinity concerns, and has committed to implementing the review's recommendations. Queensland generally has a robust process for determining water allocations for its river systems. The Council will further assess Queensland's progress on this matter in a February 2003 NCP supplementary assessment. Queensland will adopt a register of water allocations based on the land title register, and run by the Land Titles Office.

- Queensland has completed its national road transport reform agenda.

- Queensland has a comprehensive legislation review program. It has so far completed over 70 per cent of its reviews of significant existing legislation, implemented reforms for almost 40 per cent of these priority reviews. Before consideration by the Cabinet, all proposals for new (including amending) legislation are tested for compliance with competition principles through a formal public benefit test.

  – Queensland has made good progress applying NCP reforms to the professions. Following a general review of its health and medical practitioner legislation, Queensland significantly reduced advertising restrictions and removed many other restrictions on the conduct of businesses supplying health professional services. Queensland's second-stage health practitioner reviews examined, among other things, ownership controls on optometrists, certain restrictions on dentists and core practice restrictions across professions.

    Queensland is reviewing its legal practice regulations, including the requirements for admission to the legal profession, required qualifications for practice, ownership restrictions, the reservation of practice (including conveyancing) and professional indemnity insurance, and expects to have a Bill before the Parliament in 2002.

    Queensland has completed satisfactory review and reform activity in relation to the regulation of osteopaths, psychologists, commercial agents, driving instructors, motor vehicle dealers, employment agents, hairdressers and hawkers. It has completed reviews and implemented

partial reforms in relation to the regulation of medical practitioners, chiropractors, dentists, nurses, optometrists, podiatrists, physiotherapists, lawyers, security guards, private inquiry agents, second-hand dealers, property agents and auctioneers. It appears to be on track with the implementation of outstanding reforms.

Queensland has retained, however, restrictions on the use of the titles 'occupational therapist' and 'speech pathologist'. The Council considers these title restrictions do not meet NCP obligations. Title restrictions are unlikely to provide significant consumer protection benefits in these two areas because most patients are referred via another health professional or use the services of therapists employed in health facilities such as hospitals, nursing homes, community health centres and rehabilitation services. Several other jurisdictions do not require occupational therapists to be registered and only Queensland requires speech therapists to be registered. The Council accepts, however, that the impact on competition of this restriction is likely to be insignificant.

- Queensland has satisfactorily completed the review and reform of its planning and building legislation. Review and reform activity for building and construction regulation, the regulation of associated professional services (architects, surveyors and valuers) and the regulation of associated building trades appears to be progressing well and will be assessed again in 2003.

- Queensland has made significant progress on retail trading matters. Restrictions on shop trading hours have been significantly relaxed in the populous south-east Queensland region and other major metropolitan regions. Remaining restrictions are subject to applications (for further deregulation) to an independent assessment process that takes into account NCP principles. In relation to liquor licensing arrangements, Queensland's specialist provider model requires a seller of take-away liquor to hold a general (hotel) licence, which means that operators of off-hotel outlets must conduct a primary hotel business. Queensland is the only jurisdiction to impose this type of restriction on operators of take-away liquor outlets. The Council considers that these restrictions in their current form do not meet NCP obligations; in particular, it is not clear that the restrictions are necessary to meet the Government's objective of minimising harmful consumption of alcohol. Queensland has no other significant regulatory restrictions on retail trading.

- Queensland has satisfactorily completed NCP reforms in relation to education and vocational training, and is making good progress in the review and reform of the regulation of child care services.

- Queensland's NCP reform of its dairy and grains regulation is a considerable achievement. Queensland met its dairy industry obligations after repealing its vesting, price-setting and quota provisions following the national agreement in 2000 to deregulate the

industry. Queensland's export monopoly on barley and wheat expired on 30 June 2002.

- Queensland retained the single desk arrangements governing the marketing of sugar, while removing some restrictions on cane supply and milling. (The Commonwealth removed the tariff on imported raw sugar in 1997). Developments internationally are likely to bring pressures for further change in sugar industry arrangements.

- Queensland has completed a review of its fisheries regulation. This provided a framework for subsequent reviews of individual fisheries. The Council will review Queensland's progress in this area in 2003. Also in 2003, the Council will further consider Queensland's progress in applying NCP principles to forestry in 2003.

- Queensland's review of taxi and hire car regulation largely endorsed existing arrangements, contrary to the conclusions of all other NCP reviews. The Council does not accept that Queensland's review made a robust case for the retention of these arrangements, and regards the State as not having met its NCP obligations in this area. Queensland has agreed to re-examine taxi and hire car regulation over the current 2002-03 in the light of experience elsewhere in Australia, and the Council will revisit this issue in the 2003 NCP assessment.

- Queensland continues to meet its obligations under the Conduct Code Agreement.

- Queensland was one of the first jurisdictions to establish a competitive neutrality complaints mechanism. The Queensland Competition Authority, a body independent of the government, administers the mechanism, which became operational in 1997. The authority receives and investigates complaints from competitors of publicly owned businesses that are gazetted as significant business activities, where those complaints relate to a government businesses' payments of taxes or application of tax equivalent systems, debt guarantee fees and regulatory neutrality issues. The Premier and Treasurer, in consultation with the portfolio Minister, deal with complaints about other matters and may ask the authority to investigate these complaints. The authority also provides prices oversight of Queensland Government monopoly businesses and is the State regulator for third party access arrangements.

  Queensland has achieved good progress in working with local governments to develop and apply appropriate NCP reforms. Local governments have a more extensive business role in Queensland than in other jurisdictions. Queensland has recognised this by setting aside a proportion of its competition payments for local governments that successfully implement NCP obligations, including competitive neutrality.

  Queensland has reviewed the *Local Government Act 1993*, the *City of Brisbane Act 1924*, and all local government laws. Competitive neutrality reforms are also being implemented by local governments, with the initial

focus on the large businesses operated by the 18 largest local governments. Competitive neutrality reforms are now almost completed for these businesses, and the focus of Queensland's competitive neutrality reforms at the local government level has moved to smaller businesses. The overall current status of local governments' competitive neutrality implementation is that:

- eight of the large 'type 1' businesses run by local governments have been commercialised and have implemented full cost pricing;
- 13 of the 21 medium-size 'type 2' businesses have implemented all of the elements of full cost pricing; and
- 50 of the 149 small 'type 3' businesses have applied all elements of full cost pricing.

For this 2002 NCP assessment, Queensland has yet to satisfy the Council that it has met NCP obligations in relation to:

- the application of two-part tariffs for urban water supplies in Townsville;
- the requirement to address the stressed condition of the Condamine–Balonne river system;
- the deferral of retail contestability in gas without all other governments' formal approval;
- full retail contestability in electricity;
- registration requirements for occupational therapists and speech therapists;
- liquor licensing arrangements that require the operator of a take-away outlet to hold a hotel licence and operate a hotel; and
- taxi and hire car regulation.

In all other areas, completed reform activity has met NCP obligations and Queensland has made significant progress against the total NCP reform agenda.

In making its recommendations on competition payments, the Council has taken account of Queensland's considerable reform progress and successes as a reflection of its commitment to NCP reform, and the likely impact of reform failures. The Council recommends retaining the ongoing payment reduction of $270 000 imposed in the 2001 NCP assessment (for Townsville City Council's failure to satisfy the NCP requirements in respect of two-part water pricing reform). Queensland has referred a second cost-effectiveness study commissioned by Townsville City Council to the Queensland Competition Authority. This study suggests that there is no net benefit from introducing two-part pricing in Townsville. If the authority finds that this second review is robust, then the Council will recommend that the payment reduction be

immediately lifted. If the authority finds that the review is not robust, then the payment reduction should continue.

In relation to the outstanding requirement to address the stressed condition of the Condamine–Balonne river system, the Council will further examine Queensland's progress (including the conduct of the Cullen review and implementation of recommendations) in a February 2003 supplementary NCP assessment. This supplementary assessment may have implications for 2002-03 NCP payments.

The Council considered Queensland's position on retail contestability in electricity and the implications for payments recommendations at some length. The Council regards Queensland's position as, first, inconsistent with reform obligations and the approach adopted by other national market participant governments and, second, as a serious reform failure with significant adverse implications for all participant governments. The Council considers that this reform failure warrants a substantial reduction in competition payments, to apply until Queensland introduces full contestability. The Council notes, however, Queensland's continuing work to assess the implications of further reductions to the threshold for contestability. The Council also notes that there is an opportunity for all governments to amend the electricity reform agreements before the 2003 NCP assessment. Governments may choose to do this to relieve Queensland of obligations under the electricity agreements, having regard to Queensland's view that a net benefit has not been established for the introduction of full retail contestability. Accordingly, the Council makes no recommendation on payments on this issue in this assessment. In the absence of any agreement by governments relieving Queensland of its contestability obligations, the Council will assess Queensland (along with other relevant governments) on this issue for a final time in 2003 and will recommend on payments at that time, as appropriate.

Given the Queensland Government's assurances on the other significant areas of noncompliance, the Council does not consider that a further adverse recommendation on payments for 2002-03 is warranted. The Council will reassess Queensland's remaining areas of noncompliance again in 2003, along with any further reform failures and the State's overall progress with reform implementation. The Council notes that Queensland faces a substantial task in completing appropriate reform implementation for its legislation review and reform program by 2003.

Western Australia

- Western Australia has made good progress with gas reform, but has achieved little in electricity reform. The State has met all obligations under the national gas reform agreements for the purposes of this assessment. It has:

- implemented and applied the National Gas Access Code and associated legislation;
- removed significant barriers to national free and fair trade in gas;
- removed regulatory restrictions on the use of gas;
- adopted uniform national pipeline construction standards; and
- removed legislative barriers preventing contestability down to the household level, establishing a framework to allow customers to choose their gas supplier.

Western Australia is not a participant in the national electricity market and does not have specific obligations under the NCP electricity reform agreements. Nonetheless, some reform obligations in electricity arise from the general NCP agreements. The current Western Australian Government is committed to addressing longstanding reform issues in the electricity industry and implementing a reform program through the application of general NCP principles.

While Western Australia has implemented a third party access regime for the transmission and distribution network of its electricity corporation, Western Power, the Council recently considered this regime and concluded that it was not effective against the principles of clause 6 of the CPA. The regime has had little pro-competitive impact. Western Australia is conducting a comprehensive review of the structure of Western Power, consistent with the CPA clause 4 framework. Appropriate reform in response to this review will constitute one of Western Australia's most important NCP reforms. The Council will assess Western Australia's progress in electricity reform again in 2003.

- Western Australia is making good progress with its water reform obligations and has demonstrated a strong commitment to the reform process. Institutional reform has been progressed, with the adoption of independent price regulation for large parts of the urban and rural water industries. Western Australia has made good progress in cost recovery in urban and rural water pricing. It has no stressed river systems and continues to make good progress against the 2005 deadline for appropriately assigning water allocations (including environmental allocations). The State has been deficient, however, in failing to implement the intergovernmental National Water Quality Management Strategy. The Council has agreed on a remedial program with Western Australia, which will formally report to the Council on progress at the end of December 2002 and March 2003. The Council will closely monitor implementation of the program and reassess progress in the 2003 NCP assessment.

- Western Australia still has seven elements of the 1999 and 2001 NCP road transport reforms programs to fully implement. It expects to implement most of these by October 2002, although processes to enable nationally

consistent heavy vehicle registration are not expected to be in place until mid-2003. Legislation providing for this registration process was before the Parliament when the Parliament was prorogued for the 2001 State election, so it must be reintroduced.

- Western Australia has a comprehensive legislation review program. It has so far completed almost 80 per cent of its reviews of significant existing legislation, but implemented reforms for less than 20 per cent of these priority reviews. All proposals for new legislation are tested for compliance with competition principles through a process managed by the Department of Treasury and Finance. The department liaises with agencies developing new legislation with the potential to restrict competition, to ensure the legislation is reviewed. Further, the department can present its advice directly to the Cabinet if it considers competition issues are not appropriately addressed.

  – Western Australia is continuing to progress NCP reforms to the regulation of the health professions. Following the State's health practitioner legislation review, the Government released a policy framework for its new health practitioner legislation. When implemented, this framework will remove significant restrictions on advertising, business structure and business ownership. The Government has approved the drafting of template legislation.

    Western Australia is retaining existing practice protections for health professions for three years from June 2001, while it conducts a review to identify core practices that warrant restriction. The Council accepts that the core practices model is a significant reform, requiring extensive consultation, and that potential public safety risks justify retaining the current provisions for the three-year period nominated by Western Australia. The Government is also retaining restrictions on the use of the 'occupational therapist' title. The Council considers that this restriction does not meet NCP obligations. Western Australia has undertaken to consider its approach to regulating occupational therapists via the core practice review process. In 2003, the Council will consider Western Australia's progress with its core practices review to ensure it remains on track for completion by June 2004.

    Western Australia has made good progress applying NCP reforms to other professions and occupations. It is drafting legislation to remove restrictions on legal practice business structures and will consider other reforms when its review of legal practice (currently close to completion) is finished. Reviews have been completed and reform activity appears to be on track in relation to the regulation of inquiry and security agents, motor vehicle dealers, pawnbrokers and second-hand dealers, auctioneers, settlement agents and participants in the boxing industry. Reviews are close to completion for employment agents, hairdressers and real estate agents. Western Australia is still to review the regulation of driving instructors. In 2003, the Council will

finalise the assessment of compliance in those areas where review and reform activity is not complete.

- Western Australia has consolidated and reviewed its town planning legislation. Review and reform activity for the regulation of associated professional services (architects, surveyors and valuers) appears to be progressing well. Similarly, reviews of legislation regulating the building and related trades are either complete or close to completion. Western Australia has also made progress in reviewing and reforming education and vocational training legislation. The Council will finalise its assessment of Western Australia's compliance with its NCP obligations in these areas in 2003.

- Western Australia has significant remaining restrictions on competition in relation to retail trading hours and liquor licensing. Trading hours are restricted on week days, and Sunday trading by large retailers is prohibited outside tourist precincts. Western Australia's review process, which commenced in 1999, has been drawn out and the Government is still to consider the review report. The Western Australian Government has acknowledged that there is some support in the community for removing trading hours restrictions and a case for reform. It has undertaken to implement reforms during 2002-03. No details of these reforms are yet available; the Government is to examine these via a Ministerial task force. Western Australia's liquor licensing legislation contains a needs test, whereby the licensing authority can reject a licence application because there are already sufficient existing liquor outlets in the affected area. The legislation also distinguishes between hotels and liquor stores, with only hotels able to trade on Sundays. Western Australia's review of liquor licensing legislation is complete and its recommendations appear to address NCP concerns. The Government has not yet announced its response to the review recommendations, but has recognised the need for reform and will review liquor licensing arrangements during 2002-03.

- Western Australia's petroleum pricing legislation requires that retail petrol prices be fixed for at least 24 hours, and that a minimum wholesale price be set for motor fuels. These restrictions are intended to encourage stability and transparency in pricing. Monitoring of petrol prices by the ACCC suggests, however, that the Act has no consistent effect on prices and that prices may even be higher in Perth than in some other capitals. The Council will reassess Western Australia's compliance with NCP principles in each of these areas in 2003.

- Western Australia still has some way to go to meet legislation review and reform obligations in most areas of primary industry. The *Grain Marketing Act 1975* provides an export monopoly in the marketing of coarse grain. The Government, while committing to deregulation of the monopoly, will do so only when the Commonwealth removes the Australian Wheat Board monopoly. Western Australia has agreed to establish arrangements such that, until deregulation, the monopoly

(held by the Grain Pool of Western Australia) will operate only in export markets where there is genuine market power attributable to the single desk.

Western Australia's 1996 review of the *Chicken Meat Industry Act 1977* recommended that growers be able to opt out of industry-wide negotiations on supply fees and that controls on entry to the processing and growing sectors be removed. The Government expects to introduce legislation to implement the recommendations of its review later in 2002. Review and reform activity in relation to potato supply and marketing is similarly drawn out, with Western Australia recently recommencing its consideration of this issue.

The State is the only jurisdiction to retain egg marketing regulation, but is considering options for removing this regulation. Western Australia also recently restarted a review of bulk handling arrangements, focusing on the anticompetitive effects of restrictions on how Cooperative Bulk Handling Limited prices its services. The State's review and reform of the regulation of veterinary surgeons appears to be on track, and Western Australia reformed its dairy regulation following the national decision to deregulate the industry.

– Western Australia has completed reviews of the two major Acts regulating its fisheries and has released its review reports. The more significant questions arising from these reviews relate to the western rock lobster and pearl fisheries. The Government expects to have implemented pro-competitive reforms in the rock lobster fishery by the start of the 2003 season. The review of this fishery also signalled potential benefits from introducing an output-based management regime. In relation to the pearl fishery, the Government accepted most of the recommendations of its NCP review, but not proposals to remove limits on hatchery quotas and to auction wildstock quotas. The Government indicated that it would revisit these matters in 2005 when the current hatchery policy expires. The Council will consider these issues in the 2003 NCP assessment. The Council will also consider Western Australia's progress on forestry at this time, noting that the Government is currently considering a consultant's review of the application of competitive neutrality principles to native forest timber operations.

– Western Australia has completed a review of its *Taxi Act 1994*, and subsequently has implemented limited reform. It allows (virtually) free entry to the hire car industry, although it imposes several other regulatory restrictions that constrain the ability of hire cars to compete with taxis. The Government released 60 new taxi licences in 2000, but appears to have made no further attempt to release licences. It is now proposing an industry forum to evaluate the community benefit from further relaxation of supply restrictions. The Council considers that this process may lead the interests of the industry to subsume the overall community interest. Given the reform outcomes to date, the

Council does not consider that Western Australia has complied with its NCP obligations relating to the taxi and hire car industry. Western Australia provided some assurances during the 2002 NCP assessment that it wants to progress reform, including improving driver remuneration and career opportunities. The Council will reassess Western Australia's progress in the 2003 NCP assessment.

- Western Australia continues to meet its obligations under the Conduct Code Agreement.

- The Government has committed to the establishment of an independent economic regulator with jurisdiction over the electricity, gas, rail and water industries. The proposed Economic Regulation Authority is expected to be operational by 1 January 2003. It will be responsible for access regulation and have independent advisory functions in relation to any retail pricing and inquiry functions determined by the Government. The authority will also be responsible for issuing and enforcing industry licences.

- Western Australia is applying its competitive neutrality obligations by corporatising or commercialising its significant businesses, which includes a requirement to apply competitive neutrality principles. Western Power and the Water Corporation are corporatised. Other large businesses are commercialised or proposed for commercialisation. Port authorities, for example, were commercialised under the *Port Authorities Act 1999*. Western Australia's competitive neutrality complaints mechanism received no substantive complaints during 2001. Western Australia does not, however, apply competitive neutrality principles to its health business activities. The Council has raised this with the State's competitive neutrality complaints secretariat and will consider the coverage of competitive neutrality application in the State in the 2003 NCP assessment.

  Western Australia's local governments have conducted an extensive program of business reviews to assess whether the introduction of competitive neutrality principles is warranted. Competitive neutrality principles have been introduced in many businesses as a result. Western Australia recently focused on extending competitive neutrality to smaller government agencies, conducting 23 competitive neutrality reviews of significant business activities.

For the purposes of the 2002 assessment, Western Australia has not met NCP obligations in relation to:

- water quality issues and the adoption of the intergovernmental National Water Quality Management Strategy;

- the regulation of retail trading hours;

- liquor licensing arrangements;

- arrangements relating to egg marketing;
- supply management and marketing arrangements relating to potatoes;
- registration requirements for occupational therapists; and
- taxi and hire car regulation.

In all other areas, completed reform activity has met NCP obligations, although barely so in relation to overall progress on the legislation review and reform program.

The Council has had constructive discussions with the Western Australian Government and has been able to resolve an appropriate process for addressing the national water quality reform obligations. Western Australia will report to the Council on progress at the end of December 2002 and March 2003. This matter may have implications for Western Australia's NCP payments for 2002-03.

Discussions between the Council and the Western Australian Government on the other outstanding issues are continuing. Consequently, the Council has been unable to finalise its 2002 NCP assessment and make recommendations on NCP payments to Western Australia for 2002-03. The Council will finalise its assessment and make payments recommendations when discussions on outstanding issues are concluded. The Council will recommend that NCP payments be paid in full for the 2002-03 financial year if these outstanding issues are resolved (noting the water quality matter above).

In 2003, the Council will again assess Western Australia's remaining areas of noncompliance with NCP principles, along with any further reform failures and the State's overall progress with reform implementation. The Council notes that Western Australia faces a severe challenge in completing reform implementation for its legislation review and reform program by 2003, and will need to devote more resources to this effort over the next 12 months.

South Australia

- South Australia has met all obligations under the national electricity and gas reform agreements for the purposes of this assessment.

  South Australia was lead legislator for the national gas code legislation, setting up derogations and transitional arrangements consistent with the gas agreements. It has completed its structural reform commitments and reviewed legislation that restricts intra-field competition in the Cooper Basin, in accordance with the gas agreements and the CPA, and implemented appropriate reforms. South Australia has:

  – implemented and applied the National Gas Access Code and associated legislation;

- removed significant barriers to national free and fair trade in gas;
- removed regulatory restrictions on the use of gas;
- adopted uniform national pipeline construction standards; and
- removed legislative barriers preventing contestability down to the household level, establishing a framework to allow customers to choose their gas supplier.

South Australia has introduced significant reform to its electricity industry. Structural arrangements have been comprehensively reviewed. South Australia has established an independent regulator responsible for pricing, licensing and network access. It has taken all actions necessary to introduce the national electricity market and will extend contestability down to the household level in early 2003, allowing customers to choose their electricity supplier. South Australia is participating with other relevant governments in a review of energy markets, to address outstanding issues identified by the Council in previous assessments. These include the development of a truly national grid, the implementation of full retail contestability and the sunsetting of derogations to the National Electricity Code. Other reform issues include streamlining national market institutional arrangements, improving the wholesale market pricing mechanism and introducing effective demand management mechanisms.

The Council notes that all necessary South Australian regulatory approvals for the South Australia New South Wales Interconnect (SNI) have been granted, but remains concerned about the apparent overlap between the national electricity market and South Australia's regulatory processes for new interconnects. The Council will revisit these outstanding issues in 2003, in the light of the recommendations of, and governments' responses to, the Energy Markets Review.

- South Australia has achieved significant progress with implementing water reform. It has developed a comprehensive allocation system that provides for environmental needs (including those of the River Murray) and involves significant community involvement. South Australia continues to progress implementation of consumption-based pricing reforms for the commercial sector and trade waste charging reforms. The Council has identified two issues of concern in this assessment, however. First, South Australia's dividend policy may not be consistent with CoAG commitments because dividend distributions from SA Water to the Government exceed total after-tax profits. The Council will reassess this issue in 2003 after a broad review of the dividend policies of all jurisdictions has taken place. Second, South Australia has not implemented the intergovernmental National Water Quality Management Strategy. The Council has agreed with South Australia on a final timetable to implement the national strategy. The Council will reassess this issue in 2003.

- South Australia has completed its national road transport reform agenda.

- South Australia has a comprehensive legislation review program. It has so far completed almost 80 per cent of its reviews of significant existing legislation, and implemented reforms for almost 40 per cent of these priority reviews. All agencies considering new legislation or amendments to existing legislation must consider restrictions on competition, demonstrate in Cabinet submissions seeking approval to draft legislation that competition issues have been considered, and address competition issues in the second reading speech of Bills to Parliament.

  – South Australia has made good progress with reviewing laws regulating the professions and occupations. Reviews are complete in most cases, although in some cases reform implementation was not concluded because legislation lapsed with the calling of the 2002 State election.

    South Australia has completed reviews of a range of health practitioner legislation, including legislation regulating chiropractors and osteopaths, medical practitioners, nurses, physiotherapists, dentists, optometrists and opticians, chiropodists, psychologists and occupational therapists. It has implemented satisfactory reforms to legislation regulating nurses. Replacement medical practitioner legislation lapsed with the calling of the 2002 State election. In other cases, the Government is drafting legislation, or still considering its response to review recommendations.

    South Australia has retained ownership and related restrictions for dentists contrary to the recommendation of its review. The Council considers that these restrictions do not meet NCP principles. It acknowledges, however, that the legislation contains mechanisms for granting exemptions to the ownership restrictions, which may reduce their adverse impacts. The Council will monitor the exemptions process and finalise its assessment in 2003. South Australia has also indicated that it will retain registration requirements for occupational therapists, but has not provided a convincing public interest rationale for registration. The Council considers that South Australia's action in this area does not meet NCP principles, but accepts that the cost of this restriction on competition is not likely to be significant.

    South Australia's review of legal practitioner regulation recommended opening further areas of legal work to competition. The work in this area lapsed with the calling of the State election; nevertheless, the national model laws process provides a means of addressing several of the recommendations of South Australia's review. A Bill to remove ownership restrictions on conveyancers also lapsed with the calling of the election. South Australia has completed or significantly progressed reviews of the regulation of security and investigation agents, tow truck operators, driving instructors, second-hand motor vehicle dealers, second-hand dealers and pawn brokers, auctioneers and employment

agents. Reform of the regulation of land agents and hairdressers has been implemented.

- South Australia has reviewed its land use and development regulation, and the regulation of related occupations. It has also completed a review of its building regulation, and has completed (or is close to completing) reviews of the regulation of related trades, including building contractors, plumbers and gas fitters, and electricians.

- South Australia has not met its legislation review and reform obligations in relation to the regulation of barley marketing. South Australia and Victoria jointly reviewed barley marketing arrangements in 1997. Both governments accepted the review recommendations to remove restrictions on domestic marketing and to retain the export monopoly for the shortest possible time. Unlike Victoria, which has now deregulated both domestic and export marketing, South Australia legislated to extend the marketing monopoly indefinitely, with a further review of the export monopoly to be conducted by November 2002. South Australian growers therefore have fewer options for the sale of their crop, and alternative export marketers are unable to offer their services to the State's growers. Further, evidence suggests that prices achieved by growers in Victoria, where marketing is deregulated, may be higher than those received by South Australian growers, perhaps reflecting the greater freedom of Victorian growers to respond to market demands. South Australia has not produced credible public interest evidence to support its decision to extend the monopoly. The Government has, however, undertaken that the review due by November 2002 will be open, independent and robust, with terms of reference that reflect competition principles. The Council regards this issue as a significant competition question and will reassess South Australia's progress in meeting its NCP obligations in the 2003 NCP assessment.

  South Australia is making progress on its NCP obligations in several other areas of primary industry, however. Its reform of its dairy industry, following the national decision to deregulate the industry, was a considerable achievement. The State's review of the regulation of veterinary surgeons is complete, although no decision on the review recommendations has been announced. South Australia repealed its regulation of bulk grain handling (which imposed a sole right to receive and deliver grain, and an obligation to charge uniform prices) in 1998. The State's poultry meat regulation, while not yet repealed in accordance with the recommendation of the review of the legislation, does not shelter collective bargaining action from challenge under the Trade Practices Act and therefore is not operational. South Australia recently released for consultation draft replacement legislation, which will need to be assessed under the State's gatekeeping process. South Australia is also reviewing its principal fisheries legislation. The Council will look for South Australia to have completed review and

reform activity in these areas consistent with NCP principles by the time of the 2003 NCP assessment.

- South Australia has considerable restrictions on retail activity, including trading hours, liquor licensing and the licensing of petrol retail outlets. Trading hours regulation imposes significant restrictions on opening times for shops outside the central business and the Glenelg Tourism Precinct. It exempts certain types and sizes of shop from the restrictions, leading traders to devote considerable effort to finding ways in which to circumvent the restrictions on trading times. There are differences in the times that different types of shops selling similar products are able to open. Consumers are prevented from shopping at times that are convenient to them. At the time of printing of this report, the South Australian Government released a media statement outlining limited changes to its trading hours regime. The Government's proposal appears to recognise the need to address the current complex system of exemptions, but the Council has as yet no detail of what South Australia is proposing in this area. The Council is looking for South Australia to further develop its proposals for reforming trading hours arrangements to address its NCP obligations in this area.

- The State's liquor licensing arrangements contain a needs test, whereby the licensing authority can reject a licence application because there are already sufficient existing liquor outlets in the affected area. South Australia undertook in the 1999 NCP assessment to reconsider this provision during 2000-01. While this review had not been conducted by June 2002, the Government has advised the Council that it aims to complete the review and reform of licensing legislation by June 2003.

- South Australia's petrol retail licensing arrangements allow the Government to withhold new licences if the new licence holder would provide unfair and unreasonable competition to sellers in the area surrounding the new outlet. A review of this legislation has been completed but is yet to be considered by the Government. The Council will consider South Australia's compliance with NCP principles in each of these areas in 2003.

- Although South Australia's taxi licensing legislation contains a discretion enabling the Minister to release new licences, there has been no release of new licences since 1 January 1999. The Council considers that the mere existence of the legislative discretion is insufficient for compliance with CPA clause 5 obligations. In discussions with the Council, the South Australian Government has undertaken to examine possible mechanisms for addressing restrictions on the availability of taxis. Until the 2003 NCP assessment, the Council will pursue discussions with South Australia on arrangements for improving the supply of taxis.

- South Australia continues to meet its obligations under the Conduct Code Agreement.

- South Australia applies competitive neutrality principles to all significant Government business activities, identifying significant businesses on the basis of their size and influence in the relative market(s). Businesses are categorised to facilitate the application of competitive neutrality principles. Even businesses that are not categorised are still subject to investigation if there is a complaint that they are not appropriately applying competitive neutrality principles. South Australia recently completed an interdepartmental review of its competitive neutrality policy. In July 2002, the Government approved a revised policy statement. South Australia refers competitive neutrality complaints to its Competition Commissioner for investigation. Five written complaints about State Government business activities were received in 2001, although only one was assessed as a competitive neutrality issue. There were no complaints about local government business activities.

For the purposes of the 2002 NCP assessment, South Australia has not met NCP obligations in relation to:

- the regulation of retail trading hours;

- liquor licensing arrangements;

- barley marketing arrangements;

- ownership restrictions for dental practices;

- registration requirements for occupational therapists;

- water quality and implementation of the National Water Quality Management Strategy; and

- taxi and hire car regulation.

In all other areas, completed reform activity has met NCP obligations, and South Australia has made significant progress against its total NCP reform agenda.

The Council has had constructive discussions with the South Australian Government and has been able to resolve appropriate processes for addressing the outstanding water reform, liquor licensing and barley marketing issues. The Council will monitor the impact of restrictions on dental practices and occupational therapists. It also anticipates further reform activity in relation to taxi and hire car regulation over the next 12 months.

In discussions with the Council about the reform of retail trading hours restrictions, the South Australian Government undertook to revisit previous review evidence and to explore options for change. South Australia has

proposed some limited reforms but is still to explain in detail how it proposes to address anomalies in its trading hours arrangements. Consequently, the Council has been unable to finalise its 2002 NCP assessment and make recommendations on NCP payments for 2002-03. The Council will finalise its assessment and make payments recommendations for 2002-03 when South Australia provides more detail on its approach to retail trading hours reform. The Council will recommend that competition payments be paid in full for the 2002-03 financial year once it its satisfied that this issue is resolved consistent with NCP principles.

In 2003, the Council will reassess these areas of noncompliance, along with any further reform failures and South Australia's overall progress with reform implementation. The Council notes that South Australia faces a substantial challenge in completing reform implementation for its legislation review and reform program by 2003.

Tasmania

- Tasmania initially had limited NCP reform obligations in relation to the energy markets. As a party to the national electricity market agreements, Tasmania has obligations in relation to connection to the national market, but these do not acquire full effect until physical interconnection with the mainland is established. Similarly, Tasmania's obligations under the national gas agreements have been triggered by the development of its gas industry. Tasmania has met all of its new obligations for this 2002 NCP assessment.

  Tasmania has:

  – implemented and applied the National Gas Access Code and associated legislation. (It has not yet sought certification of this legislation as required by the agreements, but this application is imminent);

  – removed significant barriers to national free and fair trade in gas;

  – removed regulatory restrictions on the use of gas; and

  – adopted uniform national pipeline construction standards.

  Tasmania has made a commitment to join the national electricity market through the construction of the Basslink interconnector. In preparation for meeting obligations that arise following interconnection, Tasmania has enacted the National Electricity Law and reviewed and reformed structural arrangements for electricity utilities. Tasmania has also enacted the Tasmanian Electricity Code for third party access to transmission and distribution services which is consistent with how the National Electricity Code provides for the access regime in the national electricity market.

- Tasmania experienced some delays in implementing its water reform obligations in the earlier years of the NCP program. It has since made some progress on implementing two-part tariffs, but the Council has several concerns about aspects of the State's approach in the area of urban full cost recovery. Tasmania has not provided sufficient information for the Council to make a full assessment of urban full cost recovery.

  Tasmania has a legislated framework for water allocations and trading, and has achieved progress in implementing:

  – effective water catchment management strategies; and

  – bulk water pricing.

  The Council has some concerns regarding the State's processes for determining environmental allocations and the inappropriate use of socio-economic studies to delay those allocations. These problems are evident in the draft Great Forester water management plan, which was the first plan developed in Tasmania. Given the precedent value of this plan and the Council's concerns with the current draft, the Council will reassess all final plans in 2003.

- Tasmania has completed its national road transport reform agenda.

- Tasmania has a comprehensive legislation review program. It has so far completed around 90 per cent of its reviews of significant existing legislation, and implemented reforms for almost half of these priority reviews. Tasmania's legislation gatekeeping process assesses all new legislative proposals, including against competition principles.

  – Tasmania has made good progress in reviewing and reforming laws governing professions and occupations. It has reviewed and reformed legislation governing several health professions, including chiropractors and osteopaths, dentists, nurses, physiotherapists, podiatrists, psychologists and radiographers. Tasmania's health practitioner legislation reforms have removed advertising restrictions, ownership restrictions and, in some cases, practice reservations. The Government has reviewed its *Medical Practitioners Registration Act 1996*, in which restrictions on ownership of practices are a key competition issue. The Government is yet to consider the review recommendations. Tasmania is finalising its review of optometry regulation, where again the key issues are restrictions on ownership and advertising.

    Tasmania has completed satisfactory reviews and reforms of legislation governing commercial and inquiry agents, security providers, driving instructors, pawnbrokers and second-hand dealers, and hairdressers. The Government is proposing to replace legislation governing auctioneers and real estate agents later in 2002. Tasmania has also reviewed its legal practitioner legislation and the Government will soon consider a reform proposal in relation to conveyancing.

- Although Tasmania's taxi and hire car legislation allows the Transport Commission to issue additional taxi licences, there has been no issue of new licences in urban areas since 1995. Unlimited numbers of hire car licences are available at a fee of $5000 although hire cars are restricted to pre-booked work. The Government is still to respond to the recommendation of the State's taxi review group to eliminate the Transport Commission's discretion over the issue of new licences, replacing it with a provision requiring the annual auction of new licences. In addition, the Council is not convinced that the formula governing the release of taxi licences will reduce the existing scarcity of licences. Given these circumstances, Tasmania cannot be considered to have met NCP obligations relating to taxis and hire cars. Tasmania has undertaken, however, to progress taxi licensing reform during 2002-03, and the Council will consider this matter again in 2003.

- Following two NCP reviews of retail trading hours arrangements, both of which found that restricting trading hours is not in the public interest, the Tasmanian Government legislated to allow unrestricted trading except on Easter Friday, Christmas Day and the morning of Anzac Day. As Victoria did when introducing its trading hours changes, Tasmania is allowing local governments to conduct a vote on whether to retain restrictions within their area. The changes to Tasmania's trading hours will operate from 1 December 2002.

  Tasmania's review of liquor licensing had not reported by June 2002. The review is considering the two major restrictions: the requirement that nonhotel outlets sell liquor in quantities of at least nine litres and the prohibition on the sale of liquor by supermarkets. Tasmania has therefore not complied with NCP principles in relation to liquor licensing. The Tasmanian Government assured the Council during this 2002 assessment that it is committed to examining liquor licensing issues consistent with the public interest as soon as possible. The Council will consider this matter further in 2003.

- Tasmania has also reviewed its education legislation. It has implemented all review outcomes except those concerning the regulation of vocational education and training. A minor review of arrangements for the registration of universities has been completed. Tasmania has also updated legislation that governs the licensing of child care providers and establishes standards of care.

- Tasmania has completed a review of its land use and planning legislation. It has also satisfactorily completed the review and reform of its building legislation and the regulation of associated building trades. Review and reform activity for the regulation of associated professional services (architects, surveyors and valuers) appears to be progressing well. The Council will finalise its assessment of Tasmania's compliance with its NCP obligations in these areas in 2003.

- Tasmania continues to meet its obligations under the Conduct Code Agreement.

- Tasmania has made good progress with implementing competitive neutrality reforms. Tasmania's significant State Government businesses are subject to tax equivalent regimes, debt guarantee fees, dividend requirements and regulatory equivalence with the private sector. Competitive neutrality principles also apply to significant business activities at local government level. The Government Prices Oversight Commission, an independent commission, handles competitive neutrality complaints. The mechanism allows for complaints to be brought against any public business activity at either the State or local government level. Tasmania is reviewing its policy to better identify significant local government businesses to which competitive neutrality should apply.

For the purposes of the 2002 assessment, Tasmania has not met NCP obligations in relation to:

- full cost recovery in urban water supplies;
- allocation of water for the environment in water management plans;
- liquor licensing regulation; and
- taxi and hire car regulation.

In all other areas, completed reform activity meets NCP obligations, and Tasmania has made significant progress against the total NCP reform agenda. The Council will reassess Tasmania's progress with full cost recovery in urban water pricing in an October 2002 supplementary assessment. This matter may have implications for Tasmania's 2002-03 NCP payments.

In making recommendations on competition payments, the Council has taken account of Tasmania's considerable reform progress and successes as a reflection of a commitment to NCP reform, and the likely impact of reform failures. Balanced against this progress, and given the assurances provided by the Government on the significant areas of noncompliance, the Council considers that the noncomplying matters identified in this assessment do not warrant an adverse recommendation on payments for 2002-03 (noting the urban water pricing matter above). In 2003, the Council will reassess Tasmania's progress in the other areas of noncompliance, along with any further reform failures and the State's overall progress with reform implementation. The Council notes that Tasmania faces a difficult challenge in implementing all reforms flowing from its legislation review and reform program by 2003.

The ACT

- The ACT has met all obligations under the national electricity and national gas reform agreements for the purposes of this 2002 NCP assessment.

The ACT has:

- implemented and applied the National Gas Access Code and associated legislation;
- removed significant barriers to national free and fair trade in gas;
- removed regulatory restrictions on the use of gas;
- adopted uniform national pipeline construction standards; and
- introduced contestability down to the household level, allowing customers to choose their gas supplier.

The ACT has taken all actions necessary to introduce the national electricity market with one exception: it is yet to extend contestability down to the household level, allowing customers to choose their electricity supplier. A recent review by the Independent Competition and Regulatory Commission recommended in favour of extending contestability to households, but the Government is yet to respond. The ACT is participating with other relevant governments in a review of energy markets, designed to address outstanding issues identified by the Council in previous assessments. These include the development of a truly national grid, the implementation of full retail contestability and the sunsetting of derogations to the National Electricity Code. Other reform issues include streamlining national market institutional arrangements, improving the wholesale market pricing mechanism and introducing effective demand management mechanisms. The Council will revisit all of these outstanding issues in the 2003 assessment in the light of the recommendations of, and governments' responses to, the Energy Markets Review.

- The ACT has established a strong record on water reform, being the only jurisdiction in the 1999 NCP assessment to have fully met its obligations under the water reform agreements. (That assessment was the first occasion on which water reform commitments were assessed). The ACT does not have any rural water or nonmetropolitan urban water suppliers, so its reform program in water is nearly complete. A particular achievement is the move to independent price regulation for water services. The Council considers that the ACT's dividend policy may not be consistent with CoAG commitments because dividend distributions from ACTEW to Government almost equal after-tax profits. Further, the ACT needs to consider the merits of systematic pricing arrangements for trade waste by the 2003 NCP assessment. The ACT is yet to establish a cap on water entitlements with the Murray–Darling Basin Commission.

- The ACT will implement the one remaining component of its national road transport reform agenda by December 2002. This component is a minor matter relating to the continuous registration of motor vehicles.

- The ACT has a comprehensive legislation review program. It has effectively completed its reviews of significant existing legislation, and implemented reforms for over 30 per cent of these priority reviews. The ACT tests all proposed legislation for compliance with competition principles. It requires regulatory impact statements to be prepared on all proposed new or amended legislation or subordinate legislation as part of the policy development process. Cabinet submissions must indicate whether policy recommendations have any competition implications. The Department of Treasury advises departments in the preparation of the regulatory impact statements

  – The ACT has few areas of regulatory restriction on competition in retail trading. It removed shop trading hours restrictions in 1997, and has reviewed liquor licensing arrangements. The few restrictions in the area of liquor licensing were found to be in the public interest. The ACT has reviewed its fuel pricing legislation consistent with its NCP obligations.

  – The ACT has made good progress in applying NCP reforms to the regulation of professions and occupations. It completed a consolidated review of its 11 health profession Acts in March 2001. The reforms recommended by the review appear consistent with CPA principles. The Government has approved the drafting of legislation to implement the recommendations, and expects to have a Bill before the Legislative Assembly in late 2002. The ACT Parliament amended the *Pharmacy Act 1931* in August 2001, with the intention of ensuring only registered pharmacists or companies controlled by registered pharmacists can own and operate pharmacies. The ACT considers this amendment does not introduce any new restrictions on pharmacy ownership. It is preparing advice for the Council on the effect of the amendment. The Council will finalise its assessment of the ACT's NCP compliance in relation to the health and pharmacy professions in 2003.

    The ACT ceased its review of its legal practitioner regulation, given the work underway on uniform national laws for the legal profession. It has reviewed (or considered via a regulatory impact process) laws regulating security guards and patrol services, driving instructors, motor vehicle dealers, pawnbrokers and second-hand dealers, real estate and other business agents, auctioneers, hawkers and providers of child care services.

  – The ACT has reviewed its education sector legislation consistent with NCP principles. Reviews of legislation governing planning, land and development approvals, and related occupations (such as surveyors), have been completed. The ACT has also completed a review of its legislating regulating building and building related trades, and of the certification process for building approvals.

  – There are remaining restrictions on taxi and hire car services. The ACT's review of this regulation recommended that taxi licensing restrictions be removed and that the Government buy back existing

licences at market value. It also recommended the removal of all restrictions on hire car licence numbers. A second review (by the Independent Competition and Regulatory Commission) was completed in June 2002. It also recommended that supply restrictions on taxi and hire car licences be removed. The ACT Government is considering the commission's recommendations and has undertaken to respond on the issue of reform of the industry as soon as possible. The Council will look for a substantive Government response to the review recommendations by the 2003 NCP assessment.

- The ACT continues to meet its obligations under the Conduct Code Agreement.

- The ACT has made good progress in competitive neutrality reform. Appropriate taxation, debt guarantee and regulatory neutrality arrangements are being applied to the Government's full range of business activities. The Independent Competition and Regulatory Commission considers complaints that ACT Government business activities are not appropriately applying competitive neutrality policy. No complaints were lodged in the ACT in 2001.

The ACT's completed reform activity has met NCP obligations and the ACT has made substantial progress against the total NCP reform agenda. For the purposes of the 2002 NCP assessment, the only matters that the ACT is still to address are:

- the regulation of the taxi and hire car industry;

- effective trade waste pricing;

- whether the dividend payout ratio for ACTEW is consistent with NCP obligations; and

- a Murray–Darling Basin Commission cap on entitlements for the ACT.

The Council will reassess these issues in the 2003 NCP assessment. In relation to trade waste charges, the Council will look for systematic charging arrangements in 2003.

In making its recommendations on competition payments, the Council has taken account of the ACT's considerable reform progress and successes, as a reflection of a commitment to NCP reform, and the likely impact of reform failures. Balanced against this progress, and given the assurances provided by the Government on the significant areas of noncompliance, the Council considers that the noncomplying matters identified in this assessment do not warrant an adverse recommendation on payments for 2002-03. The Council will reassess the ACT's progress with the remaining areas of noncompliance again in 2003, along with any further reform failures and the Territory's overall progress with reform implementation. The Council notes that the ACT has relatively few significant remaining legislation review issues but still has some way to go to complete reform implementation by 2003.

The Northern Territory

- The Northern Territory has made good progress with gas and electricity reform.

  The Territory has met all obligations under the national gas reform agreements and general NCP principles for the purposes of this assessment. It has implemented relevant national gas reform legislation without any transitional arrangements or derogations. It has:

  – implemented and applied the National Gas Access Code and associated legislation;

  – removed significant barriers to national free and fair trade in gas;

  – removed regulatory restrictions on the use of gas; and

  – adopted uniform national pipeline construction standards.

  The Territory is not a participant in the national electricity market and does not have any obligations under the NCP electricity reform agreements. Through the application of general NCP principles, however, the Northern Territory has shown that it is committed to the reform of the electricity industry.

  The Territory undertook a major review of the structure of its Power and Water Authority in late 1998. In response to the review, the Government developed arrangements to permit competition in the Territory's electricity market, apply economic regulation to the electricity industry and transfer regulatory and policy functions from the Power and Water Authority. The Government has sought to promote greater competition within its electricity sector by providing for third party access to the transmission and distribution network of its electricity corporation. The Council has assessed this regime against NCP principles and has certified it as being effective.

- The Territory is making sound progress with its water reform obligations and has demonstrated a commitment to the reform process. Reforms have been implemented to achieve cost recovery and rates of return on urban services, consumption-based pricing, the removal of cross-subsidies, institutional separation and bulk water pricing. The Territory has no stressed river systems. It continues to make progress against the 2005 deadline to appropriately assign water allocations (including environmental allocations), and in developing public education programs to support the water reform process.

- The Territory's one outstanding component of the national road transport reform agenda is expected to be addressed in 2003.

- The Territory has a comprehensive legislation review program. It has so far completed around 90 per cent of its reviews of significant existing

legislation, and implemented reforms for over 40 per cent of these priority reviews. All Cabinet submissions on new legislative proposals must comment on whether the proposed legislation includes new restrictions on competition. If so, the proposing agency must analyse the community benefits and costs of the restriction and consider whether the restriction is the only way in which to achieve the objective of the legislation.

– The Territory has made good progress in applying NCP reforms to the professions. It has reviewed legislation regulating chiropractors, dentists, medical practitioners, nurses, Aboriginal health workers, occupational therapists, optometrists, osteopaths, physiotherapists, psychologists and radiographers. The previous Government approved the preparing of an omnibus Health Practitioners Bill (to replace six existing Acts). The Council doubts the strength of the public interest rationale for the continued registration of occupational therapists. The Territory is one of only four jurisdictions to require registration.

  The Northern Territory has also reviewed the regulation of legal practitioners, commercial agents, process servers, inquiry agents, bailiffs, driving instructors, motor vehicle dealers, pawnbrokers and second-hand dealers, real estate agents and their representatives, conveyancing agents, auctioneers, and hawkers. Legislation has been amended in several cases, and amendments to other legislation are being prepared. The Territory has completed a review of its *Building Act* (which regulates building practitioners) and is progressing reviews of legislation regulating associated trades. The Council will review progress in these areas in 2003.

– The Northern Territory repealed its *Grain Marketing Act* in 1997, thus meeting NCP obligations. It replaced various mining legislation with the *Mining Management Act 2001,* but has yet to respond to the NCP review of its *Mining Act*. The Territory has completed a review of its fisheries regulation and the Government is expected to consider its response to this review by October 2002. The Council will finalise its assessment of NCP compliance for the Territory's remaining primary industry matters in 2003.

– The most significant transport NCP issue for the Territory is the review and appropriate reform of the regulation of taxi and hire car licensing. The Council found in the 2001 NCP assessment that the Northern Territory had met its obligations in these areas, reflecting the Territory's decision in January 1999 to remove all licensing restrictions. In November 2001, the Northern Territory Government imposed a temporary (six-month) cap on the number of minibus, private hire car and taxi licences (with the exception of wheelchair accessible taxis), which it later extended to December 2002. The Government also announced a review of the regulatory framework, releasing a discussion paper for this review in May 2002. Given the cap on licences, and noting that the discussion paper canvasses measures

that may restrict competition, the Council will reassess the Territory's NCP compliance in relation to taxis and hire cars in 2003.

- There is no legislation regulating retail trading hours in the Northern Territory. Liquor licensing arrangements include a needs test that can exclude applicants for new licences on the basis of their potential competitive threat to incumbents. The Territory's legislation also discriminates between hotels and liquor stores, in that liquor stores are prohibited from opening on Sundays whereas hotels may trade between 10 a.m. and 10 p.m. The NCP review of these restrictions is underway. The Council will reassess the Territory's progress in relation to liquor licensing in 2003.

- The Territory continues to meet its obligations under the Conduct Code Agreement.

- The Territory has made significant progress with implementing competitive neutrality reforms. This effort has involved applying tax and debt equivalents to Government business divisions, ensuring the business divisions pay for all inputs used in providing services and ensuring prices charged fully reflect costs. The Territory has also reviewed the capital structure and dividend policies of Government business divisions against private sector benchmarks, and established performance monitoring arrangements through a range of financial and nonfinancial indicators. The recently enacted *Government Owned Corporations Act 2001* is allowing a 'shareholder' model of corporate governance to be applied to large government businesses that operate in competition with the private sector.

For the purposes of the 2002 NCP assessment, the Northern Territory has not met NCP obligations in relation to:

- the licensing of liquor outlets; and

- registration requirements for occupational therapists.

In addition, the Council notes the developments in the Northern Territory in relation to taxi and hire car regulation. The Council is concerned that these may signal the inappropriate re-introduction of restrictions on the supply of taxis and hire cars. In all other areas, completed reform activity has met NCP obligations and the Northern Territory has made substantial progress against the total NCP reform agenda.

In making recommendations on competition payments, the Council has taken account of the Territory's considerable reform progress and successes as a reflection of a commitment to NCP reform, and the likely impact of reform failures. Balanced against this progress, and given the assurances provided by the Government on the significant areas of noncompliance, the Council considers that the noncomplying matters identified in this assessment do not warrant an adverse recommendation on payments for 2002-03. The Council will reassess the Northern Territory's progress with these areas of

noncompliance, along with any further reform failures and the Territory's overall progress with reform implementation, in 2003. The Council notes that the Territory faces a large task in completing reform implementation for its regulation review and reform program by 2003.

The Commonwealth

The Commonwealth has played mostly a coordinating and facilitating role in the related reforms areas (electricity, gas, road transport and water), because few of these activities fall within its jurisdiction. It has also undertaken specific reforms in relation to its Government businesses and anticompetitive legislation. In addition, the Commonwealth has initiated NCP and complementary reforms in communications and transport services, including reforms in telecommunications, airports and rail. The Commonwealth established the ACCC and the Council to help progress reform, providing significant new funding for the ACCC's expanded regulatory roles.

- The Commonwealth has implemented the National Gas Access Code and associated legislation. It is participating with other relevant governments in a review of energy markets, to address outstanding issues identified by the Council in previous NCP assessments. These include the development of a truly national grid, the implementation of full retail contestability and the sunsetting of derogations to the National Electricity Code. Other reform issues include streamlining national market institutional arrangements, improving the wholesale market pricing mechanism and introducing effective demand management mechanisms. The Council will revisit these issues in the 2003 NCP assessment in the light of the recommendations of, and governments' responses to, the Energy Markets Review.

- The Commonwealth does not have any specific water supply responsibilities, so does not have distinct obligations under the water reform agreements.

- The Commonwealth will implement the one remaining component of its national road transport reform agenda in 2003.

- The Commonwealth has a comprehensive legislation review program, and has so far completed over 80 per cent of its reviews of significant existing legislation. Reforms have been implemented for almost 30 per cent of these priority reviews. The Commonwealth has robust arrangements to vet new legislation restricting competition. Regulation impact statements must be prepared for all proposed new and amending regulation (primary legislation, subordinate legislation, quasi-regulation and treaties) with the potential to restrict competition. The Office of Regulation Review (ORR) advises on whether the requirements of this process have been met, and reports annually on the Commonwealth's overall performance in this area.

- The Commonwealth conducted the Wallis review of the regulatory framework of Australia's financial system. In response to the recommendations of this review, the Commonwealth introduced far-reaching changes to Australia's financial regulatory structure, which came into effect in 1998.

- The Commonwealth commissioned the Productivity Commission to conduct reviews of the *Customs Tariff Act 1995 — Automotive Industry Arrangements* and the *Customs Tariff Act 1995 — Textiles Clothing and Footwear Arrangements*. In both cases, the Commonwealth decided to freeze the tariff reduction program over the period 2000–05 in the face of review findings that there would be an overall net benefit from faster and deeper tariff reductions.

  In relation to automotive tariffs, the Commonwealth argued that its response achieved two important objectives. These were the continuation of the process of tariff reform and progress towards the APEC 2010 goal of trade liberalisation, and the management of the transition to lower tariffs to best position Australia to attract investment in the car industry. Automotive tariffs are again under review by the Productivity Commission. The Commonwealth indicated that its 1997 textiles, clothing and footwear package was designed to assist in securing jobs by encouraging additional investment and promoting an internationally competitive textiles, clothing and footwear industry in Australia.

- With agreement from the States and Territories, and prompted by the Council's NCP consideration of gambling regulation, the Commonwealth commissioned the Productivity Commission to examine a wide range of social and economic issues related to gambling regulation. The review has informed policy considerations on gambling services by all Australian governments.

- Following a review, the Commonwealth introduced less prescriptive product labelling regulations and adopted mandatory labelling standards that are consistent with accepted international nomenclature, to lower costs and reduce barriers to trade.

- The Commonwealth has reviewed some aspects of the *Quarantine Act 1908* and implemented appropriate reforms. It will review remaining aspects that restrict competition and have not yet been subject to NCP principles. A review of the *Export Control Act 1982* made recommendations to reduce compliance costs and restrictions on exports, which the Commonwealth has accepted. The Commonwealth also integrated and streamlined a range of export concession arrangements into a single scheme (TRADEX) reducing the costs of doing business.

- The Commonwealth has reviewed legislation that restricts competition in port, marine and shipping services, including a Productivity Commission review of part X of the Trade Practices Act. The

Commonwealth has implemented most of the recommendations of these reviews and is considering implementing the remainder.

- The Commonwealth played a leading role in the review and reform of dairy marketing arrangements, coordinating the national adjustment assistance package to facilitate reform measures. The Commonwealth conducted an independent review of wheat marketing arrangements. The review did not consider that a net community benefit from the arrangements had been established and made recommendations to reduce restrictions on wheat exports while retaining the Australian Wheat Board operations intact. The Commonwealth accepted most of the review recommendations, except those designed to reduce restrictions on exports. The Council considers that this response by the Commonwealth does not meet NCP obligations.

- The Commonwealth has reviewed several areas of health regulation and implemented some of the recommendations of these reviews. The Council considers, however, that there is scope to apply NCP principles further to impediments to competition in the health insurance industry.

- The Commonwealth has commissioned major reviews of regulation of telecommunications, broadcasting services and radiocommunications.

  Among the most important concerns identified by the Productivity Commission's inquiry into broadcasting regulation (which reported in April 2000) is that scarce spectrum should be allocated to its most highly valued uses. Existing arrangements that do not require incumbent television networks to bid for spectrum cannot guarantee this outcome. Similarly, mandating the 'simulcasting' of high definition television may not be consistent with consumer preferences. The Commission also recommended that:

  - datacasting services be defined as digital broadcasting services;
  - multichannelling be permitted; and
  - commercial and national broadcasters be permitted to provide interactive services.

  The Commonwealth is yet to respond fully to the Productivity Commission recommendations. In early August 2002, it announced a review of the roles of the Australian Broadcasting Authority and the Australian Communications Authority, which will focus on arrangements for managing broadcasting and telecommunications spectrum.

  The Department of Communications, Information Technology and the Arts is conducting a separate review of datacasting, canvassing in its issues paper:

- some liberalisation of the genre rules;
- case-by-case decisions by the Australian Broadcasting Authority on whether a datacast would fall within the definition of a commercial television broadcast;
- provision for datacasters to offer interactive services only; and
- provision for datacasters to offer narrowcasting services (services to specific groups).

The department is expected to finalise the datacasting report in 2002 and the Government is required to release the report within 15 sitting days of receiving it.

The Productivity Commission's review of the *Radiocommunications Act 1992* has made several draft recommendations to improve competitive arrangements for spectrum allocation. The Commission forwarded the final report to the Government on 1 July 2002.

The Productivity Commission review of telecommunications (parts XIB and XIC of the Trade Practices Act) argued that regulation is required because carriers need access to Telstra's local loop (a natural monopoly) to offer call origination and termination services to their customers. Further, Telstra's prior status as the monopoly provider means that it dominates subscriber numbers and the access network. The Productivity Commission recommended that the ACCC continue to oversee telecommunications competition and that access arrangements apply to only core telecommunications services. On 24 April 2002, the Minister for Communications, Information Technology and the Arts announced the Government's initial response to the report, including that the Government will:

- retain the telecommunications-specific regulatory regime;
- require the ACCC to publish benchmark terms, conditions and prices, of access to core telecommunications services;
- remove 'merits review' rights so Telstra cannot appeal to the Australian Competition Tribunal on the ACCC's access arbitrations; and
- implement an accounting separation of Telstra's wholesale and retail operations.

– In response to the recommendations of a National Competition Council review of the *Australian Postal Corporation Act 1989,* the Government decided to:

- reduce protection of Australia Post's domestic mail service;
- introduce an access regime;

- open incoming international mail to competition; and
- introduce a service charter, as approved by the Government.

There is a difference between the Commonwealth's reforms and the Council's recommendations in respect of one major issue: rather than a comprehensive access regime, the Council proposed open competition in business letter services and all international mail services. The success of the Government's approach will depend heavily on the effectiveness of the access regime. The Government introduced a Bill in 2000, providing for the establishment of an access regime and some other changes, but withdrew this in 2001. Once the access regime is in place, the Commonwealth will have satisfied its NCP obligations in relation to postal services.

- The Commonwealth operates a number of business enterprises (established under enabling legislation or the Corporations Law), share-limited companies and business units (set up as separate commercial activities within agencies). All are required to operate on a competitively neutral basis to avoid unfairly disadvantaging actual or potential competitors. Australia Post, for example, is a Government business enterprise established under its own Act of Parliament, and it is required to pay all Commonwealth and State taxes and charges.

  The Commonwealth has an autonomous competitive neutrality complaints mechanism — the Commonwealth Competitive Neutrality Complaints Office — located within the Productivity Commission. The office advises the Treasurer on the application of competitive neutrality to government activities. Notably, it is able to recommend that competitive neutrality arrangements be applied to businesses below the Commonwealth's threshold for significance.

- The Commonwealth also has a responsibility under the competition agreements (CPA clause 4) to examine industry regulation and matters relating to the structure of its public monopolies where it is introducing competition or proposing privatisation.

  – The Council has previously concluded that the framework for the regulation of the telecommunications sector was consistent with competition principles, but that the Commonwealth had not met its obligation to examine the treatment of the remaining monopoly element of Telstra's business, the local fixed network.

  – The Commonwealth was also obliged to conduct a CPA clause 4 review to determine the appropriate structure for the Sydney Basin airports (including the proposed second airport) before privatisation. The Commonwealth has conducted this review and has met NCP obligations in this area.

  – The Commonwealth has instituted reform measures in rail services. The above-rail (train operations) and below-rail (track) businesses of

Australian National were restructured and sold over the period 1993–2002. In November 1997, the Commonwealth sold the Tasmanian rail services, including track and above-rail facilities. The Commonwealth did not conduct a formal CPA clause 4 review before either privatisation process, but the reforms appear to have been largely consistent with NCP principles.

For the purposes of the 2002 NCP assessment, the Commonwealth has not met NCP obligations in relation to:

- export marketing arrangements for wheat;
- restrictions on competition in health insurance arrangements;
- the structural reform of Telstra;
- providing for greater competition in postal services;
- broadcasting and radiocommunications legislation; and
- automotive and textile/clothing/footwear tariff arrangements.

There are further reviews under way or proposed in some of these areas. The Commonwealth has announced a review of the roles of the Australian Broadcasting Authority and the Australian Communications Authority, which will focus on arrangements for managing broadcasting and telecommunications spectrum, and the Department of Communications, Information Technology and the Arts is conducting a separate review of datacasting. Automotive tariff arrangements are currently under review by the Productivity Commission. There is to be a further review of wheat marketing arrangements in 2004 but the Commonwealth has not agreed to conduct this as an NCP review.

Apart from the above matters, the Commonwealth's completed reform activity meets NCP obligations. The Council does not make recommendations in relation to the Commonwealth's noncompliance with NCP obligations, because the Commonwealth does not receive NCP payments. The Council will consider the Commonwealth's progress with the areas of noncompliance again in 2003, along with any further reform failures and the Commonwealth's overall progress with reform implementation. The Council notes that the Commonwealth faces a difficult challenge in completing reform implementation for its regulation review and reform program by 2003.

1 The National Competition Policy and related reforms

Obligations under the National Competition Policy agreements

The three National Competition Policy (NCP) agreements of April 1995 establish the program of NCP and related reforms. The NCP agreements are augmented by sector-specific intergovernmental agreements on the four related areas of reforms: electricity, gas, water resource policy and road transport (NCC 1998). To meet obligations for the 2002 NCP assessment, governments must:

- be a party to the Conduct Code Agreement and have implemented the Competition Code (a modified version of part IV of the *Trade Practices Act 1974* [the TPA]), including notifying the Australian Competition and Consumer Commission (ACCC) of all legislation or provisions in legislation that rely on s. 51 of the TPA, within 30 days of the legislation being enacted or made;

- be a party to the Competition Principles Agreement (CPA) and have implemented the major elements of the CPA program, including;

  – applying competitive neutrality principles to all significant government-owned businesses (including local government businesses) where appropriate (CPA clause 3);

  – undertaking structural reform of public monopolies where competition is to be introduced or before a monopoly is privatised (CPA clause 4);

  – reviewing existing (at 1996) legislation that restricts competition (including Acts, enactments, ordinances and regulations) and removing restrictions, where appropriate (CPA clause 5);[1] and

  – undertaking gatekeeper regulatory impact analysis (including systematic and transparent assessment of alternatives to regulation) of

[1] The CPA originally set a deadline of 2000 for governments to complete legislation reviews and appropriate reforms. In November 2000, the Council of Australian Governments extended the deadline to 30 June 2002.

proposed new or amended legislation that restricts competition (CPA clause 5);

- have achieved effective participation in the fully competitive national electricity market (NEM), if a relevant jurisdiction, including completing all transitional arrangements;

- have fully implemented (if relevant) free and fair trading in gas between and within jurisdictions;

- have achieved satisfactory progress in implementing the 1994 Council of Australian Governments (CoAG) strategic framework for the reform of the water industry, consistent with timeframes established through intergovernmental agreement;

- have fully implemented the road transport reforms developed by the Australian Transport Council and endorsed by CoAG; and

- ensure national standards are set in accordance with the principles and guidelines for good regulatory practice endorsed by CoAG in 1997.

The CPA also commits governments to consider establishing independent prices oversight arrangements for government business enterprises. Such businesses often have the potential to engage in monopolistic pricing behaviour, either because they are legislated or natural monopolies or because they operate in markets where competition is weak. Prices oversight arrangements now exist in all States and Territories except Western Australia. In Western Australia, Ministers, sector-specific regulators and public sector officials perform economic regulatory functions. The State Government has committed to establishing an independent multi-industry economic regulator — the Economic Regulation Authority — which will perform a range of functions, including making recommendations to the Government on tariffs and charges for government monopoly services.

Agreements reached by Heads of Government following CoAG's review of the NCP and the role of the National Competition Council in 2000 also provide direction on the implementation of the NCP. Heads of Government affirmed the importance of the NCP in sustaining the competitiveness and flexibility of the Australian economy and contributing to higher standards of living. They agreed to several measures to clarify and finetune implementation, with the objectives of establishing a practical framework for the ongoing effective implementation of the NCP and addressing community concerns about NCP implementation.

The guidance on reform implementation provided by CoAG relates mainly to the legislation review and reform and competitive neutrality obligations. It includes: extending the deadline for completing the legislation review and reform program from 2000 to 30 June 2002; requesting that governments document the public interest reasons supporting their reform decisions and make this reasoning publicly available; requesting that governments consider the likely impacts of reform measures on specific industry sectors and

communities, including likely adjustment costs; directing the Council to examine, in considering compliance with CPA clause 5, whether the conclusion reached by a legislation review is within a range of outcomes that could reasonably be reached on the information available to a properly constructed review process; and recognising that satisfactory reform implementation may include a firm transitional arrangement that may extend beyond 30 June 2002, where justified by a public interest assessment. CoAG's additional guidance on compliance with the CPA clause 3 competitive neutrality obligations involve governments adopting a 'best endeavours' approach where a government business is not subject to executive control by government, definition of the term 'full cost attribution', and processes relating to the provision of community service obligations (see chapter 2).

Fully participating jurisdictions

The *Competition Policy Reform Act 1995* defines 'fully participating jurisdictions' as those States and Territories that are parties to the Conduct Code Agreement and that apply the Competition Code as law, either with or without modifications. Each State and Territory signed the Conduct Code Agreement to extend the operation of part IV of the TPA to all business activities within their jurisdiction, and each has enacted a modified version of part IV (the Competition Code). Each State and Territory is a fully participating jurisdiction for the purpose of the 2002 NCP assessment.

Governments' NCP annual reports

The CPA obliges all governments to produce annual reports outlining their progress against their legislation review and competitive neutrality obligations. The aim of these reports is to provide full public reporting on these areas of NCP activity by governments.

As part of the 1997 NCP assessment, governments agreed that reporting on NCP activity more broadly would be beneficial, recognising that the reports provide significant input to the assessments and to community awareness of the NCP. Governments agreed to provide their annual reports by the end of March in each assessment year, detailing their NCP activity to at least the end of the previous year.

All governments provided annual reports in 2002, thus meeting reporting obligations under the CPA. Except for the Commonwealth, each government's report was publicly available at 30 June 2002. The Commonwealth provided a draft annual report that it will subsequently publish. At the request of the Council, all governments provided additional information augmenting and/or clarifying the material in their NCP reports for 2002. Table 1.1 sets out the dates on which governments made their reports available.

Table 1.1: Governments' provision of NCP annual reports

Government	*Date on which the Council received the 2002 annual report**
Commonwealth	19 April 2002
New South Wales	11 April 2002
Victoria	3 April 2002
Queensland	3 April 2002
Western Australia	28 March 2002
South Australia	17 April 2002
Tasmania	30 April 2002
ACT	8 April 2002
Northern Territory	19 April 2002

* To assist the Council, some governments made their reports available initially in draft form, before the relevant government endorsed the draft for public release. The dates reported are the dates on which governments submitted their reports, whether draft or endorsed. All State and Territory reports are now endorsed and publicly available. The Commonwealth Government's report was in draft form at 30 June 2002.

NCP payments to the States and Territories

Under the Agreement to Implement the National Competition Policy and Related Reforms, the Commonwealth agreed to make NCP payments to the States and Territories as a financial incentive to implement the NCP and related reform program. The payments recognise that the States and Territories have responsibility for significant elements of the NCP, yet much of the financial dividend from the economic growth arising from the NCP reforms accrues to the Commonwealth through the taxation system. The payments are a means, therefore, of distributing across the community the gains from economic growth that arise from investment in NCP reform.

The Council assesses governments' progress against the NCP obligations and makes recommendations to the Federal Treasurer on the distribution of NCP payments. The prerequisite for States and Territories receiving NCP payments is satisfactory progress against the NCP obligations; if governments do not implement the agreed reforms, then there are no reform dividends to share. The Council may recommend that the Federal Treasurer reduce or suspend the NCP payments otherwise available to a State and Territory where that State or Territory has not invested in the reform program in the public interest.

The Council may recommend a reduction or suspension because failure to implement the program as agreed can contribute to a decline in economic activity and, consequently, to a reduction in the overall financial dividend from reform. The Council's primary objective, however, is to assist

governments to achieve reform outcomes that are consistent with the interests of the community. Consequently, the Council recommends suspension or reduction of NCP payments only as a last resort — that is, only where a government does not propose a satisfactory path to dealing with identified breaches of reform obligations. CoAG has asked the Council, when assessing the nature and level of the reduction or suspension recommended for a particular State or Territory, to account for:

- the extent of the jurisdiction's overall commitment to the implementation of the NCP;
- the effect of one jurisdiction's reform efforts on other jurisdictions; and
- the impact of the jurisdiction's failure to undertake a particular reform (CoAG 2000).

The Council interprets CoAG's guidance on the nature and level of payments recommendations to mean that individual minor breaches of reform obligations should not necessarily have adverse payments implications where the responsible government has generally performed well against the total NCP program. Nevertheless, a single breach of obligations in relation to an important area of reform may be the subject of an adverse recommendation, especially where the breach has a large impact and/or has an adverse impact on another jurisdiction. The Council also interprets CoAG's guidance as suggesting that the quantum of any payments recommendation should bear some relationship to the responsible government's overall performance on reform implementation, the impact of the breach of reform obligations and whether there are adverse impacts on other jurisdictions.

The Council's advice to the Federal Treasurer in this 2002 NCP assessment informs the Treasurer's decisions on the distribution of NCP payments in 2002-03.[2] Approximately $740 million is available in 2002-03, on the basis that the States and Territories meet their reform obligations. This amount is distributed among the States and Territories on a per capita basis, as shown in table 1.2. The Council also assesses the Commonwealth's progress in implementing the NCP program, but the Commonwealth, although a party to the NCP agreements, does not receive NCP payments.

[2] In November 2000, Heads of Government reaffirmed their commitment to the NCP program and asked the Council to undertake annual assessments of governments' performance in meeting their NCP and related reform obligations following the assessment in 2001. Prior to 2002, the Council conducted assessments in 1997, 1999 and 2001.

Table 1.2: Estimated maximum NCP payments for 2002-03[a]

Jurisdiction	*NCP payments in 2002-03 ($m)*
New South Wales	248.6
Victoria	184.7
Queensland	139.6
Western Australia	73.0
South Australia	56.7
Tasmania	17.7
ACT	11.9
Northern Territory	7.5
Total	739.8

[a] Estimates based on current inflation rate and population growth.

Source: Commonwealth of Australia 2002, Budget Paper No. 3 — Federal Financial Relations.

2 The Competition Principles Agreement reforms

Signed by all governments in 1995, the Competition Principles Agreement (CPA) establishes the principles for governments to apply in reviewing and reforming legislation, reforming public monopolies and applying competitive neutrality. Legislation (including new legislation) should not restrict competition unless the benefits of the restriction to the community outweigh the costs, and the objectives of the legislation can be achieved only by the restriction. CPA clause 1(3) lists public interest matters to consider in the comparison of community costs and benefits, but the comparison can account for other factors as well. This chapter describes the National Competition Council's approach to legislative reviews that have not been completed.

The CPA clause 4 sets down that governments should remove regulatory functions from a public monopoly before introducing competition into its market. Before privatising a public monopoly, a government should review matters set down in clause 4, including the appropriate commercial objectives of the monopoly, the merits of separating any natural monopoly elements from potentially competitive elements of the monopoly, and the most effective means of separating the monopoly's regulatory functions from commercial functions.

The CPA clauses 3 and 7 establish the principles for applying competitive neutrality to significant business activities, including at the local government level. All governments have made considerable progress in introducing competitive neutrality to their businesses and those of their local governments. The Council is concerned, however, about the slow processing of some competitive neutrality complaints.

Achieving effective legislation

The National Competition Policy (NCP) introduced several measures aimed at improving the effectiveness of Australia's regulatory arrangements via the three NCP agreements: the CPA, the Conduct Code Agreement and the Agreement to Implement the National Competition Policy and Related Reforms. This section focuses on the obligations in CPA clause 5 and discusses the questions that the Council considers in assessing governments' compliance.

Clause 5 of the CPA obliges governments to review and, where appropriate, reform all existing (at June 1996) legislation that restricts competition. It

requires governments to remove restrictions on competition unless they show the restrictions are warranted — that is, that restricting competition benefits the community overall (being in the public interest) and that the restriction is necessary. Clause 5(1) states:

> *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*. (CoAG 1995)

The CPA clause 5 originally set a target date of 2000 for governments to complete all reviews and (appropriate) reform activity. The Council of Australian Governments (CoAG) decided in November 2000 to extend this target date to 30 June 2002 (CoAG 2000).

Clause 5 also obliges governments to review regularly any restrictive legislation against the guiding principle; reviews are to occur at least once every 10 years. This obligation is designed to ensure that regulation remains relevant in the face of changes in the circumstances that gave rise to the legislation originally and/or changes in government and community priorities over time. Finally, clause 5 specifies that governments must ensure new legislation that restricts competition (that is, all restrictive legislation enacted after June 1996) is accompanied by evidence to demonstrate that the restrictions are consistent with the CPA clause 5(1) guiding principle. This is an ongoing obligation for governments.

Governments' CPA legislation review and reform commitments represent an extremely comprehensive reform effort over a relatively short period. The Commonwealth and the eight States and Territories will have reviewed more than 1800 pieces of legislation by the time they complete their programs. The scope of legislation being reviewed is broad, encompassing, for example, legislation regulating agricultural marketing arrangements, forestry, fishing, transport services (including taxis), professions and occupations, compulsory insurance arrangements, retail trading hours, liquor licensing, the education sector, gambling activities, the communications sector, and planning, construction and development services. Subsequent chapters of this report discuss governments' compliance with the CPA legislation review and reform obligations.

Two obligations in other NCP agreements also aim to improve the effectiveness of Australia's regulatory base. The first obligation is that governments must ensure decisions taken by Ministerial councils and national standard-setting bodies (entities aimed at improving Commonwealth–State/Territory coordination) are set according to the principles and guidelines endorsed by CoAG. The CoAG principles and guidelines reflect the CPA guiding principle: they seek minimum necessary

standards, accounting for economic, environmental, and health and safety concerns. Governments' compliance with this obligation is discussed in chapter 15. The second obligation — an ongoing commitment under the Conduct Code Agreement — is that governments must notify the Australian Competition and Consumer Commission (ACCC) of legislation or provisions in legislation enacted or made in reliance on s. 51(1) of the *Trade Practices Act 1974* (the TPA). Governments' compliance with the Conduct Code Agreement is discussed in chapter 16.

Assessing governments' compliance with the CPA clause 5: the Council's approach

Under the NCP agreements, receipt of NCP payments by each State and Territory depends on the extent to which each jurisdiction has complied with the competition policy principles in the CPA, including its progress towards completing reviews and implementing appropriate reforms of legislation that restricts competition. The 2002 NCP assessment considers review and reform activity by governments up to and including 30 June 2002 — the date set by CoAG for completing reviews and implementing appropriate reforms. The Council concentrated on regulation that is likely to have more significant impacts on competition, prioritising the assessment of areas where reform would provide the greatest benefit to the community.

The Council considers both review activity and reform implementation when assessing governments' compliance. It looks for robust and objective reviews because these increase the likelihood of policy outcomes that are in the public interest. The Council also looks for governments to implement review recommendations expeditiously, unless a government can demonstrate that review recommendations are not in the public interest. It considers too whether new legislation restricting competition is in the public interest.

Prioritising review and reform activity: focusing on regulation with greater impacts on competition

In the 2001 NCP assessment, the Council identified several areas of regulation likely to have nontrivial impacts on competition (see box 2.1). The Council asked governments to review and reform these matters as 'priorities' — that is, to complete review and reform activity in these areas as soon as possible and by no later than the CoAG target date. The Council recognised the significant resource demands on governments from completing all reviews and implementing reforms, and considered that the greatest benefit to the community would arise from prioritising review and reform activity to address as soon as possible the restrictions with a greater impact on competition.

Accordingly, the Council based the 2002 NCP assessment of compliance on governments' progress in completing reviews and implementing appropriate reforms in the higher impact areas identified in 2001. This approach acknowledges that governments might not have completed review and reform activity in other, lower priority areas by 30 June 2002. The prioritisation in 2001 therefore created a two-stage process for assessing review and reform activity: the 2002 NCP assessment would consider the priorities identified in 2001, while the 2003 NCP assessment would finalise all remaining legislation review and reform matters.

Prioritising the assessment also allows the Council to deal with information deficiencies arising because the date of the Council's 2002 report coincides with the target date for governments to complete the review and reform program. This coincidence of timing means that governments' 2002 NCP annual reports, which are the Council's primary data source for the 2002 NCP assessment, do not contain details of governments' activity between the release of the annual reports and the finalisation of the Council's assessment report. While the Council has taken steps to obtain information about governments' activity on the outstanding priority issues since the annual reports were released, it has been unable to obtain a complete picture on every piece of legislation. The 2003 NCP assessment, which will take place in mid-2003 and will rely on governments' annual reports covering activity to at least 31 December 2002, will not suffer from such difficulties.

Governments occasionally have added to their original (1996) review programs when they identify restrictive legislation that was not originally scheduled for review. The Council accepts that governments may need time beyond the CoAG target to complete these extra reviews. For later additions to governments' legislation review programs, the Council assesses clause 5 compliance on a case basis.

Box 2.1: Priority legislation areas

Primary industries
Barley/coarse grains
Dairy
Poultry meat
Rice
Sugar
Wheat
Fishing
Forestry
Mining
Food regulation
Agricultural and veterinary chemicals
Quarantine
Bulk handling

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

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

Insurance and superannuation services
Workers compensation insurance
Compulsory third party motor vehicle insurance
Professional indemnity insurance
Public sector superannuation: scheme choice

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

Legal sector
Legal profession

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

(*continued*)

Box 2.1 continued

Retail regulation
Shop trading hours
Liquor licensing
Petroleum retailing

Social regulation
Education services
Gambling
Child care services

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

Objective and robust reviews

Throughout the life of the NCP, the Council has emphasised the link between high quality reviews and well-considered, effective policy outcomes. Open, independent and objective review processes provide the best opportunity to identify and assess all costs and benefits of restrictions on competition and to implement regulations (including alternatives to restrictions) that best achieve the community's goals.

The Council has consistently encouraged governments to adopt independent review processes. Governments sometimes argue, however, that the inclusion of stakeholders representatives on review panels is necessary to achieve the best review outcome — that is, to achieve adequate participation by the stakeholder group, to gain access to relevant information and expertise, and to find compromises between conflicting interests. The Council's experience, however, is that it is often difficult for direct stakeholders to reach agreed positions on key issues. There is also considerable doubt that agreements between directly interested parties will fully reflect the interests of the wider community.

The Council strongly supports the approach proposed by the Commonwealth Office of Regulation Review (ORR). In commenting on how interested parties may be best involved, the ORR stated:

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

The Council notes that CoAG has drawn attention to the need for properly constituted and rigorous reviews. CoAG asked the Council to consider, when assessing whether jurisdictions have complied with the CPA clause 5 guiding principle has been met, 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'.

Also important is a rigorous analytical approach, whereby the review considers all relevant evidence and reaches conclusions and recommendations that are logically drawn from that evidence. There is a danger that policy actions in line with review findings and recommendations based on flawed analysis or incomplete evidence may not satisfy the CPA guiding principle. The Council's approach in assessing compliance, therefore, is to look for evidence that reviews:

- had terms of reference based on the CPA clause 5(9), supported by publicly available explanatory documentation such as an issues paper;
- were conducted by an appropriately constituted review panel able to undertake an independent and objective assessment of all matters relevant to the legislation under review, including restrictions on competition and public interest matters;
- provided for public participation (including participation by directly interested parties) through appropriate consultative processes;
- assessed and balanced all costs and benefits of existing restrictions on competition and considered alternative means of achieving the objective of the legislation;
- considered all relevant evidence and reached reasonable conclusions and recommendations based on the evidence before the review; and
- demonstrated a net public benefit where there are recommendations to introduce or retain restrictions on competition.

In assessing compliance, the Council accounts for whether flaws might have compromised the review's recommendations. Flaws can occur for a number of reasons, such as where the review terms of reference do not encompass relevant questions, the review analysis is deficient and leads to recommendations that are inconsistent with the evidence, or the review fails to consider relevant evidence. In this 2002 assessment, the Council has identified (a) reviews where the direct representation of stakeholder groups on review panels appears to have adversely affected the quality of review recommendations, and (b) reviews where analytical flaws raise a question about recommendations and, consequently, about whether policy actions in line with the recommendations would meet the CPA guiding principle.

The need for governments' responses to address the CPA clause 5 guiding principle

Testing whether restrictions on competition are warranted — that is, assessing benefits and costs to the whole community — involves governments considering the public interest factors in the CPA clause 1(3) (including the likely impacts of reform on specific industry sectors and communities). The community-wide perspective means that restrictions must benefit the whole community, not just particular groups. In assessing compliance with the CPA clause 5, the Council looked for governments to have provided at least a statement of the findings/recommendations of relevant reviews, and a clear and comprehensive explanation of their response to the review and its supporting rationale. (CoAG emphasised the importance of governments explaining their decisions, stating that they should document the public interest reasons for a decision or assessment and make them available to interested parties and the public.)

Because NCP reviews are required to assess and balance the costs and benefits of restrictions, arguments supporting a restriction usually arise through the evidence and recommendations of the relevant review. Moreover, open public policy-making offers a public benefit, which is enhanced where members of the public can participate in the review of legislation and have access to the review report. For these reasons, the Council has encouraged governments, as part of their public interest explanations, to make their review reports publicly available (recognising, however, that the NCP agreements do not require the public release of reports).

Queensland's approach, which it applies to all CPA obligations and which it explains in its 2002 annual NCP report, is that reform should not occur unless the net community benefits from reform can be clearly demonstrated (Queensland Government 2002, p. 12). Queensland considers that to undertake reform where there is no clear net community benefit would amount to implementing competition for competition's sake, and would be contrary to the intent of the NCP. The presumption underlying CPA clause 5 favours competition, so governments wishing to retain a legislative restriction in compliance with the CPA need to demonstrate that the restriction provides a net community benefit. Queensland's approach, therefore, may be potentially at odds with the CPA clause 5 guiding principle. The Council discussed its concerns with the Queensland Premier, who explained that there is no difference in practice between Queensland's approach and the CPA guiding principle.

Implementing appropriate reform

The CPA guiding principle means that governments must do more than review restrictive legislation; they need to change their legislation if restrictions cannot be justified. That is, governments must not only conduct rigorous and objective reviews, but also implement appropriate reform.

Appropriate reform implementation involves governments removing restrictions on competition from their legislation unless the restrictions meet the CPA guiding principle. Governments may, therefore, retain legislative restrictions on competition, but then are obliged to show that the restriction(s) is warranted via a robust net community benefit case.

Appropriate reform implementation may include, where justified by a public interest assessment, having a firm transitional arrangement that extends beyond 30 June 2002 (CoAG 2000). The Council considered in this 2002 assessment that governments have met their CPA obligations, even if they did not complete reforms by 30 June 2002, where they:

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

In this assessment, the Council looked for governments to ensure reform outcomes that restrict competition have regard to review recommendations (assuming reviews were properly constituted and conducted). For compliance, governments need to provide a public interest rationale for competition restrictions that is supported by relevant evidence and robust analysis.

- Where a government has introduced or retained competition restrictions on the basis of review recommendations, but the review does not provide clear reasoning and argument to support its recommendations, the Council has looked for the government to make transparent the evidence and logic underlying its decision.
- Where a government has introduced or retained competition restrictions, but this approach is not reasonably drawn from the recommendations of the review, the Council has looked for the government to provide a rigorous supporting case, including a demonstration of flaws in the review's analysis and reasoning.

The CPA guiding principle does not mean that governments must always conduct a full public review before reforming restrictions. Governments sometimes repeal redundant legislation after preliminary scrutiny shows that the legislation provides no public benefit. Such action meets the CPA objectives. Similarly, a government may choose to disregard a review recommendation supporting a restriction or seek to achieve policy outcomes via an approach other than that recommended by a review. Where a government has not implemented the recommendation of a properly constituted rigorous review, however, the Council has looked for the government to provide a robust net community benefit argument, explaining why the approach recommended by the review is inappropriate.

Different regulatory approaches across jurisdictions

The NCP provides for the possibility of different governments using different regulatory approaches to similar problems. Different governments may evaluate the various factors differently and thus reach a different conclusion on the appropriate approach. Given that Australia is essentially one national market, however, there is a strong argument that uniform or consistent regulation across jurisdictions is likely to benefit the community by reducing regulatory imposts on businesses and service providers, and ultimately leading to lower prices to consumers. The Council looks for governments to be cognisant of the approaches adopted in other jurisdictions, particularly where these involve removing restrictions on competition.

The NCP facilitates greater legislative consistency in various ways. First, the CPA offers scope for national reviews. It provides that a government, where one of its reviews has a national dimension or effect on competition (or both), should consider whether the review should be a national review. Twelve national reviews have been scheduled under the NCP. Nine have been completed, although the relevant governments still have to undertake the necessary legislative action in most cases. Progress with national reviews is discussed in chapter 15.

Apart from national reviews under the NCP, governments have implemented mutual recognition since 1993. Mutual recognition is aimed at creating a regulatory environment that will 'encourage enterprise, enable business and industry to maximise their efficiency, and promote international competitiveness' (CoAG 1998). The Commonwealth *Mutual Recognition Act 1992* and related State and Territory mutual recognition legislation aim to achieve a national market in goods and services via two principles:

- that goods that may be sold legally in one State or Territory may be sold in a second State or Territory, regardless of differences in standards applying to goods in the relevant jurisdictions; and

- that a person who is registered to practise an occupation in one State or Territory be able to register to practise an equivalent occupation in a second State or Territory.

Questions of mutual recognition may arise where occupations are registered in some, but not all jurisdictions. The NCP assessment implications are discussed in chapter 6 (health and pharmaceutical services), chapter 8 (other professions and occupations) and chapter 13 (planning, construction and development services).

New legislation that restricts competition

The CPA clause 5(5) obliges governments to ensure proposals for new legislation that restricts competition are accompanied by evidence to show that the legislation provides a net benefit to the community and that the

restriction is necessary to achieve the objectives of the legislation. Clause 5 therefore has two broad elements: it establishes the program of review and reform of existing restrictive legislation against the CPA guiding principle, and it requires governments to ensure all subsequent restrictive legislation meets the guiding principle.

The obligation regarding new legislation has been an ongoing obligation for governments since the signing of the NCP agreements in 1995. In response, all governments have established arrangements for 'gatekeeper' scrutiny of the competition impacts of new and amended legislation. Box 2.2 summarises these arrangements in each jurisdiction.

The Council considers each government's performance against the CPA clause 5(5) obligation in each NCP assessment. In this 2002 assessment, the Council considered new legislation in the priority areas to check that gatekeeper scrutiny is ensuring new legislation meets the CPA guiding principle and therefore addresses governments' policy objectives as effectively as possible. Subsequent chapters discuss relevant legislation.

Box 2.2: Arrangements for scrutiny of new restrictive legislation, by jurisdiction

Commonwealth Government

A Regulation Impact Statement (RIS) must be prepared for all new and amended legislation regulation with the potential to restrict competition or impose costs or confer benefits on business. The RIS must clearly identify a problem and relevant policy objectives, and assess the costs and benefits of alternative means of fulfilling the objective. The ORR advises on whether the RIS process requirements have been met, including advising the Government on whether the RIS provides an adequate level of analysis. The ORR also provides guidance and training to agencies on the preparation of RISs.

New South Wales

All agencies developing or amending legislation that restricts competition are required to assess competition effects. The Cabinet Office scrutinises all proposals for new legislation that restricts competition to ensure that there is evidence demonstrating that new restrictions are consistent with the CPA guiding principle.

Victoria

Victoria assesses all proposals for new restrictive legislation against the public interest test. The assessment accounts for the CPA clause 5 guiding principle of the benefits of the restriction to the community as a whole outweighing the costs, and the objectives of the legislation only being achievable by the restriction. Cabinet submissions on legislative proposals include a NCP Impact Assessment section. The Department of Treasury and Finance advises the Treasurer and Cabinet on NCP issues, and assists departments on NCP matters.

Queensland

Before Cabinet consideration, all new (including amending) legislation that restricts competition must be subject to a public benefit test. In 2001, Queensland introduced 18 pieces of legislative amendment, or new legislation, that had been subjected to scrutiny under its legislation gatekeeping arrangements.

Western Australia

The Department of Treasury and Finance advises agencies on NCP obligations and encourages agencies to consider NCP principles at an early stage of preparing new law. Western Australia's legislative process contains a mechanism to ensure Treasury and Finance is formally informed of progress on new legislation. Where Treasury and Finance considers a proposed new law has the potential to restrict competition, it liaises with the proponent agency to ensure the law is appropriately reviewed. Reviews of new legislation are conducted in the same way as reviews of existing legislation. Since 1996, the gate-keeping process has identified 80 proposals for new laws that contain potential restrictions, including 15 in 2001.

The Department of Treasury and Finance may present its advice to the Cabinet directly if it considers that the agency proposing the new legislation has not appropriately addressed NCP issues.

South Australia

All agencies considering new legislation or amendments to existing legislation are to follow a process developed by the Department of Premier and Cabinet and endorsed by departmental chief executives. The process requires agencies developing policy to consider restrictions on competition; to show in Cabinet submissions seeking approval to draft legislation that competition issues have been considered; and to address competition issues in the second reading speech of Bills to Parliament.

(*continued*)

Box 2.2 continued

Tasmania

Tasmania's gatekeeping process examines all proposals for new legislation including against NCP principles. The gatekeeper process has assessed more than 500 legislative proposals since 1996.

The ACT

The ACT Government requires regulatory impact statements to be prepared on all proposed new or amended legislation and subordinate legislation (for example, regulations) or government direction, as part of the policy development process. Cabinet submissions must indicate whether their recommendations have any competition policy implications. The Department of Treasury advises departments in the preparation of the regulatory impact statements.

The Northern Territory

In the Northern Territory, all Cabinet submissions on legislative proposals must comment on whether the proposed legislation includes new restrictions on competition. If so, the proposing agency must analyse the community benefits and costs of the restriction and whether the restriction is the only way to achieve the objective of the legislation.

Structural reform of public monopolies

Protection of some public monopolies from competition, through regulation or other government policies, has allowed structures to develop that do not readily respond to market conditions. Rectifying strategies include removing the relevant legislative restrictions and applying competitive neutrality principles, but these reforms will not always be sufficient to establish effective competition. Structural reform may be needed to dismantle a government business that has developed into an integrated monopoly. Such reform involves splitting the monopoly (or parts of it) into smaller entities, including splitting the competitive or potentially competitive elements from the monopoly elements.

Structural reform is particularly important where a public monopoly is to be privatised. Privatisation without appropriate reform will result in a private monopoly supplanting the public monopoly, with few real gains and potentially considerable risks.

Obligations relating to the structural reform of public monopolies are set out in clause 4 of the CPA. Under this clause, governments agreed to relocate regulatory functions away from the public monopoly before introducing competition into the market served by the monopoly. The aim is to prevent the former monopolist enjoying a regulatory advantage over its (existing or potential) competitors.

Clause 4 also sets out review obligations aimed at ensuring that reform paths lead to competitive outcomes. Before introducing competition into a sector

traditionally supplied by a public monopoly or privatising a public monopoly, governments have undertaken to review:

- the appropriate commercial objectives of the public monopoly;
- the merits of separating potentially competitive elements of the public monopoly from the natural monopoly elements;
- the merits of separating potentially competitive elements into independent competing businesses;
- the best way of separating regulatory functions from the monopoly's commercial functions;
- the most effective way of implementing competitive neutrality;
- the merits of any community service obligations (CSOs) provided by the public monopoly, and the best means of funding and delivering any mandated CSOs;
- the price and service regulations to be applied to the relevant industry; and
- the appropriate financial relationship between the owner of the public monopoly and the public monopoly.

In this 2002 assessment, the Council considered each jurisdiction's structural review and reform activity (including the location of industry regulation) where competition is to be introduced to public monopoly markets or where privatisation is proposed or under way. Subsequent chapters discuss particular structural reform matters. In particular, the Council considered that government decisions regarding the Western Australian electricity sector, Sydney Airport and South Australian ports generated clause 4 obligations.

Competitive neutrality

Competitive neutrality involves placing significant government business activities on the same footing — for taxes, interest costs and regulations — as their actual or potential private competitors, to the extent that the benefits to be realised from implementation outweigh the costs. It encourages governments to corporatise their significant government business enterprises and ensure the prices charged by other significant government businesses reflect full cost attribution.

Competitive neutrality aims to ensure Australia's resources are used as efficiently as possible, by removing from public businesses any net competitive advantage due to public ownership. Competitive neutrality allows

resources to flow to efficient government and private businesses. Publicly owned businesses will attract resources if they merit them, rather than because they have artificial advantages associated with government ownership. These resource allocation effects mean that community economic welfare is maximised from a given level of resources.

By placing government business activities on a similar competitive footing to that of their actual or potential private competitors, competitive neutrality establishes conditions for increased participation in industries, thus promoting competition with flow-on benefits to consumers.

The increased transparency and accountability associated with competitive neutrality encourage improved performance by government businesses. The businesses cannot hide behind the protection given by the advantages that they previously enjoyed, which often encouraged complacency about their efficiency. Improved performance contributes to better services and lower prices for users of the services, and reduced demands on taxpayers. In these ways, competitive neutrality supports the effectiveness of the performance monitoring regimes that many governments introduced for their businesses in recent years.

There are other important benefits of competitive neutrality. Governments that own the businesses are in a better position to assess the future of the business, and recognise the costs of community service obligations (CSOs) that previously government businesses might have provided through cross-subsidies. This recognition leads to improved government decision-making about CSOs. Competitive neutrality helps owner governments to make better informed decisions about the future of their entities. Full attribution of costs often leads governments to assess afresh whether they wish to provide a good or service directly through a government business, to allow competitive bidding for the provision of the good or service, or to vacate the area of production.

Clause 3 of the CPA obliges all governments to introduce competitive neutrality, where it is in the net public interest, for government business enterprises and for other significant government business activities. Clause 7 of the CPA extended these obligations to significant local government business activities.[1] Governments were required to establish principles for identifying significant government business activities to which competitive neutrality should be applied, and a mechanism for hearing complaints of noncompliance with competitive neutrality principles and policy. The capacity of individuals or firms to make complaints is important to the robustness of competitive neutrality arrangements.

[1] The Commonwealth and the ACT do not have local government sectors. The Council agreed in its 1997 NCP assessment that the relatively small size of local government businesses in the Northern Territory obviated a need to apply competitive neutrality principles to local government business activities. Local governments in the Northern Territory are small and provide relatively few services themselves, instead providing services via contractors.

Clause 3 of the CPA allows for competitive neutrality not to apply to small government business activities, on the ground that the costs of implementing competitive neutrality for such businesses are likely to exceed the benefits. Most jurisdictions determine significance on a case basis, with reference to turnover thresholds and market impacts.

All governments have made good progress in implementing competitive neutrality. Each released its policy in 1996 and some have subsequently revised the policy. Many governments have also issued specific policy statements covering the application of competitive neutrality to local government business activities. The CPA gives each government the freedom to define and establish its own competitive neutrality arrangements (within the requirements of the CPA clause 3). As a result, differences in approach and emphasis have arisen among jurisdictions. These differences in competitive neutrality policies and application can highlight possible best practice, helping governments to enhance their policies in recent years.

Competitive neutrality obligations under the NCP

Clause 3 of the CPA defines the competitive neutrality obligations for governments. The following are the principal elements of this clause.

- For those significant government business enterprises that are classified by the Australian Bureau of Statistics as public trading enterprises and public financial enterprises, jurisdictions are required to adopt ('where appropriate') a corporatisation model and to impose Commonwealth, State and local government taxes or tax equivalents, debt guarantee fees and those regulations to which the private sector is normally subject.

- Where a government agency undertakes 'significant' business activities, the government will ('where appropriate') implement the principles applicable to public trading enterprises and public financial enterprises, *or* ensure that the prices charged for goods and services take account ('where appropriate') of taxes or tax equivalents, debt guarantee fees and private sector equivalent regulations and reflect full cost attribution for these activities.

- The principles for public trading enterprises, public financial enterprises and other significant business activities need be implemented (in each case) only to the extent that the benefits outweigh the costs.

- Each government was required to publish a competitive neutrality policy statement by June 1996 (including a complaints mechanism), and must report annually on the implementation of the competitive principles, including allegations of noncompliance.

In November 2000, CoAG clarified some practical implementation issues and agreed that governments could have regard to the following factors in applying clause 3.

- Where a government business (for example, a university) is not subject to the executive control of a government, a 'best endeavours' approach could be adopted. CoAG stated that this would require governments, at a minimum, to provide a transparent statement of competitive neutrality obligations to the business.

- Governments are not required to undertake a competitive process for the delivery of CSOs, and are free to determine who should receive a CSO payment or subsidy, which should be transparent, appropriately costed and directly funded by government.

- A range of costing methods, including fully distributed cost, marginal cost and avoidable cost, satisfy the term 'full cost attribution' in clause 3.

Governments' progress in implementing their obligations

The Council assesses each government's compliance with the competitive neutrality principles in the CPA by considering:

- the government's application of competitive neutrality principles to all government business enterprises and significant government business activities (including local government businesses) to the extent that the benefits from application outweigh the costs; and

- the government's use of effective processes for investigating and acting on complaints that significant government business activities are not applying appropriate competitive neutrality arrangements.

The Council has consistently emphasised the importance of effective competitive neutrality arrangements. In the 1997 NCP assessment, the Council said:

> *As the reform process continues, the Council will look in more detail at matters related to the effectiveness of jurisdictions' reform programs. This will encompass, in particular, consideration of the effectiveness of approaches to corporatisation, including performance monitoring arrangements, application of full cost pricing principles and delivery of CSOs.* (NCC 1999a, p. 57)

The concept of full cost attribution to significant business activities is a central aspect of competitive neutrality. An optimum of the current approaches applied by governments may have the following features.

- In addition to labour, raw materials and the competitive neutrality elements listed above (taxes or tax equivalents, debt guarantee fees and the costs of regulation equivalents), costs include a targeted rate of return, costs of noncurrent assets used and depreciation.

- Targets for rates of return are based on the weighted average cost of capital of each significant business activity, which measures the cost of the business activity's equity and debt.

- Other costs may also be relevant, even if not explicitly mentioned in the CPA. All jurisdictions' competitive neutrality policy statements note that local government rates and charges (or equivalents), for example, are an element of the full cost price. Unless government businesses undertake full cost attribution, they may be able to operate at lower profit levels than their competitors can and thus undercut them even if less efficient.

- Significant business activities are required to recover all costs in the medium to long term, while having the freedom to practise marginal pricing in the short term (or to practise commercial pricing strategies) in response to market conditions.

While the CPA does not explicitly link the delivery of CSOs and competitive neutrality, the ways in which CSOs are delivered can have a significant bearing on competitive neutrality outcomes. The Council takes into account the extent to which CSOs are clearly defined, costed and directly funded by government (in line with the CoAG agreement of November 2000).

In relation to complaints handling, the Council noted the importance of an effective, generally accessible mechanism, stating that for the 1999 and 2001 NCP assessments it would take account of:

> … *the degree of independence of the mechanism, the intended scope of coverage including the nature of complaints which can be lodged, the transparency of reporting of complaints and findings and the ease of access for complainants.* (NCC 1999a, p.58)

The Council considers that governments should give their complaints bodies scope to investigate competitive neutrality complaints about all public businesses, particularly where the government does not require all businesses to apply competitive neutrality. Even where businesses are small (so the net benefit from applying competitive neutrality principles may not be clear), the investigation of complaints can provide the government with useful advice about appropriate policy action. Allowing complaints to be heard about all government businesses can sometimes establish that the impact of that business in the market is greater than previously thought.

Coverage of competitive neutrality principles

The Council monitors the coverage of the competitive neutrality principles in each of the jurisdictions. Now, six years after the publication of competitive neutrality policy statements, the Council expects that all significant government businesses (including at local government level) should be subject to competitive neutrality where appropriate, as intended by the CPA clause 3. In the first two NCP assessments, the Council accepted that it was appropriate for governments to apply competitive neutrality principles to their larger businesses as a transitional measure. The Council has always regarded business size thresholds as arbitrary and relatively inflexible measures of significance, however, and has consistently noted that significant businesses should be identified on the basis of their effect or potential effect on their relevant market(s).

While several governments apply minimum revenue thresholds for the purposes of defining *significant* business activities, governments also commonly account for the impact of a business on the markets in which in which it operates. Some governments allow competitive neutrality complaints to be made about any government businesses, which is a mechanism for ensuring an independent government entity could consider any significant impacts on private competitors.

Particular structural arrangements in some jurisdictions mean that failure by certain government businesses to apply competitive neutrality principles is *not* noncompliance. Where businesses are not subject to executive control (for example, universities and part privatised businesses where the relevant government is a minority shareholder and the privatisation took place before the NCP), CoAG directed that the Council should consider governments' compliance with CPA clause 3 on a 'best endeavours' approach. In several cases, governments have informed the Council that they have alerted entities over which they do not have executive control to the government competitive neutrality policies. CoAG indicated that this was a minimum requirement; there are additional possible steps for entities outside executive control. Governments have implemented some of these steps, including:

- making competition policy staff available to deal with queries to assist the entities' introduction of competitive neutrality;
- preparing information packages specific to the application of competitive neutrality to these entities;
- offering to deal with complaints; and
- holding regular meetings with the entities to review competitive neutrality implementation.

The Council Secretariat has received several inquiries from private companies about competition from university entities in bidding for contracts for research or educational work. Some inquiries have concerned universities'

provision of commercial recreational services. These inquiries underline the value of jurisdictions encouraging universities to apply competitive neutrality principles in their business activities through measures such as those described above.

The Council Secretariat has also received several inquiries about the business activities of local governments, especially with regard to recreational facilities. While it is appropriate for local governments to subsidise recreational services they see as a community priority, jurisdictions could consider encouraging local governments to transparently report such subsidies (in order to facilitate community knowledge of the local government's policy) and to regularly review the significance of their business activities.

Box 2.3 summarises government policies on defining significant government businesses. Box 2.4 provides information on particular government entities to which States and Territories recently extended (or are considering) the application of competitive neutrality.[2]

Box 2.3: Governments' approaches to defining significant government businesses

The **Commonwealth** applies competitive neutrality principles to all government business enterprises and their subsidiaries, other share-limited trading companies and all designated business units, competitive tendering and contracting bids, and other business activities with commercial receipts exceeding $10 million per year, while those businesses below $10 million per year are assessed for significance on a case basis. A commercial business activity with a turnover of less than $10 million may be required to implement competitive neutrality arrangements if an investigation by the Commonwealth Competitive Neutrality Complaints Office upholds a complaint that it is benefiting from its government ownership. (The Government does not apply tax equivalents to SBS because it is seen as incurring certain competitive disadvantages, such as limited advertising time. The Council considers such a 'trade-off' between advantages and disadvantages to be unusual, and recommends that these arrangements be reviewed.)

In **New South Wales**, competitive neutrality is applied to Public Trading Enterprises, State-owned corporations and General Government Businesses, where significant business activities are defined on a case basis. At the local government level, competitive neutrality is applied as follows: Category 1 businesses (which have annual sales turnovers/annual gross operating income higher than $2 million) must adopt a corporatisation model and apply full cost attribution. Category 2 businesses (less than $2 million annual gross operating income) are free to determine the extent of separation from mainstream activities, but must apply full cost attribution and make subsidies explicit.

In **Victoria**, the determination of significance for a government business (or a local government business) is based on the importance of the business in the market as measured by its size, competitive impact and the resources that it commands. Victoria does not apply competitive neutrality principles to some businesses — including businesses that do not compete with private companies; business activities that are small in relation to their markets in terms of size and competitive impact; and businesses that have mainly advisory or regulatory functions. Local government businesses in Victoria are subject to full cost attribution on a case basis.

(*continued*)

[2] Chapter 4 refers to competitive neutrality in the forestry sector.

Box 2.3 continued

Queensland classifies State Government businesses as 'significant' (for the purpose of implementing competitive neutrality principles) according to the scale of the business and its impact on the market. Queensland applies an indicative framework in assessing significance — that is, an expenditure threshold of $10 million is used as a guide to significance. Larger local government businesses are also subject to competitive neutrality, while financial incentives are used to encourage the application of competitive neutrality principles to smaller council businesses. Several smaller Queensland councils are still considering the application of competitive neutrality reforms to their business activities.

Western Australia determines significance on the basis of the importance to the State economy of the market in which the government business activity takes place. At the local government level, businesses with turnover of $200 000 or more are potentially subject to competitive neutrality.

South Australia uses impact on the market as the principal determinant of significance. Most councils are involved in small-scale business activities and cost-reflective pricing is the most common approach to competitive neutrality at the local government level.

In **Tasmania**, all GBEs, public trading enterprises and public financial enterprises at the State government and local government level apply corporatisation principles. The significance of other entities for competitive neutrality application is based on impact on the market. Tasmania is currently undertaking a review that will seek to more clearly identify significant business activities at the local government level. Tasmania expects to have revised by mid-2002 its policy statement on the application of competitive neutrality policy to local government.

In the **ACT**, the impact of the business on the market is the primary consideration in determining whether a government business activity is significant. All ACT government businesses are subject to competitive neutrality requirements.

The **Northern Territory** considers all 'government business divisions' and government business enterprises to be significant businesses.

Box 2.4: Instances of extended application of competitive neutrality

In its previous NCP annual report to the Council, **Queensland** reported that competitive neutrality is being introduced to the Public Trust Office in stages. The latest NCP annual report confirms that the Public Trust Office has fully implemented the first-stage reforms during 2001 and full cost pricing. The next stages of reform are being implemented during 2002.

Following a review in 2001, the Queensland Government endorsed the application of competitive neutrality principles to TAFE institutes — where they compete directly with private providers on price — and the implementation of a full cost pricing model for competitive purchasing and fee-for-service programs by February 2002. Legislation is being introduced to establish a new statutory authority to undertake the regulatory functions currently administered by WorkCover Queensland.

Western Australia reported in its 2002 NCP annual report that the Government is considering a competitive neutrality review of native forest timber operations (completed by independent consultants). The State completed a competitive neutrality review of the Valuer-General's Office in November 2000, which recommended that the office operate according to competitive neutrality principles. The office has introduced the change by pricing on a competitively neutral basis. Western Australia is drafting legislation to apply competitive neutrality to the Bunbury and Busselton Water Boards. The Government expects to complete competitive neutrality reviews of TAFE colleges and universities in 2002.

(*continued*)

Box 2.4 continued

South Australia reports that the then Government decided in late 2001 not to apply the *Public Corporations Act 1993* to the Public Trustee, and that competitive neutrality compliance options are being considered. In the case of Medvet Science, which is a subsidiary of the Institute of Medical and Veterinary Services, most commercialisation reforms have been implemented, with the exception of tax equivalents. This exception is under review.

Tasmania reported that the review of the exemption of the Port Arthur Historic Site Management Authority from income tax equivalents and dividends was completed in March 2001. The Government decided to exclude the authority from the national tax equivalents regime because it does not consider that the authority participates in a contestable industry and because there are public interest considerations (namely, conserving a major part of Australia's history and bringing tourists to the Tasman peninsula, which suffers from high unemployment).

The **Northern Territory** Government applied the Government-owned corporations framework to the Power and Water Corporation from 1 July 2002 while the application of the framework to other Government Business Divisions is to be considered on a case basis during 2003.

Defining and funding CSOs

The ways in which governments use their businesses to deliver CSOs can have a significant impact on resource allocation. Where public sector businesses are required to fund CSOs through cross-subsidies, they can be handicapped compared with private sector competitors. By increasing the prices of goods and services that fund the CSOs, cross-subsidies can hold back demand for goods and services. In some cases, funding through cross-subsidies has been supported by regulations that restrict competition for the government business, or by leniency in the rate of return required of the business. Such measures have reduced the achievement of competitive neutrality.

In November 2000, governments recognised (in the CoAG forum) that it is preferable for CSOs to be clearly identified, funded from the Budget and reported by the government. This approach eliminates resource allocation distortions, enhances community awareness of the CSOs and allows a better comparison with other demands on the public purse. Without careful and systematic identification and implementation of CSOs, market participants and taxpayers cannot determine whether the prices charged by a government business reflect full cost attribution (as required by the CPA clause 3) or contain an element of subsidy (or penalty) due to government ownership. Visible CSOs enable private firms to readily identify CSO payments to government-owned competitors and adjust their business decisions accordingly. Further, the ability of complaints processes to resolve pricing complaints expeditiously often depends on governments clearly defining and costing CSOs.

All governments acknowledged, in their competitive neutrality policy statements and related pricing guidelines, the need to clarify the objectives and specify the noncommercial obligations of their businesses. Governments'

policies and guidelines generally emphasise the importance to effective public policy of clearly identifying, defining and costing CSOs and explicitly funding them from the purchasing agency's budget.

The Council has no role in assessing whether CSO objectives are appropriate — that is a matter for governments. Rather, governments' provision of public information about their CSOs enables the Council to confirm that CSOs are specified and funded such that effective and transparent provision of CSO services is encouraged, with minimal impact on the efficient provision of other commercial services. Public reporting of information about CSO arrangements is important in verifying that governments' policy approaches are consistent with the efficient resource allocation objective of the CPA clause 3.

Box 2.5 summarises the governments' approaches to the delivery of CSOs.

Box 2.5: Community service obligation policies

The **Commonwealth's** annual NCP report notes that the 'intention' of competitive neutrality is to encourage 'more effective and transparent provision of CSOs', with 'minimal impact' on the efficient provision of other commercial services. The Commonwealth's policy is that CSOs should be funded from the purchasing portfolio's budget, with costs determined as part of a commercially negotiated agreement. If direct funding would entail proportionately large transaction costs (more likely to be the case with small government businesses), however, then portfolio Ministers can opt to purchase CSOs by notionally adding to the provider organisation's revenue result to calculate the rate of return. Where this is done, CSOs should be costed as if funded directly from the portfolio department's budget.

In **New South Wales** and **Queensland**, the relevant government business provides details of CSO payments in its financial and annual reports. Where any commercialised government business unit in Queensland delivers a CSO, the Government pays the unit and a CSO Agreement formally recognises the arrangement.

In **Victoria**, government business enterprises are required to disclose CSO obligations and funding in their corporate plans, and some are reporting on them in their annual reports. Victoria summarised CSO arrangements for all agencies in the supplementary tables of its 2002 NCP annual report. Many Victorian CSOs are funded by the Budget, but some entertainment or arts venues carry internally the cost of concessional entry fees.

Western Australia, Tasmania, the **ACT** and the **Northern Territory** identify and cost CSOs in their annual Budget process. In Western Australia, various means of funding CSOs are allowed, but direct Budget funding is the preferred approach. In Tasmania, the Government purchases CSOs from government business enterprises, and clearly identifies, justifies and separately accounts for those CSOs. The ACT's 2002 NCP annual report provides a table and costing of all of its CSOs.

South Australia's *Public Corporations Act 1993* requires, where relevant, that the arrangements for CSOs be set out in the charter of a public corporation, including the CSOs' nature, scope, costing and funding. The CSOs of commercialised South Australian entities are identified and costed. In relation to entities subject to cost-reflective pricing, South Australia advised that there is generally direct Budget funding of noncommercial functions. South Australia advised that a CSO working group is continuing its work to improve some procedural aspects of CSO policy arrangements, particularly purchaser–provider arrangements and the provision of information to the Government to assist its decisions on the approval and funding of CSOs.

Investigation of alleged noncompliance

All governments have instituted complaints processes and, in their NCP annual reports, document allegations and actions taken in response. Some governments require complaints to be made in the first instance to the government business that is the subject of the complaint, and then to an independent body or to the competition policy unit. In some jurisdictions, the independent body considers complaints only if the relevant Minister(s) decides this is appropriate.

Design of complaints mechanisms is a matter for each government; the CPA does not prescribe the mechanisms and processes. The question for NCP assessment of compliance is whether complaints are heard expeditiously and effectively, because failure in these regards can be damaging to the complainant and to general confidence in the competitive neutrality arrangements. The Council is concerned about the slowness of some complaints investigations, and encourages governments to consider options for accelerating them. Private businesses should be able to expect quick processing of complaints.

Table 2.6: Complaints mechanisms

In those jurisdictions where complaints can be made to an independent body, that body usually has been established to promote competition, pricing and market conduct outcomes, especially with regard to government entities. Examples of such bodies are **New South Wales'** Independent Pricing and Regulatory Tribunal, the **Queensland** Competition Authority, **South Australia's** Competition Commissioner, **Tasmania's** Government Prices Oversight Commission, and the **ACT's** Independent Competition and Regulatory Commission. In New South Wales, the Premier can refer competitive neutrality complaints about tender bids to the State Contracts Control Board for independent assessment. The Commonwealth complaints unit is the Commonwealth Competitive Neutrality Complaints Office (CCNCO), which is located within the Productivity Commission.

In **Victoria**, the Competitive Neutrality Complaints Unit (located in Treasury) considers all complaints, although the unit encourages parties to seek to resolve the differences themselves in the first instance. In **Western Australia**, the Expenditure Review Committee of Cabinet handles complaints with administrative support from the Competitive Neutrality Complaints Secretariat. In the **Northern Territory**, the Treasury handles complaints.

Some governments allow complaints to be lodged only against government entities that are subject to competitive neutrality principles, while others allow complaints to be made against other government business activities as well. In most States, complaints against local government businesses must be made in the first instance to the local government, and then to the complaints body of that State.

Complaints highlighted in the 2002 NCP annual reports

Commonwealth, State and Territory NCP reports indicated that most governments received new competitive neutrality complaints in 2001.[3]

- At the Commonwealth level, the CCNCO conducted investigations of four competitive neutrality complaints over the nine months to the end of March 2002. The CCNCO's consideration of a complaint against ARRB Transport Research Limited, which has 10 governments as its members, found no evidence that competitive neutrality principles had been breached. The CCNCO suggested, however, that member governments consider specification and funding of non-commercial public interest research undertaken by ARRB.

- A complaint about the Bureau of Meteorology's services to the aviation industry was resumed in May 2001 following a 'stay' previously requested by the complainant. The CCNCO found that a component of these services (those provided in addition to Australia's international obligations) constitute a business activity and should be subject to competitive neutrality and competitive provision. The CCNCO recommended that the Commonwealth should complete its consideration of introducing such competition. The Commonwealth has since decided that the Bureau of Meteorology should continue to be the sole provider of basic meteorological services to satisfy community service and international obligations. The Government also decided to introduce competition in the market for 'value added' weather services during 2002.

- The CCNCO found that no action under competitive neutrality policy is required with respect to land leasing activity at Sydney and Camden airports.

- Investigation of a complaint against Docimage Business Services found that it had made appropriate competitive neutrality cost adjustments.

- During the 1 January 2001 to 30 March 2002 reporting period, the New South Wales Government did not receive any new requests for competitive neutrality complaints to be referred to the Independent Pricing and Regulatory Tribunal or the State Contracts Control Board. The Department of Local Government was not requested to review any actions in response to complaints against local governments.

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[3] A complaint lodged by the Conference of Asia Pacific Express Carriers against Australia Post in 2000 is discussed in chapter 14. Chapter 5 provides information about a 1999 complaint against two rail freight businesses: National Rail, which was jointly owned by the Commonwealth, New South Wales and Victoria, and FreightCorp, which was owned by the New South Wales Government. Both of these rail freight businesses were privatised in February 2002.

- In Victoria, complaints investigations were suspended in late 1999 while the new Government prepared a new competitive neutrality policy. This policy was released in October 2000 and complainants were encouraged to try to resolve their concerns with the government entities about which they were complaining. Some complaints were not reinstated, while the Competitive Neutrality Complaints Unit investigated (or is investigating) others (together with some new complaints). Several of the investigated complaints were against local government business activities, including waste and recycling services, leisure centres, child care centres and livestock exchange. Where the complaints unit has completed its investigation, the councils have made appropriate competitive neutrality adjustments or undertaken to conduct a public interest test, with the complaints unit to prepare a follow-up report. Other complaints have been against State Government businesses, including an interpreting service, a school and a supportive residential service.

- The Queensland Competition Authority completed its investigation of four complaints (by one party) against the Network Services Division of ENERGEX and found that two were substantiated. The Queensland Premier and Treasurer accepted this finding and ENERGEX (in association with the Electrical Safety Office) is taking remedial action. Similarly, aspects of a complaint against Queensland Rail's livestock transportation business, Cattletrain, were substantiated. Subsequently, the open-ended financial arrangements between Queensland Rail and Cattletrain ceased, thus removing the main cause of the complaint.[4] Local governments received no formal complaints, but one informal complaint resulted in the Department of Local Government and Planning requiring a council to establish a complaints-handling process and to deal with the particular complaint. The department has taken steps to ensure all local councils have mechanisms to deal with complaints.

- Western Australia's Complaints Secretariat did not receive any formal competitive neutrality complaints during 2001. It received three informal complaints about Government activities that are not required to apply competitive neutrality principles (a hospital, prisons and a government tree seedling service), and it is investigating them.[5]

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[4] Chapter 5 provides more information on this complaint.

[5] On 1 July 2002, the Council was advised by representatives of a private radiation oncology company in Western Australia of the company's concerns about competition from the radiation oncology department of a Perth public hospital, which it believes reflects advantages arising from the hospital's public ownership. Western Australia's Complaints Secretariat has informed the radiation oncology company that that State's competitive neutrality policy does not apply to health sector businesses. The matter has been raised by the Complaints Secretariat with the Department of Health. The Minister for Health is responsible for instigating any change in the policy regarding application of competitive neutrality to health sector businesses in Western Australia. The Council is discussing this matter with the Complaints Secretariat.

- In South Australia, three complaints were carried over from 2000. The Competition Commissioner's investigations are continuing in two instances, while the third complaint was withdrawn. The Competition Commissioner received five new written complaints during 2001, but found only one to be within the scope of South Australia's legislation relating to competitive neutrality. The Commissioner is still investigating this complaint. Local governments did not receive any complaints in the reporting period.

- Tasmania's Government Prices Oversight Commission received one competitive neutrality complaint in 2001, about Hobart City Council's off-street parking business. The business had not been formally endorsed as a significant business activity, and the matter was referred to the Department of Treasury and Finance. The department discussed the matter with the council, which agreed to separate the financial reporting of its on-street and off-street parking businesses. The commission has advised that this will meet the council's competitive neutrality obligations.

- No competitive neutrality complaints were lodged in the ACT or the Northern Territory during 2001.

Productivity Commission report on financial performance of government trading enterprises

Government trading enterprises (GTEs) are usually larger government businesses, and all governments include most of them in their significant business activities that are subject to competitive neutrality principles.

On 9 July 2002, the Productivity Commission released the third of its series of annual reports on the financial performance of GTEs (PC 2002c). The information used by the Productivity Commission in preparing this report included data provided by States and Territories and extracted from GTE annual reports.

The Productivity Commission's report provides significant information on the application of competitive neutrality by the Commonwealth, State and Territory governments. The report covers the financial performance of 64 GTEs, and found that in 2000-01 only 45 per cent of them earned pre-tax returns of capital that exceeded the 10 year Commonwealth Government bond rate of 5.8 per cent.[6] The Productivity Commission report indicates that average profitability deteriorated in 2000-01 (PC 2002c, pp. 5–6).

[6] The Commonwealth bond rate is typically used as the benchmark for the risk free rate of return, and GTEs should seek to achieve a rate of return that is equivalent to the risk free rate plus a margin for the degree of risk of the business (around 3 percentage points for low-risk businesses and 7 percentage points for high-risk businesses).

The Productivity Commission report comments that the low rates of return could raise competitive neutrality issues, as they may indicate that GTEs are charging lower prices than private competitors. The report acknowledges, however, that low returns could also reflect other factors, such as inherited costs being too high, overvalued assets, and inadequate government payments for CSOs (PC 2002c, pp. 6–8). The Council notes that weak market conditions or inadequate enterprise management may also explain poor returns for some GTEs, at least for a year or two. Noting that the prices of goods and services provided by many GTEs are regulated, the Productivity Commission's report suggests that the poor returns by some GTEs may possibly reflect regulatory error or a tendency of some regulators to favour the short-term interests of consumers (PC 2002c, pp. 8–9 and p. 44). The report comments that regulators must ensure that the asset valuations implicit in their price determinations are robust, because 'appropriate asset valuations are central to the formation of efficient policies regarding both capital investment and pricing regimes', and that GTE managers also should take care in asset valuations (PC 2002c, pp. 44–45).

The Productivity Commission's report provides information on governments' practice in estimating the 'stand-alone' credit ratings of their GTEs (the ratings that they would achieve if they were not government owned and therefore not enjoying an implicit government guarantee of their debt). Each GTE's credit rating determines the debt guarantee fee that it faces on top of its borrowing rate, and is therefore a significant factor in determining the GTE's costs, and thus its pricing and adherence to competitive neutrality. Some jurisdictions commission credit rating agencies to estimate the stand-alone rating. In other jurisdictions, the Treasury makes the estimates for all GTEs or for smaller GTEs (in some cases, the GTEs make their own estimates). Some jurisdictions require the rating assessments to be made more frequently than others. The Productivity Commission report also finds that the some governments apply the debt guarantee fee to a more limited range of GTEs' financial liabilities than other governments, and suggests that this may encourage some GTEs to use certain ways of raising finances to avoid the debt guarantee fee (PC 2002c, pp. 63–66). The variations in governments' debt guarantee policies have implications for competitive neutrality outcomes. The Council will discuss this matter with governments over the period to the 2003 NCP assessment.

Further to the earlier discussion in this chapter on CSOs, the Productivity Commission's report comments that:

> *Direct funding of CSOs improves transparency and makes financial performance easier to assess. This facilitates accountability of GTE management and strengthens incentives to improve financial outcomes.* (PC 2002c, p. 70)

The Productivity Commission notes that most governments argue in principle for an avoidable cost approach (involving estimation of the cost, net of any revenue associated with the CSO, that would have been avoided if the CSO were not provided) to estimating the value of CSOs, but in practice use a range of methods. These methods include revenue forgone (the difference

between the cost of supplying the CSO and the revenue derived from providing the service) and fully distributed cost (PC 2002c, pp. 72–73). The Council's recent staff discussion paper on competitive neutrality suggested that the avoidable cost approach to costing CSOs is the most appropriate method (Trembath 2002, p. 33).

The staff discussion paper also suggested that, under best practice, governments would directly fund CSOs rather than require cross-subsidisation within government businesses. In addition, the government business and the providing government agency would cost and transparently account for CSOs, and each jurisdiction's Treasury would enhance transparency further by publishing a table of all CSOs in its annual budget papers (Trembath 2002, p. 33). Box 2.5 indicates that governments' policies generally require direct government funding and transparent reporting of CSOs. The Productivity Commission reports, however, that there are instances where these policies have not been followed. Its survey of the annual reports of the 64 GTEs it is monitoring found that 27 GTEs reported direct government funding of CSOs, that other GTEs did not disclose direct funding that they had received, and that some governments have required particular GTEs to fund CSOs from their own resources. Some GTEs do not report the activity to which CSO funding relates. In some instances, governments have provided payments for non-commercial activities to GTEs, but neither party has reported them as CSOs (PC 2002c, pp. 73–79).

The Council will be discussing the matters of costing, funding and reporting of CSOs with governments over the period to the 2003 NCP assessment.

3 The related reforms

This chapter discusses governments' compliance with the four related reform obligations set out in the Agreement to Implement the National Competition Policy and Related Reforms and augmented in associated intergovernmental agreements. The four related reform obligations relate to electricity, gas, the water industry and road transport.

Electricity

Governments embarked on a program of reform in the electricity sector in the early 1990s. Specific government reform commitments were set out in the Agreement to Implement the National Competition Policy and Related Reforms, the Competition Principles Agreement (CPA) and other agreements on related reforms for the electricity sector (electricity agreements).

All State and Territory governments have obligations relating to structural reform and legislation review under the CPA. In addition, the Council of Australian Governments (CoAG) agreed to a series of electricity sector-specific reforms contained in the electricity agreements. These reforms revolved around creating a fully competitive national electricity market (NEM), featuring a national wholesale electricity market and an interconnected national electricity grid. Specific objectives set out in the electricity agreements for a fully competitive NEM included:

- an ability for customers to choose which supplier (including generators, retailers and traders) with which they will trade;
- nondiscriminatory access to the interconnected transmission and distribution network;
- no discriminatory legislative or regulatory barriers to entry by new participants in generation or retail supply; and
- no discriminatory legislative or regulatory barriers to interstate and/or intrastate trade.

The reform obligations under the electricity agreements apply to only jurisdictions participating in the NEM — currently, New South Wales, Victoria, Queensland, South Australia and the ACT. Tasmania expects to become a NEM participant in 2004, on completion of the Basslink interconnect with Victoria.

Structural reform

All State and Territory governments have structural reform commitments arising from clause 4 of the CPA. Clause 4 requires governments to take certain steps before introducing competition into a market traditionally supplied by a public monopoly and before privatising a public monopoly. They are obliged to remove any responsibilities for industry regulation from the public monopoly and to review structural and competitive arrangements in the industry (often referred to as a clause 4 review).

All jurisdictions, other than Western Australia, have completed structural reform of their electricity sector against the CPA clause 4 requirements. Reform measures have included separating generation and transmission activities, ring fencing retail and distribution businesses, and moving responsibility for industry regulation from the public monopoly to independent industry regulators.

Western Australia

Structural reform of the electricity sector is less advanced in Western Australia than in other jurisdictions. Western Power Corporation (Western Power), a wholly Government-owned corporatised business entity, is the State's major generator, transmitter, distributor and retailer of electricity. There are several privately operated generators throughout the State, primarily supplying their own mining, mineral processing or other operations, and small townships.

The Western Australian Government established an independent Electricity Reform Task Force in August 2001 to develop recommendations on:

- the extent and phasing in of the disaggregation of Western Power;
- the structure of the electricity market to be established in Western Australia;
- a Western Australian Electricity Access Code; and
- appropriate market and regulatory arrangements to move towards full retail contestability by 2005.

The task force is also examining issues such as separating regulatory legislation for the electricity industry from Western Power's enabling legislation, ensuring competitive neutrality is achieved, and ensuring transparent funding arrangements for the delivery of community service obligations (CSOs). It is expected to deliver its recommendations to the Western Australian Government by August 2002.

The National Competition Council is satisfied with the progress that Western Australia has made in meeting its obligations in regard to structural reform

in the electricity sector. It will consider the recommendations of the task force and Western Australia's further progress as part of the 2003 National Competition Policy (NCP) assessment.

Legislation review and reform activity

Table 3.1 summarises jurisdictions' progress in reviewing and reforming their electricity-related legislation under clause 5 of the CPA. The evidence before the Council is that the governments that are still to complete their CPA clause 5 obligations have all significantly advanced their review activity and/or their consideration of regulatory reform options since the 2001 NCP assessment. The Council will finalise in 2003 the assessment of governments' compliance with the CPA clause 5 obligations to review and reform electricity sector legislation.

Electricity agreement obligations for NEM participating jurisdictions

The Council identified in its 2001 NCP assessment the issues that would be the focus of its 2002 NCP assessment of NEM-participating jurisdictions' implementation of the electricity agreements. These issues are considered in the following section.

Further NEM reforms

In its 2001 NCP assessment, the Council highlighted areas of the NEM design that it considered needed improvement and refinement to achieve the national market objectives contained in the electricity agreements. These areas included:

- developing the national market character of the NEM in the wholesale trading arrangements by improving the despatch and pricing arrangements;
- encouraging transmission interconnection to develop a national grid rather than series of regional networks; and
- refining the NEM institutional framework so NEM policy can be developed and implemented.

A comprehensive discussion of the Council's views on appropriate NEM reform is contained in its public submission to the CoAG Energy Market Review (the Parer Review). The Parer Review is expected to issue its final report in February 2003. The Council will consider the Parer Review's final

recommendations and governments' responses to those recommendations in the 2003 NCP assessment.

Code derogations

The Council considers that derogations to the National Electricity Code (the Code) should be transitional only and that governments should not seek additional or extended derogations unless clear public benefit can be demonstrated. Since the 2001 NCP assessment, the only additional or extended derogations to the Code relate to the implementation of full retail contestability in New South Wales and Victoria. The Council accepts the need for these derogations, which are transitional only and will cease by July 2004. No government has indicated an intention to add or extend derogations.

Vesting contracts

At the commencement of the NEM, all governments (other than the ACT) put in place vesting contract arrangements to protect retailers from wholesale price fluctuations following the introduction of competition in the wholesale market. Derogations giving effect to these arrangements were transitional only and have come to an end in New South Wales, Victoria and Queensland. The arrangements in South Australia will end on 31 December 2002.

In New South Wales the Electricity Tariff Equalisation Fund replaced the vesting contract arrangements. The fund effectively has the same function as that of the vesting contract arrangements — to manage the wholesale price risk faced by retailers which are obliged to supply customers at regulated tariffs. The Council notes continuing concern by some market participants that the fund has impacts on the operation of the NEM by, for instance, affecting pricing or hedging arrangements. The Council understands that New South Wales intends the Electricity Tariff Equalisation Fund only to be a transitional arrangement. It notes, however, the New South Wales NCP annual report did not commit to this arrangement being only transitional.

The Council expects that the Parer Review will consider the effect on the NEM of the Electricity Tariff Equalisation Fund's continued operation. The Council will consider the Parer Review's expected analysis of the fund, together with any recommendations, in the 2003 NCP assessment.

Licensing arrangements

The Council expressed a concern in the 2001 NCP assessment in relation to South Australia's licensing requirements for potential interconnectors, particularly in light of the SNI interconnector project. The Council noted that it would be inconsistent with the State's NCP obligations were its licensing arrangements to revisit issues of customer benefit following approval under

processes set out in the National Electricity Code, particularly where that assessment focussed on the benefits to the State rather than the market as a whole.

The Council notes that all necessary South Australian regulatory approvals for the SNI interconnect project have been granted. The Council, however, remains concerned about the apparent overlap between national electricity market and South Australian regulatory processes for new interconnects. The Council will revisit this issue in the 2003 NCP assessment following the recommendations of, and governments' responses to, the Parer Review.

Full retail contestability

The Council considers that the implementation of full retail contestability (FRC) (under which all customers have the ability to choose their electricity supplier) is an essential component of the electricity reforms. All NEM governments have introduced retail contestability to varying degrees. All customers in New South Wales and Victoria are contestable, while those consuming more than 200 megawatt hours, 160 megawatt hours and 100 megawatt hours per annum are contestable in Queensland, South Australia and the ACT respectively.

New South Wales and Victoria

FRC commenced in New South Wales and Victoria in January 2002. Both jurisdictions continue to have regulatory oversight of retail tariffs for customers choosing to remain on franchise tariffs. Such arrangements are intended to be transitional and should cease once the retail market is sufficiently developed to ensure competitive tariffs.

Both governments sought and obtained Australian Competition and Consumer Commission (ACCC) authorisation for additional Code derogations principally dealing with metering arrangements to facilitate FRC. The derogations limit contestability in the provision of various metering services. The ACCC accepted that such limitation is appropriate at this stage to facilitate the introduction of FRC. The derogation is to cease by July 2004.

The Council considers that both New South Wales and Victoria have satisfied their NCP electricity agreement obligation to introduce FRC. The Council will assess the development of the retail market, together with the effect of the additional derogation and regulation of retail tariffs for both New South Wales and Victoria, in the 2003 NCP assessment.

South Australia and the ACT

South Australia is scheduled to introduce FRC in January 2003. In its NCP annual report, South Australia noted that it is progressing jurisdictional

issues associated with the implementation of FRC from the scheduled date. The Council will assess South Australia's progress towards the implementation of FRC in 2003.

In the ACT, the Government referred consideration of whether the benefits of FRC would outweigh the costs to the Independent Competition and Regulatory Commission. The commission concluded in its July 2002 final report that there would likely be a small overall increase in cost of about $6 per month for small residential customers following the introduction of FRC. Nonetheless, the commission recommended the implementation of FRC, noting that in the longer term, benefits will arise from a competitive market that regulation cannot provide. The Council will consider the ACT Government's response to the commission's recommendations in the 2003 NCP assessment.

Queensland

The Queensland Government agreed to implement FRC as part of its commitments under the 1994 CoAG electricity agreements. As with other NEM jurisdictions, Queensland implemented contestability in phases beginning with large customers in 1998. By July 1999, all customers in Queensland consuming over 200 megawatt hours of electricity per year were eligible to take contestable terms. Remaining customers in Queensland continue to be supplied by local retailers on a franchise basis.

At the time of the Council's June 1999 NCP assessment, the Queensland Government was committed to the introduction of FRC by January 2001. By the time of the Council's June 2001 NCP assessment, the Government stated that it would introduce competition to customers who consume less than 200 megawatt hours per year provided that there was a net public benefit.

The Queensland Government commissioned a review by PA Consulting of the costs and benefits of introducing FRC in Queensland. PA Consulting provided its report to the Government in December 2000. The report has not been publicly released. The report considered the costs and benefits of three different FRC implementation models. The models related to different network pricing options, ranging from a capped cost reflective network approach to a postage stamp approach where all customers pay the same network charge irrespective of the actual cost of supply. PA Consulting concluded that for two of the three network pricing models considered, the benefits outweighed the costs of FRC implementation.

Queensland Treasury undertook additional work to update the analysis in the PA Consulting review by taking into account:

- a revised FRC start date from 1 January 2002 (considered by PA Consulting) to 1 January 2003; and
- the May 2001 distribution network price determination by the Queensland Competition Authority (QCA).

A summary of Queensland Treasury's analysis was made publicly available in October 2001 (Queensland Treasury 2001).

On the basis of this work, the Queensland Government concluded that the costs of implementing FRC exceeded the benefits for all FRC implementation models considered. Accordingly, in October 2001, the Government announced that it would not implement FRC at this stage, but did agree to:

- review the decision in 2004 once the impact of the introduction of FRC in other Australian jurisdictions and overseas is known; and
- consider the extension of retail competition to small business customers who consume less than 200 megawatt hours per year.

The Government subsequently stated that the introduction of FRC after 2004 or the extension of retail contestability in Queensland would only occur should there be a positive net benefit following a cost and benefit assessment. The Government has committed to undertaking an updated assessment of the costs and benefits of FRC in Queensland no later than October 2004. Queensland Treasury is currently undertaking such an assessment for customers consuming between 100 and 200 megawatt hours per year and expects to finalise its recommendations by the end of 2002.

Queensland cost-benefit analysis

Drawing on the main findings set out in Queensland Treasury's 2001 analysis, the Queensland Government noted that the cost of implementing FRC would be at least $184 million over the five year period from 1 January 2003 (Government of Queensland 2002). In contrast, the Government estimated the benefits from introducing FRC over this period to be $52 million.

The Government noted that full deregulation of prices is consistent with the rationale for the introduction of competition. If this is implemented, consumers would be subject to the actual cost of their electricity. Customers in regions other than South-East Queensland, however, would face increased electricity prices if full deregulation of prices occurred.

The Government noted that the other option is to increase CSO payments to subsidise the costs associated with the introduction of FRC and the loss of cross-subsidies as low supply cost customers move off the uniform tariff and take contestable terms. The total cost of additional CSO payments would be up to an estimated $271 million over five years.

On this basis, the Government concluded that the costs of introducing FRC outweigh the benefits, and decided not to introduce FRC for all customers consuming less than 200 megawatt hours per year.

Assessment

The Council considers the implementation of FRC to be an essential component of the electricity reforms. In 1994, the NEM Governments, taking a long term view of electricity reform, considered that FRC was of such importance to overall electricity reform that FRC implementation was included as a principle reform objective in the electricity agreements. The FRC implementation commitment was express and was not conditional on a favourable cost benefit analysis. The Council, however, accepts that implementation of the CoAG commitment may, given developments in the electricity sector and generally, no longer be socially beneficial. The Council considers that any case to deviate from the original commitment on this basis must be made out in a clear and unambiguous manner. The case that the benefits of introduction do not outweigh the costs must be supported by independent, rigorous and transparent evidence. The key issue for the Council is whether it is satisfied that the evidence provided by the Queensland Government in support of its claim that the benefits of FRC introduction do not outweigh the costs, satisfies this test.

To support its case, the Government referred the Council to the PA Consulting report, the Queensland Treasury 2001 analysis, and a supplement to its NCP annual report which considered the costs and benefits of FRC in greater detail. It also provided additional information in response to requests by the Council. Queensland provided the PA Consulting report to the Council on a confidential basis and as such, the Council is unable to refer to the report's specific content in the public NCP assessment.

Benefits of FRC

PA Consulting identified the following benefits from FRC:

- lower energy bills for consumers;
- incrementally lower wholesale electricity prices than would have occurred in the absence of FRC;
- enhanced customer choice;
- improved product and service offerings; and
- reduced capital investment requirements for electricity infrastructure.

PA Consulting noted that the main source of FRC benefit is customer bill savings. Bill savings are expected as a result of reductions in wholesale energy prices, network prices, operating cost reductions on the part of retailers and the willingness of retailers to reduce margins (or the inescapability of them doing so given competitive forces). For the purpose of the calculation of FRC costs and benefits, however, PA Consulting did not include as a benefit retail operating cost reductions or reductions in margins because it did not consider these to be significant.

Queensland Treasury also considered it inappropriate to include as a benefit wholesale price reductions due to the construction of new generating capacity or interconnection with New South Wales because it considered these are not attributable to FRC. Further, the Queensland Treasury considered that bill savings arising from customers paying actual network costs of supply under FRC are not a benefit as they are offset by an increase in CSOs (see below for further discussion). As such, the only benefit taken into account in the Queensland Treasury analysis is the reduction in incremental wholesale energy costs, which is a direct result of an increase in competitive pressures caused by the introduction of FRC. This includes price savings resulting from the procurement of energy at lower prices by competing retailers. Queensland Treasury estimated this benefit to be $52 million over five years.

The Council considers it likely that dynamic efficiency benefits will be the most significant benefits arising from FRC. Dynamic efficiency benefits include improvements in the efficiency of retailers from changes in the provision of services over time, such as the development of new product mixes that add value to customers as retailers compete for market share. Innovation in product offerings may include improved services and a wider range of products such as 'green power' or dual fuel product offerings. Technological improvements and cost reductions in metering, for instance, resulting from increased competitive retail pressures under FRC would also be expected. Cost savings and service and product improvements resulting from such innovation would in turn be passed on to customers. While both PA Consulting and Queensland Treasury noted the likelihood of such benefits, neither took it into account in the final calculation of FRC costs and benefits because they considered there to be a lack of empirical evidence on how valuable these potential benefits are to consumers.

In addition, FRC is expected to improve liquidity in the market for electricity risk management financial instruments with an increased number of retailers with specific risk profiles competing in the retail market. Liquidity and depth in this market is essential to effective wholesale trading arrangements.

FRC is a necessary step to the creation of market conditions conducive to improved demand management. Retailers in a competitive market have incentives to manage consumption, particularly at peak periods when prices are high and demand is short. A dynamic effect of this will be an incentive on retailers to offer products and incentives to customers to manage demand to reduce peak period consumption. The use of time-of-use meters within an FRC environment will enable retailers to effectively offer such products and incentives, and enable customers to more effectively manage consumption. A reduction in peak period consumption will have a significant effect on price. NECA recently referred to United States estimates suggesting a 5 per cent managed reduction in peak demand can reduce the cost of servicing that peak by up to 50 per cent (NECA 2002, p. 6). The Australian Bureau of Agricultural and Resource Economics noted that the largest likely potential gains from FRC are those associated with effective demand management (Short et al. 2001, p. 84).

Further, FRC will have an important impact on upstream markets. Residential customer electricity consumption in Queensland in 1999-2000 accounted for approximately 30 per cent of the total (ESAA 2001, p. 44). Exposure of this sector to competition and the actual cost of supply would likely result in improved price signals to guide more efficient investment in generation, transmission and distribution network infrastructure. For example, effective demand management may result in the deferment of investment in new peak generating capacity.

Queensland Treasury recognised this potential benefit but considered that it is largely realised through contestability for large customers and through Queensland's extensive use of controlled circuit water heating. It also considered that effective demand management is not achievable in the absence of interval meters and that domestic demand may be inherently inelastic so that demand management benefits are small. The Council considers that with FRC, time-of-use meters will become more common place over time particularly given expected cost reductions. Further, while demand elasticity for the overall quantity of electricity consumed may be relatively inelastic, the time at which much of the consumption occurs can be effectively managed. The potential benefits from such demand management, particularly through the reduction of peak time consumption, can be significant.

The full extent of dynamic efficiency benefits and benefits arising from effective demand management under FRC can only be realised in the medium to long term. The difficulty with Queensland Treasury's analysis is that consideration of a five year time period is insufficient to capture the most substantial dynamic benefits of FRC such as improved infrastructure investment signals, improvements in product and technological innovation and the benefits of effective demand management. Such a long term approach was recently adopted by the ACT regulator in its cost/benefit analysis of FRC implementation for small customers (that is, those consuming less than 100 megawatts per year) in the ACT (ICRC 2002, p. vi). The regulator noted that "whilst the costs of FRC are immediate and specific, the benefits are generally delayed and diffuse and therefore difficult to measure" (p. 8). In contrast, Queensland Treasury argued that a five year analysis timeframe was appropriate from the perspective of considering and formulating government policy on the issue.

In addition, the introduction of FRC has invariably been accompanied by transitional measures, such as the retention of uniform tariffs for customers not taking contestable terms, intended to protect customers until such time as the competitive market reaches sufficient maturity. In the United Kingdom, FRC was implemented in May 1999. By June 2000, 6.5 million customers, 1 in 4, had exercised their choice to change electricity supplier. The aggregate bill savings to customers that changed electricity supplier was £299 million since the start of competition representing a 15 per cent reduction in real terms (OFGEM 2000, p.1-2). The uniform tariff was abolished in the United Kingdom three years later, in April 2002. As a mature market is necessary for the full realisation of FRC benefits, consideration of FRC costs and benefits over a short five year time period is inadequate. The Council considers

Queensland Treasury's failure to adequately take into account the long term dynamic efficiency benefits of FRC in the final quantitative comparison of costs and benefits to be a significant flaw in its analysis. While the Council accepts that these benefits are difficult to quantify, the benefits of FRC would outweigh the costs if the dynamic benefit gains were considered to equal a mere 1.3 per cent of the electricity retail turnover in Queensland for customers consuming less than 200 megawatts per year (estimated by PA Consulting at $1.35 billion per year). The Council considers that this figure is likely to underestimate benefits, even in the short to medium term. Considered over a longer period, the Council would expect the relative value of the dynamic benefits to increase in significance. (For clarity, the figure of 1.3 per cent of turnover is not an estimate of the actual dynamic benefits of FRC implementation in Queensland. Rather it is used to make the point that a measurement of the dynamic benefits as even a small proportion of the total market size would result in the benefits of implementation outweighing the costs).

Costs of FRC

The Council considers that only reasonable costs incurred as a result of the implementation of FRC should be included as a cost in the analysis. It also considers it inappropriate to allocate all of the identified FRC implementation costs, such as the capital cost of metering, to the five year period considered in the analysis. Queensland Treasury acknowledged these concerns and revised its FRC implementation costs estimate to be $141 million over five years.

The Council notes that Queensland Treasury considered but excluded from the cost/benefit calculation, costs associated with retailers participating in the competitive market, in customers considering various retailer and product choices and the regulation of the contestable market. The Council considers that these are likely to be small, if not insignificant. In any case, at least part of these costs is likely to be absorbed by retailers. Taking into account costs or benefits that are not likely to be passed onto consumers would be inconsistent with the general approach of PA Consulting and Queensland Treasury, which have focused on the impacts on consumers as a surrogate measure of community welfare.

The Council notes that the proposed trading arrangements considered by PA Consulting in the calculation of FRC costs included global settlement at the jurisdictional level. Global settlement involves determining retailer purchases from the wholesale market on the basis of the consumption of all customers. This differs to current NEM trading arrangements (referred to as settlement by difference trading arrangements). Under these arrangements consumption by customers on contestable terms is subtracted from total consumption at a particular network connection point. The amount remaining is assumed for the purpose of settlement to be the amount of electricity purchased from the wholesale market by the incumbent retailer.

The Council understands that the cost of establishing and implementing a global settlement system would likely be significant. Implementation would involve both systems modification and extensive changes to the settlement provisions of the Code. The Council does not consider it appropriate for Queensland to include this cost in its cost/benefit analysis for two reasons. The first is that a change to global settlements may be not be necessary until such time as the retail market matures and significant numbers of customers take contestable terms. This may not occur within the five year period considered in the analysis. Second, such a move would most logically take place as a NEM-wide initiative with development and implementation costs being shared among NEM jurisdictions. The Council notes that FRC was implemented in both New South Wales and Victoria without a change to global settlement.

CSO impact

Both PA Consulting and Queensland Treasury considered the impact of the introduction of FRC on the Queensland Government's CSOs. They noted that CSO payments would be higher for all three network pricing models considered with the introduction of FRC than under existing uniform tariff arrangements in the absence of FRC.

The Council does not consider it appropriate to treat such an increase as a cost of FRC as the forecast increase in CSOs would be offset by an increase in consumer benefits by way of bill savings. Low supply cost customers that took contestable terms would no longer pay a subsidy to fund supply to higher cost customers as is the case under existing uniform tariff arrangements. The removal of the cross-subsidy would translate as customer bill savings but would equally result in higher CSOs as the burden of funding the subsidy would shift from low supply cost customers to the Government. Queensland Treasury considered that any increase in the level of CSO payments as a result of FRC is a social policy issue and is relevant to the cost/benefit analysis. They did, however, recognise that changes to CSO payments amount to transfers between the Government and consumers, and as such, did not include CSO impacts in the derivation of the direct costs and benefits of FRC.

Conclusion

Queensland Treasury calculated the costs of implementing FRC in Queensland for the five year period commencing 1 January 2003 to be $184 million. Taking into account the Council's concerns in relation to certain cost items, Queensland Treasury's costs estimate was reduced to $141 million over five years. This figure does not reflect the Council's additional concern in relation to the trading settlement arrangements adopted in the analysis.

Queensland Treasury estimated that the benefits flowing from FRC would be $52 million over five years. This figure represents an expected reduction in incremental wholesale energy costs, which are a direct result of an increase in

competitive pressures resulting from the introduction of FRC. This figure did not include a reduction in energy costs due to new generation, savings arising from customers paying actual network costs and expected retail operating cost reductions. (The reasons for the exclusions are set out above under FRC benefits).

The Council accepts Queensland Treasury's reasoning for the exclusion of these items as FRC benefits. The Council, however, considers the Queensland Treasury's estimate of the benefits of FRC to be grossly understated principally because of its failure to factor into the cost/benefit calculation, the dynamic benefits of FRC. Dynamic benefits such as improved retailer efficiency, innovation in product and service offerings, technological development, improved price signals for more efficient industry investment, enhancement of the financial risk management markets and the potential for effective demand management are collectively the most significant benefits of FRC. The realisation of such benefits requires a medium to long term perspective. The Council considers the five year period of time considered by Queensland Treasury to be too short to encapsulate the realisation of the most significant benefits of FRC.

On the basis of Queensland Treasury's calculations, the difference between the costs and benefits of implementing FRC is $89 million over five years. The Council considers that the value of the dynamic benefits of FRC would likely be greater than this amount, and as such, the benefits of FRC implementation would outweigh the costs over the five year time period considered by Queensland. The Council would also expect the relative value of the dynamic benefits to be greater the longer the time frame considered.

The Council notes the recent report of the ACT Independent Competition and Regulatory Commission in its cost/benefit analysis of FRC in the ACT. It expected FRC implementation costs to increase electricity bills for small customers in the ACT by between 7 and 9 per cent. Nonetheless, the commission recommended that FRC be implemented in the ACT on the basis that non-quantifiable potential benefits flowing from FRC will have a positive net benefit. It noted that in the longer term, benefits will arise from a competitive market that regulation cannot provide (ICRC 2002, pp. vi and 10).

The Council considers its expectation that dynamic and non-quantifiable benefits flowing from the introduction of FRC in Queensland to be at least 1.3 per cent of small customer electricity retail turnover to be entirely reasonable and well within the benchmark estimate applied by the ACT regulator. Such an estimate of dynamic and non-quantifiable benefits would result in a net public benefit following introduction of FRC in Queensland.

For the reasons set out above, the Council is of the view that the Queensland Government has not demonstrated in a clear and unambiguous manner that the costs of implementing FRC outweigh the benefits. Accordingly, the Council considers that the Government has failed to satisfy its NCP assessment obligation to implement FRC. The Council considers this failure to be serious. FRC is an essential component of competition policy reform in

the electricity sector. This was acknowledged by governments which expressly included in the electricity agreements, an obligation to give customers the ability to choose their electricity supplier. Failure to do so renders the reform program for the electricity sector incomplete and will have the effect of stifling expected competitive benefits, not just in the retail sector but throughout the industry.

Table 3.1: Review and reform of legislation regulating electricity

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Electricity (Pacific Power) Act 1950*	Constitution of Pacific Power	Not for review, because the Government has established a new State-owned corporation from Pacific Power's generation business.	Act is expected to be repealed after a transitional period.	Council to finalise assessment in 2003.
	Electricity Safety Act 1945	Requirements relating to the authorisation and inspection of electrical products, regulation of the sale and hiring of electrical apparatus	Review is under way and near final completion.	The Government expected to make a decision on the review's recommendations by June 2002.	Council to finalise assessment in 2003.
	Electricity Supply Act 1995	Regulation of electricity supply	Review will be undertaken after trends in the fully contestable retail market become clear.		Council to finalise assessment in 2003.
	Electricity Transmission Authority Act 1994	Constitution of the New South Wales Electricity Transmission Authority		Act was repealed.	Meets CPA obligations (June 2001).
	Energy Administration Act 1987	Constitution of the Energy Corporation of New South Wales	Review was completed.	Licence and approval requirements repealed.	Meets CPA obligations (June 2001) in relation to electricity-related provisions.
Victoria	*Electricity Industry Act 1993*	Implementation of electricity industry reform	Review was completed.	Act was replaced by the Electricity Industry Act 2000. The *Electricity Industry (Residual Provisions) Act 1993* contains remaining provisions relevant for historical purposes.	Meets CPA obligations (June 2001).

(*continued*)

Table 3.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Electricity Industry Act 2000*	Implementation electricity industry reform	Act was assessed against NCP principles at introduction. Assessment found the Act's provisions to be consistent with NCP principles, that is, the provisions do not restrict competition, but rather underpin existing competition and facilitate its introduction for domestic and small business customers.		Meets CPA obligations (June 2001).
	Electric Light and Power Act 1958			Act was repealed and replaced by the Electricity Safety Act 1998.	Meets CPA obligations (June 2001).
	Electricity Safety Act 1998	Safety standards for equipment, licensing of electrical workers	Act was assessed against NCP principles at introduction. Assessment found the restrictions were justified in the public interest on public safety and consumer protection grounds. Act addresses consumers' inability to detect hazardous products and assess the competency of tradespeople.	Restrictive provisions were retained.	Meets CPA obligations (June 2001).
	Electricity Safety (Equipment) Regulations 1999	Standard-setting and approval requirements for electrical equipment	Regulations were assessed against NCP principles at introduction. Assessment found the restrictions justified in the public interest on public safety and consumer protection grounds. Regulations address consumers' inability to detect hazardous products.	Restrictive provisions were retained.	Meets CPA obligations (June 2001).
	Snowy Mountains Hydro-Electric Agreements Act 1958			Act was repealed.	Meets CPA obligations (June 2001).
	State Electricity Commission Act 1958		Scoping study has shown that the Act does not restrict competition.		Meets CPA obligations (June 2001).

(*continued*)

Table 3.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Electricity Act 1994*	Licensing requirements, conduct requirements, restrictions on trading activities, Ministerial pricing powers	Review is under way. Review on non safety related provisions is due to be completed in the first half of 2002. Review on safety-related provisions was completed and Cabinet endorsed the recommendations in early 2002.	Safety-related anti-competitive provisions to be retained will be incorporated into separate Act by the end of 2002.	Council to finalise assessment in 2003.
Western Australia	*Electricity Act 1945*	Regulations concerning mandated supply, determination of interconnection prices, restrictions on the sale/hire of non approved electrical appliances, uniform pricing	Initial review was completed. Further review being conducted as part of wider electricity sector reform.		Council to finalise assessment in 2003.
	Electricity Corporation Act 1994	Exclusive retail franchise, entry restrictions for generation, competitive neutrality restrictions	Initial review was completed. Further review is being conducted as part of wider electricity sector reform.		Council to finalise assessment in 2003.
South Australia	*Electricity Act 1996*	Restrictions on market entry and market conduct	Review was completed. No reforms were recommended as Act facilitates regulation of electricity supply in conjunction with other national electricity market reforms.	Restrictive provisions were retained.	Council to finalise assessment in 2003.
	Electricity Corporation Act 1994	Restrictions on market entry and market conduct	Review was completed. No reforms were recommended because the Act facilitates regulation of electricity supply in conjunction with other national electricity market reforms.	Restrictive provisions were retained.	Council to finalise assessment in 2003.

(*continued*)

Table 3.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia (continued)	*National Electricity (South Australia) Act 1996*	Restrictions on market entry and market conduct	Review was completed. No reforms were recommended because the Act facilitates regulation of electricity supply in conjunction with other national electricity market reforms.	Restrictive provisions were retained.	Council to finalise assessment in 2003.
Tasmania	*Electricity Supply Industry Act 1995*	Licensing requirements, conduct requirements, exclusive retail provisions, tariff-setting procedures	Review was completed in late 2001.	Final review recommendations are under consideration by the Government.	Council to finalise assessment in 2003.
	Electricity Consumption Levy Act 1986			Act was repealed.	Meets CPA obligations (June 2001).
	Hydro-Electric Commission Act 1944, Hydro-Electric Commission (Doubts Removal) Act 1972 and *Hydro-Electric Commission (Doubts Removal) Act 1982*			Acts were repealed and replaced by the *Electricity Supply Industry Act 1995* and the *Electricity Supply Industry Restructuring (Savings and Transitional Provisions) Act 1995*.	Meets CPA obligations (June 2001).
ACT	*Utilities Act 2000*	Licensing requirements, restrictions on business conduct	Act's introduction followed public consultation and review of both existing regulatory arrangements and principles for effective regulation.	Restrictive provisions were retained. Other Acts amended or repealed include the *Electricity Supply Act 1997*, the *Electricity Act 1971*, the *Energy and Water Act 1988* and the *Essential Services (Continuity of Supply) Act 1992*.	Meets CPA obligations (June 2001).

(*continued*)

Table 3.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Electricity Act*		Act was reviewed as part of a broad review of the Power and Water Authority, and under a departmental review.	Act was repealed and replaced by the *Electricity Reform Act*, the *Electricity Networks (Third Party Access) Act* and the *Utilities Commission Act*.	Meets CPA obligations (June 2001).
	Power and Water Authority Act		Review was completed.	All electricity-related amendments were made in 2001 and enacted on 1 July 2002 except for the removal of the Power and Water Authority's local government rate exemption. This amendment has been made part of Government-owned corporations (GOC) legislation, which will apply from 1 July 2002. The authority actually began paying local government rate equivalents from 1 July 2001. Further amendments are to be enacted once the authority becomes a GOC.	Council to finalise assessment in 2003.

Gas

NCP commitments

NCP commitments in relation to the natural gas industry arise from specific CoAG agreements on natural gas, particularly the 1994 CoAG Gas Agreement and the 1997 Natural Gas Pipelines Access Agreement (1997 Gas Agreement), and from general NCP agreements such as the CPA. The main aim of the NCP commitments is to remove all legislative and regulatory barriers to the free trade of gas both within and across State and Territory boundaries, and to provide for third party access to gas pipelines.

The Council has previously assessed progress in implementing a uniform national access regime for transmission and distribution pipelines, structural reform of gas utilities, and franchising and licensing principles.[1] Governments have met their obligations in these areas. The significant outstanding issues in the gas reform program are Tasmania's implementation of the national gas access regime, New South Wales' derogations from the national gas access regime, the implementation of full retail contestability in all jurisdictions, and the completion of the legislative review and reform program.

National gas access regime

Tasmania

The 1997 Gas Agreement requires governments to enact legislation to introduce a uniform Gas Pipelines Access Law (GPAL) and the National Gas Access Code, establishing a regime for third party access to the services of natural gas pipelines. The Council has previously assessed that all governments, except Tasmania, have met their obligations in these areas.

Tasmania was exempted from having to comply with these obligations (under clauses 4.3 and 10.1 of the 1997 Gas Agreement) until approval for the State's first natural gas pipeline was granted or until a competitive tendering process for a natural gas pipeline in the State commenced.

To facilitate the development of a natural gas industry in Tasmania, in May 1998 the Government selected Duke as its preferred gas developer.

[1] For all governments other than Tasmania.

Construction of the offshore pipeline across the Bass Strait commenced in December 2001. The Government expects that the system will be commissioned in July 2002.

The Government is facilitating the development of the gas retail and distribution sectors within the State by awarding limited-duration, non renewable retail and distribution franchises through a tender process, in line with the requirements of the National Gas Access Code. This tender process is under way and the outcome is expected to be known by mid-2002.

Tasmania has already implemented the National Gas Access Code through its *Gas Pipelines Access (Tasmania) Act 2000*, which was passed in November 2000. Regulations under that Act are being developed. Two further pieces of legislation were passed in December 2000 regulating the Tasmanian natural gas industry. The *Gas Pipelines Act 2000* provides for regulation of gas pipeline facilities in Tasmania, including licensing provisions and the development and approval of gas safety cases. The *Gas Act 2000* regulates the distribution and retailing of natural gas in Tasmania. Regulations are being developed for both Acts.

The Council considers that Tasmania has made satisfactory progress to date towards meeting its commitments under the 1997 Gas Agreement. The Council will assess Tasmania's progress against its continued obligations in the 2003 NCP assessment.

New South Wales

Under transitional provisions in the *Gas Pipelines Access (New South Wales) Act 1998*, a number of pipelines, described as transmission pipelines in Schedule A of the National Gas Access Code, where deemed to be distribution pipelines until 1 July 2002. The provisions applied to the following pipelines:

- Wilton to Newcastle including Wilton to Horsley Park, Horsley Park to Plumpton, Plumpton to Killingworth, Killingworth to Walsh Point; and

- Wilton to Wollongong.

The effect of these provisions was to ensure that the Independent Pricing and Regulatory Tribunal (IPART) regulated access to the above pipelines until 30 June 2002. If no further regulations were made before 30 June 2002, access regulation for those pipelines would automatically be transferred to the ACCC.

The New South Wales Government, after undertaking a detailed assessment of the costs and benefits and likely impact on competition of the derogating provisions, determined to extend the derogation for a further five year period.

As required by the 1997 Gas Agreement, New South Wales sought the approval of all jurisdictions to amend the New South Wales access legislation and extend the derogation. New South Wales has advised the Council that all

jurisdictions, other than the Commonwealth, had approved the extension of the derogation for a further five years. The Commonwealth approved the extension for a further three years, concerned that future developments in the gas industry and prospective changes in the National Gas Access Code might affect the desirability of the derogation. The Commonwealth, indicating that it was willing to reconsider its position, sought a number of assurances from New South Wales relating to the future of the derogation and support for review and reform of gas regulatory arrangements. New South Wales is still in discussions with the Commonwealth on this issue.

The Council considers that the New South Wales Government does not have the approval of all the Ministers to amend its access legislation and extend the derogation in accordance with the 1997 Gas Agreement. New South Wales therefore has not fully met its national gas reform obligations. The Council will consider the matter further after the Commonwealth has finalised its response to New South Wales, in the 2003 NCP assessment.

Introduction of full retail contestability

Governments have provided (in annex H of the 1997 Gas Agreement) for the progressive introduction of full retail contestability for all gas consumers. Full retail contestability means providing consumers with the right to choose the retailer from whom they purchase their gas. This results in competition among gas retailers and gas producers, which promotes improved services, more efficient energy industries and lower prices for customers.

The introduction of full retail contestability is important to realise the benefits of competition in the gas sector as a whole. Introducing full retail contestability to promote competition effectively requires more than the removal of legal barriers. Governments also must implement a package of business rules including:

- processes for measuring gas use (whether through metering or other processes);
- protocols for transferring customers from one gas supplier to another;
- consumer protection requirements; and
- safety requirements and gas specification requirements to be met before interconnection can take place.

The legal removal of most barriers to competition occurred with the enactment of the GPAL, including the National Gas Access Code (although some barriers may remain). The business rules must make it practical for customers to select from among suppliers, thus encouraging suppliers to compete to secure customers. Similar processes of supplier selection have promoted effective competition in other industries such as telecommunications.

Table 3.2: Timetable for introduction of legal contestability under the national gas access regime

Date	*New South Wales*	*Victoria*	*Queensland*	*Western Australia*	*South Australia*	*ACT*	*Northern Territory*
1 July 1999					>10 TJ per year		
1 September 1999		100 TJ per year					
1 October 1999	>1 TJ per year					>1 TJ per year	No phase-in arrangements
1 January 2000				>100 TJ per year			
1 July 2000	All customers				Industrial and commercial customers <10 TJ per year		
1 September 2000		>10 TJ per year					
1 July 2001			>100 TJ per year		All customers		
1 September 2001		>5 TJ per year and <10 TJ per year[a]					
1 January 2002				>1 TJ per year		All customers[d]	
1 July 2002							
1 October 2002		All customers					
1 January 2003			All customers[b]				
1 July 2003				All customers[c]			

Unit of measurement: 1 terajoule (TJ) = 1012 joules.

[a] Modified from previous timetable of all customers by 1 September 2001.

[b] Modified from previous timetable of all customers by 1 September 2001.

[c] Modified from previous timetable of all customers by 1 July 2002.

[d] Modified from previous timetable of all customers by 1 July 2000.

In its 2001 NCP assessment, the Council noted that it expected that governments would have had sufficient time by July 2002 to tackle most, and in some cases all, of the obstacles that have delayed the implementation of full retail contestability. This was because the 1997 Gas Agreement nominated 1 September 2001 as the latest by which access for all customers and suppliers was contemplated.[2] Governments have experienced significant difficulties, however, in introducing effective full retail contestability in accordance with their contestability timetables. Some have announced deferrals of up to 12 months for smaller customers. Difficulties relate to matters such as:

- the introduction of information technology systems to handle customer billing and transfer;
- a need for the industry to develop market rules to allow for the orderly management of customer transfers between retailers;
- the choice and costs of a method of metering (that is, how to measure cost effectively the use by smaller customers).

In May 2000, the New South Wales Government removed all legal barriers to full retail contestability. Delays in implementing market structures and establishing the systems needed to operate a competitive market meant that the implementation of full retail contestability in gas did not occur immediately. Since 1 January 2002, however, all customers in New South Wales have been able to choose their natural gas supplier.

In the ACT, all customers have been able to choose their gas supplier since January 2002.

In Victoria, from 1 September 2001, the *Gas Industry Act 1994* was repealed by the *Gas Industry Act 2001* as the legislation containing all the ongoing regulatory provisions of relevance to the gas industry. Victoria further amended the *Gas Industry Act 2001* to facilitate the orderly introduction of full retail contestability in the State's gas market. These amendments included the introduction of a regulatory framework for developing and approving 'retail gas market rules' and fine-tuning the safety net provisions.

Victoria introduced full retail contestability on 1 September 2001 for industrial and commercial gas users consuming 5-10 terajoules per year. It has deferred the introduction of full retail contestability for consumers taking less than 5 terajoules per year from September 2001 to October 2002. Victoria introduced provisions into the Gas Industry Act to enable the deferral of full retail contestability to ensure it is introduced in an orderly and effective manner. According to the Government, deferral is the result of delays in the development of systems and processes necessary to manage customer transfers and metering data. Victoria also has attempted to coordinate the

[2] Except for Western Australia, where the date was 1 July 2002.

implementation of full retail contestability in gas with full retail contestability in electricity, and, to the furthest practicable extent, with full retail contestability in other jurisdictions.

In Western Australia, the *Gas Pipelines Access (WA) Act 1998* sets out the timetable for access to the AlintaGas distribution system in accordance with the obligations under the 1997 Gas Agreement. On 1 January 2002, the market became contestable for those customers consuming 1 or more terajoules of natural gas per year. The last stage of full retail contestability (consumers of less than 1 terajoules per year, being most small business and household consumers) will begin on 1 July 2002 with the removal of legal impediments to access. Contestability is likely to be delayed in practice, however, until mid-2003, reflecting the longer than anticipated time required for implementing the necessary rules, systems and regulatory framework to support a fully contestable gas market.

In South Australia, all natural gas consumers have been legally contestable since 1 July 2001, but the Government has identified the inadequate transmission capacity on the Moomba to Adelaide pipeline as a reason for the delay in achieving full retail contestability. The Government had anticipated this problem and has attempted to facilitate the early development of a new pipeline into South Australia. This process resulted in the proposal to construct a 45 petajoules-per-year pipeline (the SEA Gas pipeline) from Western Victoria to Adelaide by December 2003. The Government also has identified a need for the industry to develop market rules to allow for the orderly management of customer transfers between retailers

Queensland amended its *Gas Act 1965* to defer the introduction of full retail contestability from 1 September 2001 to 1 January 2003. The first tranche of contestability, effective 1 July 2001, relates to consumers connected to the distribution network using 100 terajoules per year or more. The market rules for this tranche of contestability are being developed in consultation with industry and are expected to be in place by mid-2002.

Section 12.2 of the 1997 Gas Agreement provides that:

> *Each Party will ensure that any transitional arrangements or derogations will:*
>
> *(a) be limited, in duration and extent, to transitional arrangements or derogations essential to the orderly introduction of the competitive arrangements contemplated by the Gas Pipelines Access Law (including the Code); and*
>
> *(b) except where otherwise noted in Annex H or Annex I or approved by all the Ministers under clause 12.1(a), be phased out, repealed or terminated no later than 1 September 2001, so that a competitive natural gas market characterised by access to all gas consumers and all producers in all States and Territories exists after this date.*

Queensland advised the Council that pursuant to the 1997 Gas Agreement, it sought the consent of each government to its deferral. It advised that all governments other than the Commonwealth have approved the amendments to its full retail contestability timetable. Victoria advised the Council that it consulted with, but did not seek the consent of all governments before amending its full retail contestability timetable.

The Council considers that Queensland and Victoria do not have the approval of all the Ministers to amend their full retail contestability timetables in accordance with s. 12(2)(b) of the 1997 Gas Agreement. Both States therefore have not fully met their national gas reform obligations.

Legislative restrictions on competition

Legislation directly relevant to natural gas generally falls into one or more of the following categories:

- petroleum (onshore and submerged lands) legislation;
- pipelines legislation;
- restrictions on shareholding in gas sector companies;
- standards and licensing legislation; and
- State and Territory agreement Acts.

Additionally, mining legislation (particularly to the extent that it deals with coal and oil shale, which can produce coal methane gas) and environmental planning legislation may be relevant. Governments' progress in reviewing and reforming relevant legislation is reported in table 3.3. They are making good progress in reviewing and reforming legislative restrictions in the gas industry. Since the 2001 NCP assessment, governments have completed a number of reviews and implemented reforms where appropriate.

Submerged lands legislation

Each jurisdiction has a Petroleum (Submerged Lands) Act, which forms part of a national scheme that regulates exploration for, and development of, undersea petroleum resources. These Acts were reviewed in 1999-2000. The Australian and New Zealand Minerals and Energy Council (ANZMEC) Ministers endorsed the national review report which was made public on 27 March 2001, following consideration by CoAG.

The review's main conclusion was that the legislation is essentially pro-competitive and that any restrictions on competition (e.g. in relation to safety, the environment and resource management) are appropriate given the net benefits to the community.

The review recommended two specific legislative amendments, focusing on administrative streamlining and measures to enhance the certainty and transparency of decision-making. One amendment sought to address potential compliance costs associated with retention leases and the other sought to expedite the rate at which exploration acreage can be made available to explorers. All governments accepted the recommendations.

The amendments have been incorporated into the Commonwealth's *Petroleum (Submerged Lands) Legislation Amendment Bill 2002*, which also proposes the rewrite of the Commonwealth's *Petroleum (Submerged Lands) Act 1967*. The Bill was introduced into Commonwealth Parliament on 15 May 2002 and is being considered. Amendments and rewrites of the counterpart State and Northern Territory legislation will follow once the Commonwealth Bill is passed. The Council will assess governments' implementation of the amendments in 2003.

Santos Limited (Regulation of Shareholdings) Act 1989

In September 2000, the South Australian Government announced an independent review of the *Santos Limited (Regulation of Shareholdings) Act 1989*. The Act restricts competition by preventing any one shareholder from having more than a 15 per cent shareholding in Santos Limited. On 11 July 2001, the Government announced that it had endorsed the findings of the independent review and resolved to not change the Act because the benefits of the restrictions outweighed the costs, and the objectives of the legislation could be achieved only through restricting competition (this decision reflects the importance to South Australia of gas supply from the Cooper Basin where Santos has a majority interest in the production of gas). The Council considers that South Australia has met its NCP obligations in this area.

Stony Point (Liquids Project) Ratification Act 1981

This Act ratifies an indenture between South Australia and a producer to encourage a major development for the transport and processing of Cooper Basin liquid hydrogen reserves. At that time (December 1981), it was the largest development project ever undertaken in South Australia. The Act also gave legislative effect to State commitments, and authorised and approved certain agreement for the purposes of part IV of the *TPA*. Many of the objects of the Act have now been achieved. A review of this Act (completed in October 2000) concluded, given that many of the benefits to the producers constituted past or historic benefits, that there is no significant continuing effect that would amount to a restriction on competition. The review recommended no change to the legislation. South Australia provided the final review report to the Council in January 2002. The Council considers that South Australia has met its NCP obligations in this area.

Industry standards

Industry standards are relevant to pipeline safety, gas appliance safety, gas quality and specifications, and consumer protection. Governments have enacted a range of legislation to deal with matters covered in industry standards. They have an obligation to review this legislation to ensure industry standards do not create barriers to competition, and they have a specific obligation to implement Australian Standard (AS) 2885 to achieve uniform national pipeline construction standards. Governments have largely implemented AS 2885; for more detailed information, refer to the Council's 2001 NCP assessment (NCC 2001).

Gas quality standards

The Australian gas industry has been developing a national gas quality standard so processed gas can move through all interlinked pipeline networks without adversely affecting pipelines or gas appliances. In 1999, governments and industry funded the Australian Gas Association to undertake a gas quality appliance testing program. After testing, the working group defined a specification for natural gas to provide for the safe use of gas in Australia in a wide variety of appliances and for the safe transportation of gas through pipelines. A committee called the Natural Gas Quality Specification Committee (NGQSC)[3] was subsequently formed to write a new gas quality standard specification for general purpose natural gas, which will be designated AS 4564/AG 864. The specification in this standard defines the requirements for providing natural gas suitable for transportation in transmission and distribution systems within or across State borders. It also provides the range of gas properties consistent with the safe operation of natural gas appliances supplied to the Australian market. The standard applies to general purpose uses only; any temporary departures from the specification are subject to, and provided for, under relevant gas sales contracts, legislation and/or government guidelines. The draft standard was issued for public comment on 7 December 2001. The NGQSC is expected to endorse this standard in 2002, and following that State and Territory Governments will implement this standard.

The Council considers that a national gas quality standard is essential to: (a) achieving a national gas market through the removal of barriers to interstate

[3] This standardisation committee is constituted under the rules of Standards Australia and covers a wide cross-section of the gas industry. It includes representation from the Australian Gas Association, the Australian Pipeline Industry Association, the Australian Petroleum Production and Exploration Association, and the Gas Appliance Manufacturers Association of Australia, as well as organisations such as the Gas Technical Regulators Committee, large industrial users and other gas consumers. The committee also includes representatives from governments (including Western Australia, which in not connected to the eastern gas network).

gas trade; and (b) implementing free and fair trade in gas. In its 2003 NCP assessment the Council will monitor the progress of the States and Territories in implementing the national gas quality standard.

Assessment

The Council considers that the reform process generally has been successful, with governments making good progress in implementing natural gas reform. While progress may have been slower than CoAG envisaged in its early agreements, the original timetable was ambitious, with many complex issues needing to be resolved. Given this underestimation, combined with the broad, inclusive consultative processes used to introduce the reforms, the program is still not completed

The most significant remaining issues are the application by Tasmania for certification of its access regime for its new gas pipeline service, the implementation of full retail contestability in all jurisdictions, and the completion of the remaining legislative review issues. The Council will monitor progress in these areas for the NCP assessment in 2003 and expects to be able to sign off on the last of these issues at that stage.

Table 3.3: Review and reform of legislation relevant to natural gas

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Petroleum (Submerged Lands) Act 1967*	Regulates exploration for and development of undersea petroleum resources. This legislation forms part of a national scheme.	National review was completed in 1999 – 2000 and endorsed by ANZMEC Ministers.	Legislative amendments are to be developed by the Commonwealth and reflected in State and Territory legislation.	Two specific legislative amendments flow from the review. One addresses potential compliance costs associated with retention leases and the other expedites the rate at which exploration acreage can be made available to explorers. These amendments are incorporated in the *Petroleum (Submerged Lands) Legislation Amendment Bill 2002*, which was introduced into Parliament on 15 May 2002 and is being considered. Amendment and rewrites of the counterpart State and Northern Territory legislation will follow. The Council is to finalise assessment in 2003.
New South Wales	*Petroleum (Submerged Lands) Act 1982*	Regulates exploration for, and development of, undersea petroleum resources. This legislation forms part of a national scheme.	National review was completed in 1999-2000 and endorsed by ANZMEC Ministers.	Amendments are to be developed by the Commonwealth and reflected in State and Territory legislation.	The Government is awaiting the introduction of amendments by the Commonwealth before amending its own legislation. The Council is to finalise assessment in 2003.

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales (continued)	*Energy Administration Act 1987*	Establishes the Ministry of Energy and the Energy Corporation of New South Wales, and defines its functions.	Review completed.	Licence and approval requirements were repealed by *Electricity Supply Act 1995*. Sections 35A and 35B dealt with as part of structural reform of the gas industry.	Meets CPA obligations (June 1999).
	Gas Industry Restructuring Act 1986	Makes provisions with respect to the structure of AGL.	Review was unnecessary due to repeal of Act.	Act was repealed by *Gas Supply Act 1996*, which corporatised AGL.	Meets CPA obligations (June 1997).
	Liquefied Petroleum Gas Act 1961 and *Liquefied Petroleum Gas (Grants) Act 1980*		Review completed.	Act was repealed by *Gas Supply Act 1996*.	Meets CPA obligations (June 1997).
	Petroleum (Onshore) Act 1991	Regulates the search for, and mining of, petroleum.	Review completed.	Review recommendations dealt with under the licence reduction program. Authority for exploration is retained. Business compliance costs are minimised.	Meets CPA obligations (June 1999).
	Pipelines Act 1967	Regulates construction and operation of pipelines in New South Wales.	Review completed, finding that the legislation did not contain any significant anticompetitive provisions.	No reform is planned.	Meets CPA obligations (June 2001).
Victoria	*Energy Consumption Levy Act 1982*			Act was repealed.	Meets CPA obligations (June 2001).

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Gas Industry Act 1994* and Amendment Acts	Substantially amended in 1998 to facilitate privatisation and the NCP. Act currently provides for: (1) a licensing regime administered by the Office of Regulator-General; (2) market and system operation rules for the Victorian gas market; (3) cross-ownership restrictions to prevent re-aggregation of the Victorian gas industry; (4) prohibitions on significant producers (the Bass Strait producers) engaging in anticompetitive conduct.	Full retail contestability amendments to facilitate orderly introduction of full retail contestability via: (1) a safety net for domestic customers, including interim reserve price regulation power to be reviewed in August 2004; and (2) a requirement for retailers to enter community service agreements.	Act was replaced by the *Gas Industry Act 2001* and the *Gas Industry (Residual Provisions) Act 1994* on 1 September 2001. New Acts are designed to further facilitate orderly introduction of full retail contestability. New Acts are to be as consistent as possible with reforms in the electricity industry.	The *Gas Industry Act 2001* and the *Gas Industry (Residual Provisions) Act 1994* were introduced on 1 September 2001. These amendments are consistent with NCP principles and are essentially similar to those operating in the electricity context. The 'safety net' provisions will be reviewed before their scheduled expiry on 31 August 2004. However provisions were introduced to enable the deferral of FRC. Further amendments were also made in 2001, primarily designed to facilitate the orderly introduction of FRC. The Council is to finalise assessment in 2003.

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Gas Safety Act 1997* and Regulations	New restrictive regulations introduced in relation to Gas Appeals Board, gas installations, gas quality and safety case. Aim of new regulations is to ensure safety. Uniform gas quality specifications aim to ensure gas in distribution pipelines is safe for end use.	Efforts were made to minimise compliance costs by limiting the scope of restrictions to minimum functional requirements and avoiding prescription of style or format.	No further reforms are planned.	Meets CPA obligations (June 2001).
	Petroleum (Submerged Lands) Act	Regulates exploration for, and development of, undersea petroleum resources. This legislation forms part of a national scheme.	National review was completed in 1999-2000 and endorsed by ANZMEC Ministers.	Amendments are to be developed by the Commonwealth and reflected in State and Territory legislation.	The Government is awaiting the introduction of amendments by the Commonwealth before amending its own legislation. The Council is to finalise assessment in 2003.

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Petroleum Act 1958*			Act was repealed and replaced by the *Petroleum Act 1998*. New Act retains Crown ownership of petroleum resources and permits lease system, and removes obstacles to exploration, production and administrative efficiency.	Meets CPA obligations (June 1999).

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Pipelines Act 1967*	Regulates construction and operation of pipelines in Victoria.	Review completed but did not identify any major restrictions on competition.	Review recommendations are awaiting Government consideration	Government response is planned for 2002. The Council is to finalise assessment in 2003.
Queensland	*Gas Act 1965* and Gas Regulations 1989	Provisions of the Act relating to granting gas franchises (effectively an exclusive right to lay pipes in an area and thus to supply gas to that area) and requirements for Government approval for large gas contracts establish a virtual statutory monopoly situation. Legislation also enables quantitative restrictions to be placed on the supply of gas in certain (emergency) situations, while the Gas Tribunal has the power to recommend price restrictions.	Aim is to replace the *Gas Act 1965* and *Petroleum Act 1923* with a single Act covering both areas, dealing with exploration, development, production, transmission, distribution and, in the case of gas, use.	Review was completed covering those parts of Gas Act and Petroleum Act that were not the subject of the national review of the *Petroleum (Submerged Lands) Acts*.	The *Petroleum and Gas Bill 2002* has been drafted but not introduced into Parliament. Queensland Treasury and the Queensland Department of Natural Resources and Mines are revising the content of the Bill following submissions on the exposure draft to meet stakeholder expectations and refine its content in line with NCP requirements. The Bill is expected to be introduced into Parliament in 2002. The Council is to finalise assessment in 2003.
	Gas Suppliers (Shareholding) Act 1972			Act was repealed in October 2000.	Meets CPA obligations (June 2001).
	Petroleum Act 1923		Being reviewed in conjunction with the Gas Act 1965		

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Petroleum (Submerged Lands) Act 1982*	Regulates exploration for, and development of, undersea petroleum resources. This legislation forms part of a national scheme.	National review was completed in 1999-2000 and endorsed by ANZMEC Ministers.	Amendments are to be developed by the Commonwealth and reflected in State and Territory legislation.	The Government is awaiting the introduction of amendments by the Commonwealth before amending its own legislation. The Council is to finalise assessment in 2003.
Western Australia	Dampier-to-Bunbury Pipeline Regulations 1998			Regulations were repealed on 1 January 2000.	Meets CPA obligations (June 2001).
	Energy Coordination Act 1994	Amended to introduce a gas licensing system that provides for regulation of companies operating distribution systems and supplying gas to customers using less than 1 TJ per year.	Review of new provisions found restrictions were minimal and were the most cost-effective means of protecting small customers.	No reform is planned	Meets CPA obligations (June 2001).
	Energy Operators (Powers) Act 1979 (formerly known as *Energy Corporations (Powers) Act 1979*)	Provides monopoly rights over sale of LPG and provides energy corporations with powers of compulsory land acquisition and disposal, powers of entry, certain planning approval and water rights, and indemnity against compensation claims.	Review recommended removing the monopoly over sale of LPG and retaining the land use powers of energy corporations. Land use powers are necessary to facilitate energy supply.	Restrictions on LPG trading were lifted with the enactment of the *Energy Coordination Amendment Act 1999* and *Gas Corporation (Business Disposal) Act 1999*.	Meets CPA obligations (June 2001).

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Gas Corporation Act 1994*	Creates the Gas Corporation to run certain publicly owned gas assets.		Act was repealed December 2000.	Meets CPA obligations (June 2001).
	Gas Transmission Regulations 1994			Regulations were repealed. Access and related matters are now regulated under the *Gas Pipelines Access (WA) Act 1998*.	Meets CPA obligations (June 2001).
	North West Gas Development (Woodside) Agreement Act 1979			Act was repealed and replaced by the 1994 Act of same name (see next entry).	Meets CPA obligations (June 1999).
	North West Gas Development (Woodside) Agreement Amendment Act 1994		Act is retained without reform. Retention of restrictions is justified by sovereign risk issues.		Meets CPA obligations (June 1999).
	Petroleum Act 1967	Regulates onshore exploration for, and development of, petroleum reserves.	Review is to be conducted after outcome of Petroleum (Submerged Lands) Acts is finalised.		The Government is awaiting the introduction of amendments by the Commonwealth before amending its own legislation. The Council is to finalise assessment in 2003.

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Petroleum (Submerged Lands) Act 1982* and Regulations	Regulates exploration for, and development of, undersea petroleum resources. This legislation forms part of a national scheme.	National review was completed in 1999-2000 and endorsed by ANZMEC Ministers.	Amendments are to be developed by the Commonwealth and reflected in State and Territory legislation.	The Government is awaiting the introduction of amendments by the Commonwealth before amending its own legislation. The Council is to finalise assessment in 2003.
	Petroleum Pipelines Act 1969 and Regulations	Regulates construction and operation of petroleum pipelines in Western Australia.	Review completed. Common carrier provisions are to be considered following the Petroleum (Submerged Lands) Acts review.	Minor amendments are to follow.	Meets CPA obligations (June 2001).
South Australia	*Cooper Basin (Ratification) Act 1975*	Ratifies the contract for the supply of gas by Cooper Basin producers to AGL.	Review completed, finding substantial public benefits in continuing granted concessions and exemptions on grounds of sovereign risk.	Some amendments are being considered. Draft legislation is awaiting comments.	Meets CPA obligations (June 1997).
	Gas Act 1997	Provides for separate licences to operate pipelines and to undertake gas retailing.	Review in 1999 found restrictions to be in the public interest.	No reform is planned.	Meets CPA obligations (June 1999).
	Natural Gas (Interim Supply) Act 1985	Provides for Ministerial power to restrict the production and sale of gas from outside the Cooper Basin, determine the use of ethane from the Basin, and restrict NAGASA from interstate trading in gas.	Reviewed was completed in 1996.	Key restrictions were repealed in 1996.	Meets CPA obligations (June 1997).

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia (continued)	*Natural Gas Pipelines Access Act 1995*	Establishes access regime for natural gas pipelines in South Australia.		Act was repealed by s. 50 of the *Gas Pipelines Access (South Australia) Act 1997*. For transitional purposes the Act continues until access arrangements are set under the National Gas Access Code and any continuing arbitration proceedings are finalised.	Meets CPA obligations (June 1999).
	Petroleum (Submerged Lands) Act 1982	Regulates exploration for, and development of, undersea petroleum resources. This legislation forms part of a national scheme.	National review was completed in 1999-2000 and endorsed by ANZMEC Ministers.	Amendments are to be developed by the Commonwealth and reflected in State and Territory legislation.	The Government is awaiting the introduction of amendments by the Commonwealth before amending its own legislation. The Council is to finalise assessment in 2003.
	Petroleum Act 1940	Regulates onshore exploration for and development of petroleum reserves.		Act was replaced by the *Petroleum Act 2000*. The new Act incorporates principles proposed by the ANZMEC Petroleum Sub-Committee in regard to acreage management. The Government directed efforts to facilitate new explorers entering Cooper Basin and to encourage the development of a voluntary access code for access to production facilities.	Meets CPA obligations (June 2001).

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia (continued)	*Santos Limited (Regulation of Shareholdings) Act 1989*	Restricts any one shareholder from having more than a 15 per cent shareholding in Santos Limited.	In September 2000 the Government announced an independent review of the Act.	On 11 July 2001, the Government announced that it had considered the findings of the independent review and resolved to make no change to the Act.	The benefits of the restrictions outweighed the costs and the objectives of the legislation could be achieved only through restrictions on competition. The main reason is the importance to South Australia of gas supply from the Cooper Basin where Santos has a majority interest in the production of gas. Meets CPA obligations (June 2002).
	Stony Point (Liquids Point) Ratification Act 1981	Authorises behaviour contrary to TPA.	Review was completed in October 2000. No reform was recommended.	Final review was forwarded to Council in January 2002. No reform is planned.	Many of the objects of the Act have now been achieved. The review concluded that given that many of the benefits to the producers constituted past or historic benefits, there was no significant continuing effect that would amount to a restriction on competition. No reform was recommended. Meets CPA obligations (June 2002).

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Gas Act 2000*	Regulates the distribution and retailing of gas in Tasmania. It includes provisions for the appointment of the Director of Gas, and the Director of Gas Safety and for the licensing of gas distributors and retailers.	Intended that Gas Regulations to be made under the Act to deal with, among other things, applications for distribution and retail licences and the contestability arrangements for the Tasmanian retail gas market.		Council will assess the parts of the Act dealing with licensing of gas retailers and distributors and arrangements to support gas retail contestability, as part of Tasmania's application for certification of its gas access regime The Council is to assess progress in 2003.
	Gas Franchises Act 1973			Act was repealed.	Meets CPA obligations (June 2001).
	Hobart Town Gas Company's Act 1854			Act was repealed	Meets CPA obligations (June 2001).
	Hobart Town Gas Company's Act 1857			Act was repealed.	Meets CPA obligations (June 2001).
	Launceston Gas Company Act 1982	Gives the Launceston Gas Company powers that are not available to potential competitors in the gas supply market: for example, the power to "break up public roads" without council approval, needing only to give 24 hours notice.		Act was substantially amended by new legislation. Remaining sections are to be repealed once an accurate map of the pipeline network has been completed.	This Act has been substantially repealed, with remaining sections to be repealed once an accurate mapping of the pipeline network has been completed. The Council is to finalise assessment in 2003.

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Petroleum (Submerged Lands) Act 1982*	Regulates exploration for, and development of, undersea petroleum resources. This legislation forms part of a national scheme.	National review was completed in 1999-2000 and endorsed by ANZMEC Ministers.	Amendments are to be developed by the Commonwealth and reflected in State and Territory legislation.	The Government is awaiting the introduction of amendments by the Commonwealth before amending its own legislation. The Council is to finalise assessment in 2003.
ACT	*Essential Services (Continuity of Supply) Act 1992*			Act was repealed and replaced by the *Utilities Act 2000*.	Meets CPA obligations (June 2001).
	Gas Act 1992			Act was repealed.	Meets CPA obligations (June 1999).
	Gas Levy Act 1991			Act was repealed.	Meets CPA obligations (June 1999).
	Gas Supply Act 1998			Act was repealed and replaced by the *Utilities Act 2000* and *Gas Safety Act 2000*.	Meets CPA obligations (June 2001).

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Energy Pipelines Act*	Establishes the regulatory framework for construction, operation, and maintenance of energy pipelines in the Northern Territory.	Review completed and found anticompetitive provisions in Act were justified in public interest. Impact of restrictions was considered to be low. Potential public safety and environmental benefits derived from regulating construction and operation of energy pipelines are likely to exceed direct enforcement, industry compliance and broader economic costs. Approaches such as negative licensing, co-regulation and self-regulation were rejected as being unlikely to achieve the objective of the Act more efficiently than the existing legislative framework achieves it.	No reform is planned.	Meets CPA obligations (June 2001).
	Oil Refinery Agreement Ratification Act	Imposes conditions on Mereenie Joint Venture in respect of the proposed oil refinery in Alice Springs. Refinery was not constructed because it is currently uneconomic, so legislation is of no practical effect.	Review was completed. Act is not considered to be anticompetitive.	In view of lack of relevance, the Act is to be considered for repeal at the time of the renewal of Mereenie petroleum leases in 2002-03.	Act is to be repealed after the due date for renewal of the leases in 2002-03. The Council is to finalise assessment in 2003.

(continued)

Table 3.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory (continued)	*Petroleum Act*	Regulates onshore exploration and recovery of petroleum in the Territory; grants exclusive rights; and provides for technical and financial prescriptions.	Review Steering Committee is considering the final review report.		Government endorsement of review outcomes is being sought. The Council is to finalise assessment in 2003.
	Petroleum (Submerged Lands) Act 1982	Regulates exploration for, and development of, undersea petroleum resources. This legislation forms part of a national scheme.	National review was completed in 1999-2000 and endorsed by ANZMEC Ministers.	Amendments are to be developed by the Commonwealth and reflected in State and Territory legislation.	The Government is awaiting the introduction of amendments by the Commonwealth before amending its own legislation. The Council is to finalise assessment in 2003.
	Petroleum (Prospecting and Mining) Act			Act was repealed by the *Petroleum Act*.	Meets CPA obligations (June 1999).

Water

Water reform is one of the most complex and challenging of the reform commitments of Australian governments under the national competition policy (NCP) package. It may be one of the most rewarding, however, in terms of favourable economic and environmental outcomes if the reform package is completely and successfully implemented.

The water reform commitments originated in 1994, when the Council of Australian Governments (CoAG) adopted a strategic framework for the reform of the Australian water industry. That framework was subsequently incorporated into the Agreement to Implement the NCP and Related Reforms in April 1995, linking progress on water industry reforms with NCP payments.

The inclusion of water reform in the NCP agreements was a catalyst for beneficial change in the water industry. The water reform framework has since been amended and enhanced, but its basic objective — to produce an economically viable and ecologically sustainable water industry — remains in place.

The framework shares the economic efficiency objectives of the rest of NCP, through its provisions for water pricing and cross-subsidies, investment in new schemes, trading in water entitlements and institutional reform. It is unique, however, in also having explicit environmental objectives and obligations. As such, the framework takes an integrated approach that addresses the environmental, economic and social issues associated with water use.

The water industry and its impacts

The water industry had assets of over $90 billion (valued at replacement cost) in 1999 (PC 1999).[4] Water is one of Australia's largest industries, with assets estimated to be of a similar magnitude to those of the electricity, telecommunications and airline sectors.

The provision of water and wastewater services to the largest urban areas in Australia produced $4.6 billion in revenue in 2000-01 and $792 million in dividends for the government owners of the service providers (WSAA 2001a). Wastewater treatment and disposal and recycling activities still form only a minor component of the industry, but their share is increasing. In 2000-01,

[4] The estimated replacement cost in 2000-01 of the assets of the major urban water providers alone was $50 billion.

7.8 per cent of wastewater was reused — a large increase from 4.9 per cent in 1996-97 (WSAA 2001a).

The water industry, in value added terms, is more than one quarter the size of the manufacturing and the agricultural sectors, almost half the size of the electricity industry and three times the size of the gas industry. The potential economic gains from improvements in its performance are considerable.

Bulk and urban water suppliers are predominantly State and local government owned, while the management of many rural irrigation schemes is being devolved to their irrigators. The policy and institutional environment for the industry is becoming more conducive to private sector involvement, including through the leasing out of facilities and contracting out of services.[5]

Water extraction and use has continued to grow rapidly. From 1985 to 1996-97, total use increased by 65 per cent (much the same as the increase in real gross domestic product (GDP) over the same period). Use for irrigation grew by 76 per cent, urban/industrial consumption increased by 55 per cent and rural use rose by 2 per cent. Australians now use around 24 000 gigalitres of water each year. Around 80 per cent comes from surface water and 20 per cent comes from groundwater sources (PC 2002d). Surface water predominates in all States and Territories except Western Australia and the Northern Territory.

The agricultural sector accounts for 70 per cent of water use in Australia, followed by households (8 per cent), mining and manufacturing, and gas and electricity (both 6 per cent), and other service industries (2 per cent) (WSAA 2001b).[6] Broadacre farming uses more than half of the water consumed by the whole of the agricultural sector.

Australia's water supply exceeds that of most other countries in per person terms, but Australia also has a high level of water consumption per person. Further, water supplies are not abundant in the areas of highest demand.

The pressure on demand and insufficient regard for the environmental impacts of water use have led to widespread and extensive degradation and depletion of Australia's water resources. Excessive extraction of water has stressed river systems, resulting in losses of productive land, poor water quality and reduced biodiversity. The following are some measurable consequences.

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[5] United Water and Riverland Water, for example, are large private contractors to SA Water. United Water manages and operates Adelaide's water supply and wastewater treatment systems. Its cost of operations on commencement was 20 per cent below the historical costs of the operations that it took over from SA Water.

[6] The remaining 8 per cent represents delivery losses and unaccounted for losses of water.

- More than half of assessed river basins have excessive turbidity and nutrients, and 32 per cent of assessed basins have excessive salinity (NLWRA, National Heritage Trust 2001).

- Around 26 per cent of surface water management areas are (or close to) being overused, compared with sustainable flow regime requirements. Thirty per cent of groundwater management areas are (or close to) being overused compared with their estimated sustainable yield. A similar proportion are fully allocated or overallocated (NLWRA 2001).

- Algal blooms result in some reservoirs being unsuitable for drinking water supply or recreation for over 25 per cent of the time. The annual cost of the blooms to water consumers is reported at over $150 million (Australian State of the Environment Committee 2001).

- The latest National Land and Water Resources Audit found that one third of the assessed river length has impaired aquatic biota; over 85 per cent of the assessed river reaches are significantly modified in terms of environmental features; over 80 per cent of the reaches are affected by catchment disturbance; and over half of the river reaches have modified habitat.

Implementation of the reform framework

When adopting the water reform framework in 1994, CoAG stated that the reforms could be implemented within five to seven years, although it acknowledged that the speed and extent of reform depended on the availability of financial resources to facilitate structural adjustment and asset refurbishment.

The CoAG agreement established completion dates for the major reforms (1998 for urban water pricing, the institutional reforms, water trading and allocations for the environment, and 2001 for reform of rural water pricing), but some of these deadlines were later extended. In particular, the timetable for environmental water allocations was extended to 2001 for stressed rivers and 2005 for all river systems and groundwater.

The initial timetable was optimistic; it underestimated the reform task. Significant constraints on the implementation of the reform framework include:

- the complexity of some of the reforms (for example, those that require much research and analysis before effective application);

- the need for extensive consultative and educative processes;

- the demands that the reforms have placed on governments, institutions and stakeholders, including financial demands; and

- the low base from which many of the reforms were initiated.

Jurisdictions are introducing the reforms at different rates and in some different ways. Variances in implementation reflect differences in jurisdictions' starting points (in their legislative frameworks for water, for example) and in the health of their river systems; the diversity of administrative and legislative environments across States and Territories; and differences in the interests and strengths of the relevant stakeholder groups.

Progress in implementation of the reforms has been satisfactory generally, given unforeseen difficulties and the implications of some reforms for the interests of key stakeholders. CoAG (2002) noted that 'substantial progress' was being made on the national water reforms, but that 'water management is currently in a transition phase as jurisdictions implement new water allocation arrangements'.

The reforms

Jurisdictions' fulfilment of their environmental obligations under the reform framework is assuming greater importance as the economic and efficiency objectives of water reform come to be realised. Further, as the problem of degradation of many of Australia's river systems remains acute, the need to progress the environmental aspects of the reforms is becoming more urgent.

The following sections outline the stage that governments have reached in implementing the various reforms, and the outcomes of the reforms.

Proper pricing of rural and urban water

Proper pricing is to be achieved through consumption-based pricing (where cost effective); full cost recovery; removing cross-subsidies, or making them transparent; and disclosing water services supplied at less than full cost, ideally paying suppliers for community service obligations (CSOs).

Price reform in the cities and the major nonmetropolitan urban areas is virtually complete, with the result that most Australians in large urban areas now face water prices that reflect the amount of water they use and that reward conservation. Most larger urban water suppliers now practise or are implementing full cost recovery. All are achieving, or seeking to achieve, positive rates of return. Progress towards reform by the smaller, local government-owned water businesses has been slower. Price reform has generally led to higher prices, but the consequential fall in consumption has meant lower water bills.

- The average bill of customers in urban areas declined in real terms by around 5.5 per cent over the five years ending 2000-01 (WSAA 2001a).

- Consumption-based pricing rather than pricing based on property values is giving customers appropriate price signals and control over the size of

their water bills. It results in equal treatment of customers using similar amounts of water.

The cross-subsidies between different customer classes have been marked. In the past, commercial and industrial users paid considerably more for water than households paid; for example, the average commercial establishment paid 15 times more for its water than paid by the average household in 1990-91 (IC 1992).

- Water reform is changing this situation. Real prices paid by low and medium water use businesses in Sydney fell by 75 per cent and 65 per cent respectively over the 10 years to 2000-01; high water use businesses were subject to real water and sewerage price increases of around 9 per cent. Prices paid by average industrial customers in Adelaide fell by 8 per cent over the same period (PC 2002d).

Price reform in rural areas is less complete. Water is around 8 per cent of total farm costs, on average, so higher prices can be a sizeable additional impost for water-intensive activities.

Where possible, irrigators are being charged for their water use on a volumetric basis. Cross-subsidies between users are being eliminated and the remaining ones are being made transparent. Some jurisdictions are moving faster than others towards full cost pricing, but the situation is complicated by government subsidies to rural water providers. Full implementation of the water reforms depends on the removal (or full transparency) of government subsidies and the efficient management and operation of irrigation schemes.

Investment in new rural water schemes

New schemes and extensions to existing schemes need to be economically viable and ecologically sustainable before they may proceed. No large new dams have been commenced since the water reform framework was put in place, but this principle has been tested by proposals for a dam (which did not proceed) and for extensions to existing schemes. It has been prominent in deliberations on new schemes and will be a consideration for new dams being contemplated in Queensland and Tasmania.

Institutional role separation

This principle requires the function of water service provision to be separated from the roles of water resource management, standard-setting and regulation.

The process of separation clarifies the roles and responsibilities of the institutions, allows them to focus on their core business and minimises the scope for conflicts of interest. The changes allow accountability and transparency to be established, and introduce a structural basis for the

application of other, relevant NCP principles.[7] All jurisdictions except South Australia and Western Australia now have independent prices oversight of most of the major suppliers. Western Australia has committed to introduce this measure.

Delivery of water services

The objective of this principle is efficient service delivery on a commercial basis and at the level of international best practice. The principle also involves devolving the management of rural water districts to their irrigators.

All metropolitan water businesses now have a more commercial focus. They are involved in an annual benchmarking project that allows their performance to be compared with other service providers (WSAA 2001a). Such comparisons provide an important incentive for businesses to improve their performance. In the rural sector, irrigators have greater involvement in the management of rural water districts

Improving the commercial focus and performance of water businesses helps to ensure that the potential benefits from water reforms are realised. These benefits are large. Modelled macroeconomic effects of the CoAG water reforms were estimated to improve labour productivity by 16 per cent and capital productivity by 5 per cent across the water industry (PC 1999b).

Allocations of water for the environment

A major focus of the water reform framework is on producing better environmental outcomes. Given the severity of the problems, however, gains from the reforms will take longer to achieve, be expensive initially and be more challenging than the other elements of the reform framework. Further, a still limited knowledge base means that the nature and extent of the environmental improvements will be less predictable than other outcomes from reform. More recently, gaining acceptance for environmental reform has been made more difficult by lower water allocations on account of drought in some areas.

Against this background, one of the most complex and contentious features of the water reform framework is jurisdictions' obligation to legally recognise allocations of water for the environment and to follow that through with actual allocations based on the best possible scientific research.

Jurisdictions have made progress toward satisfying their environmental commitments. Given financial considerations, the still developing science for

[7] These are the principles relating to independent prices oversight of government business enterprises, competitive neutrality, structural reform of public monopolies, legislation review and access to services provided by significant infrastructure facilities.

determining allocations, and the effects of allocations on users' interests, however, progress has been slow and not always conformed with the timetable established in the reform framework. Some jurisdictions have not done as well as others in meeting their obligations.

The National Competition Council's assessment of jurisdictions' compliance with their reform commitments for 2002 is described later in this chapter and in the chapters on the individual States and Territories. The following are examples of measures to improve the environment.

- The most concrete measure taken so far is the establishment in 1995 of a cap on diversions of water from river systems in the Murray–Darling Basin. Prior to the cap, water consumption had been increasing at almost 8 per cent each year, and could have further increased by an estimated 14 per cent had the then river management rules been allowed to continue. Importantly, the cap does not prevent new developments in the basin, provided that water for those developments is obtained via improved water use efficiency or purchases from existing developments.

- More recent initiatives have been the agreement to restore flows along the Snowy River to 28 per cent of its natural regime (for details, see NCC 2001a) and the Murray–Darling Basin Ministerial Council's decision (April 2002) to develop a business case for the recovery of 350, 750 or 1500 gigalitres of environmental flows for the River Murray. Issues of equity, property rights and water trading will be considered in the formulation of the latter initiative (see volume 2 for details of this and other decisions of the Ministerial Council designed to address environmental degradation in the Murray–Darling Basin).

- During 2002, the Victorian and South Australian governments agreed to devote $25 million in total to improving the environmental health of the River Murray. The joint effort by these governments aims to reduce salinity, improve water quality and save water. The objective is to achieve up to 30 gigalitres of environmental flows.

Integrated resource management and water quality

One objective of the water reform framework is the use of integrated approaches to natural resource management, fully recognising the interdependency of the different natural resource components, including water. Jurisdictions have also agreed to develop a National Water Quality Management Strategy by adopting market-based and regulatory measures dealing with water quality monitoring, catchment management policies, and town wastewater and sewerage disposal.

In November 2000, CoAG endorsed a Commonwealth proposal to develop a National Action Plan for Salinity and Water Quality.

Box 3.1: The National Action Plan for Salinity and Water Quality

The National Action Plan for Salinity and Water Quality provides for total expenditure of $1.4 billion to address salinity and water quality problems in 21 priority regions across Australia. It is beginning to help address environmental issues, particularly dryland salinity. All States have signed the intergovernmental agreement that sets out the overarching commitments and obligations of the national plan.

Jurisdictions have agreed to and substantially progressed key policy tools to support the implementation of the national action plan. These tools include national criteria for accrediting integrated regional natural resource management plans, a national framework for natural resource management standards and targets, and a national monitoring and evaluation framework.

Funding for priority projects in South Australia has been provided (totalling $15 million out of the planned total joint commitment of $186 million). The Commonwealth and Victorian Ministers approved in February 2002 foundation funding, priority actions and capacity building activities costing almost $18 million (from their total joint commitment of $304 million). More recently, the Commonwealth and New South Wales governments agreed to jointly commit almost $400 million to practical measures to address salinity and improve water quality in New South Wales.

At its April 2002 meeting, CoAG agreed to accelerate the implementation of the national action plan.

Governments are now taking integrated approaches to natural resource management and, in the process, spending much more on research.

- Just $300 000 was spent on a 1985 review of Australia's water resources and water use. In contrast, a sizeable proportion of the $29 million spent on the 2001 National Land and Water Resources Audit was directed to water research.

Plentiful water supply in some areas in the past and inefficient pricing regimes provided little or no incentive for research into supplying and using water more efficiently and sustainably. The increased focus on research is producing better decisions on water issues and the adoption of innovative solutions. It is providing the information required to set and achieve environmental goals. Much more remains to be done in this area, however.

While progress against the CoAG commitments has not been entirely satisfactory, there are positive developments in water conservation and in the recognition and addressing of environmental problems. In rural areas the reforms are helping move the focus away from increasing the quantity of water available and towards increasing the efficiency of water use as a means of stimulating development.

The emphasis in the reform principles on market-determined outcomes also benefits the environment (although market mechanisms alone are not sufficient to ensure the required level of environmental protection). Volumetric pricing for urban customers, for example, is inducing water savings through efficiencies in use, and reduced consumption is lowering the cost of treating wastewater and lowering the environmental damage from water use.

- Per person water use in Sydney, Melbourne and Newcastle fell by 7 per cent, 12 per cent and 14 per cent respectively from 1990 to 2000 (WSAA 2001b).[8]

- Per person consumption by customers from a selection of major Australian water utilities fell by 17 per cent over the 10 years to 2000-01 (PC 2002).

As Harris (2002) has pointed out, 'there is a quiet revolution going on — individual farmers, irrigators, manufacturers and many ordinary people are beginning to change their practices, minimise their environmental impacts and focus on quality rather than quantity'.

Water entitlements of rural customers

Jurisdictions have made progress in legislating water allocations for irrigators. They are also committed to the separation of water title from land title and to the clear specification of title (including a registry system).

Nevertheless, the issue of the property right inherent in a water entitlement is receiving increasing attention. Where allocations for the environment reduce supply for consumptive uses, the value of the water right (and, with it, farm values) can be affected, although offsetting impacts would derive from the more certain rights to the water available for rural use.

CoAG (2002) recently re-affirmed the importance of water property rights issues in dealing with the nation's salinity and water quality problems. The Council noted that the implications of changes to water property rights for investment and the impacts of the changes on water users, particularly farmers, needed to be considered.

- To clarify these issues, jurisdictions agreed to report to CoAG by September 2002 on opportunities for, and impediments to, better defining and implementing water property rights regimes (including water trading markets and, where appropriate, the responsibilities of water users). Jurisdictions will also report on how they are addressing uncertainties about property rights.

- CoAG has attached a high level of importance to the establishment of an effective and efficient system of property rights for water, and to the need for water users to have certainty of access to water.

[8] The Water Services Association of Australia notes that technological change and education campaigns also contributed to this reduction.

Trading in entitlements

The reform framework provides for trading in water entitlements, including cross border-trading where it is socially, physically and ecologically sustainable.

Trading in water is undertaken in primarily New South Wales, Victoria and South Australia, and is not extensive. While trading was possible in 40 of the 46 systems reported in the 1998–99 Australian irrigation benchmarking report, permanent and temporary water transfers represented only 7.5 per cent of total water entitlements of the systems where trade took place (High Level Steering Group on Water 2000).

- In New South Wales, in 1997-98 11.5 per cent of the total entitlement to consumptive uses was traded, overwhelmingly through temporary trades and mostly within the particular river system (Department of Land and Water Conservation 1999). The value of the trades was conservatively estimated at $60–100 million.

The volume and value of trade is growing rapidly, however; annual volumes were less than 100 gigalitres during the 1980s, but now are around 800 gigalitres. Further growth will arise from the removal of trade constraints imposed by government regulation and irrigation districts, and the development of better infrastructure for trading, including sophisticated markets, secure title and registry systems. The incentives for water trading are growing; water is becoming more expensive and its supply for consumptive purposes may tighten as a result of drier conditions in some areas and allocations for the environment.

The gains from trading in water entitlements are considerable. These derive from the increase in output as water entitlements flow to their highest value uses.

- Water trading in New South Wales in 1997-98 increased the value of irrigated agriculture by $65 million (Department of Land and Water Conservation 1999). This is a conservative estimate because the availability of water can save a crop in its final stages where otherwise it might have been lost, and the multiplier effects of the addition to agricultural income are not taken into account.

- In Victoria, the annual increase in returns to irrigators as a result of trading is estimated at just under $12 million (Department of Natural Resources and Environment 2002). This figure does not include the benefits from water traded from Victoria into other States.[9]

[9] The department also points to the employment creating impact of water trading. For each 1000 megalitres of irrigation water used on horticulture 30 on-farm, processing and support industry jobs are created. In dairying 15 jobs are created. By contrast, only one job would be lost from the trade of a similar quantity of water out of grazing.

Public consultation and education

The water reforms provide for government agencies and service deliverers to consult on proposals for change and other initiatives, and to conduct public education programs (including programs in schools).

The consultations and education programs on water use are leading to more informed communities, customers and other key stakeholders. Community-based groups, such as regional water management committees and customer consultative councils, are now influential in water matters. Initiatives by governments and water suppliers to encourage conservation in water use are having positive impacts.

Overall, these activities are producing more informed decisions. Decisions are more likely to be consensus driven and, therefore, satisfy more interest groups. Achieving effective community consultation is a complex exercise, however, and the Council has observed consultation processes that are less than adequate. In these cases, better community consultation remains on the reform agenda.

Economic outcomes

Beneficial economic impacts from the reforms are arising faster and are more apparent than the environmental outcomes of the reforms. This difference partly reflects the more immediate timetable for implementing the reforms that have economic efficiency objectives, but also reflects the intractability of the environmental issues and the long lead times for the environmental reforms to take effect.

The water reforms constitute an important part of governments' microeconomic reform agendas. Like most other structural policy initiatives of governments, the reforms involve initial costs and dislocation for some. The reforms are expected in the longer term, however, to enhance the sustainability of economic activity that depends on water and improve overall economic growth.

Contributions to economic growth will include:

- the more efficient use of resources involved in water provision generally;
- higher value agricultural and other outputs (such as mining) from the redistribution of water to more productive uses through water trading;
- in water-dependent industries such as aquaculture, fewer losses caused by poor water quality;
- improved efficiency in resource allocation resulting from reduced government subsidies to customers and water providers, and fewer cross-subsidies;

- more efficient use of new and existing water assets. The 'economically viable' test for new investments in rural schemes is reducing wasteful investment and ensuring future generations do not have to pay for poor current decisions; and

- increased recreational and tourist activity induced by cleaner (especially fewer algal blooms) river systems and storages.

A recent study (Australian Academy of Technological Sciences and Engineering and the Institution of Engineers, Australia 1999) shows that an 'adaptive management scenario' for water use (which incorporates key features of the CoAG reforms) produces an outcome for various macroeconomic variables in 2020-21 that is little different from the 'trend scenario'. The latter scenario (which envisages water use growth at past rates), however, is found to be unsustainable given constraints on water availability. Under the 'adaptive management scenario', the share of agriculture in the economy remains the same as in the 'trend scenario', although the regional distribution of activities is different, the use of water is more efficient, and there is a shift to more intensive forms of irrigated production.

The PC (1999) estimated that the CoAG water reforms will have a positive, although negligible, impact on GDP, and marginally improve export volumes and post-tax real wages. The study may have underestimated the positive GDP impact because the modelling focused on the metropolitan and nonmetropolitan urban water reforms, and did not account for rural users (which account for 70 per cent of water consumption) or the effects of the reforms to water trading, water rights and the criteria for new water investments.

Moreover, the water reforms are helping to limit the rate of environmental degradation, thus limiting the reductions in productive capacity and the other costs associated with a deterioration in water quality and availability.

Future developments

The environmental aspirations of the water reform framework are the most challenging of its various objectives for governments. They will be an important, continuing focus of assessments by the Council.

More generally, price tensions are resulting as demand for water for consumptive and environmental uses grows in the face of constraints on developing new supplies. The capital cost of a permanent transfer or purchase in the Murray–Darling Basin rose to around $800 per megalitre by the end of the 1990s from levels of around $300 per megalitre in the early part of that decade.

Fortunately, aspects of the water reform framework (such as full cost and volumetric pricing) are helping to moderate demand for water and individuals, business and governments are actively pursuing water

conservation and efficiency measures. The water savings from these measures can be significant, as shown by the following examples:

- The planned Wimmera–Mallee pipeline would save 93 000 megalitres of the 120 000 megalitres currently used by that system. The envisaged capital cost ($300 million) or around $3200 per megalitre, however, is considerable.

- A New South Wales cotton farm, by adopting better irrigation techniques, has raised its yields (as a result of less waterlogging) and increased its water use efficiency by 45 per cent, giving an overall lift in annual profit of $100 000 (*Australian Financial Review*, 24 April 2002, p. C5).

- As much as 40 per cent of water channelled for irrigation is lost to evaporation and seepage (Australian Academy of Technological Sciences and Engineering and the Institution of Engineers, Australia 1999). The Cooperative Research Centre for Freshwater Ecology estimated that 15 per cent of irrigation water from the River Murray is lost to seepage. The Land and Water Resources Research and Development Corporation suggests that irrigators should be able to achieve 70–85 per cent water use efficiency, but many (especially flood irrigators) are operating at below 50 per cent efficiency.[10]

2002 NCP assessment framework

In December 2001, Senior Officials of CoAG endorsed a proposal to prioritise jurisdictions' water reform commitments across the 2002 to 2005 NCP water assessments. They agreed that the 2002 assessment would largely comprise a follow-up on issues outstanding from the 2001 assessment of jurisdictions' progress across the entire water reform framework. (These are described as **assessment issues**.)

It was also decided that the Council would report on developments in some areas identified for examination in the 2003 NCP assessment. These areas of the water reform framework were not to be assessed in 2002, but progress is reported as a bridge to the 2003 assessment (described as **progress report issues**). (As a general rule, the Council will call for progress reports on key issues in the year before their assessment.) In addition, it was decided that the Council would consider issues raised in submissions from stakeholders.

As part of the preparations for the 2002 NCP assessment, the Council publicly released a water assessment framework document (NCC 2002) to:

- set out a clear, transparent basis for the assessment;

[10] Note, however, that some of the 'inefficiencies' consist of irrigation water lost to river systems. For this reason, care needs to be taken in measuring the environmental gains from water efficiency savings.

- identify the information that jurisdictions should provide to demonstrate compliance;
- outline the scope of the 2002 assessment and issues identified for future assessment, to guide public submissions; and
- provide a basis for early identification and bilateral discussion of reform outcomes that are proving difficult to achieve.

The Council's 2002 water assessment framework is available on the Council's website (www.ncc.gov.au). Background on the source of jurisdictions' obligations and the intentions of the reforms is in the Council's 2001 water assessment framework.

In addition to the annual NCP assessment, the Council may conduct supplementary assessments where they would be of value in furthering the timely and proper implementation of the water reform framework.

Assessment issues

The main issues set down for assessment in 2002 are:

- aspects of full cost recovery by nonmetropolitan urban water and wastewater businesses;
- consumption-based pricing through two-part tariffs in certain jurisdictions;
- aspects of full cost recovery, consumption-based pricing, CSOs and cross-subsidies in relation to the rural water providers of some jurisdictions;
- any new rural water schemes, to ensure they are economically viable and ecologically sustainable;
- aspects of the practices of New South Wales, Victoria and Tasmania in relation to water allocations in water management plans and water property rights;
- jurisdictions' progress in implementing environmental allocations of water, including actions to alleviate the conditions of stressed rivers;
- aspects of the integrated resource management practices of Western Australia, South Australia and Tasmania;
- compliance by Western Australia and South Australia with the National Water Quality Management Strategy; and
- certain issues concerning the public consultation and education obligations of Queensland, South Australia and the Northern Territory.

Progress report issues

The Council also has examined some areas due for assessment in 2003, providing progress reports on:

- the implementation of tax equivalent regimes by metropolitan water service providers, and developments in the factoring of externalities into pricing by urban service providers;
- certain aspects of consumption-based pricing in New South Wales, Queensland and Western Australia;
- the reporting of CSOs by Victoria, Queensland and Tasmania;
- jurisdictions' reporting of cross-subsidies;
- aspects of institutional reform by jurisdictions;
- jurisdictions' progress in devolving the management of irrigation schemes; and
- jurisdictions' implementation of water trading arrangements.

The assessment process

Regular and intensive consultations were held with jurisdictions during the course of the 2002 assessment. The Council's deliberations depend on the availability of adequate information on the issues being addressed, and jurisdictions were mostly helpful in responding to requests for information on progress in implementing their reform obligations.

As in previous years, stakeholders made important contributions to the assessment process. The Council received 17 written submission on a range of water reform issues. (A list of the submissions is at Appendix A to volume 2.) Where possible, those who provided submissions were met, and the Council received a number of oral submissions in meetings with other groups.

Summary of assessment

The remainder of this chapter summarises, by jurisdiction, the outcomes of the Council's deliberations on the 2002 water reform issues. All assessment issues and some of the major progress report issues are covered in this summary chapter in this volume of the 2002 NCP assessment. A separate water reform volume contains chapters that report in detail the progress of each State and Territory and the Murray–Darling Basin Commission against their reform commitments.

New South Wales

Consumption-based pricing – bulk water services

In 2001, the Council had not received information on bulk water services offered by Hunter Water Corporation, Gosford City Council and Wyong Shire Council. In particular, it was not known whether these bodies provided bulk water services and, if so, whether there was sufficient separation from their retail service businesses to enable them to calculate an efficient bulk water price.

New South Wales reports that Gosford City Council and Wyong Shire Council do not have bulk water supply businesses, so a ringfencing issue does not arise for them.

The Hunter Water Corporation supplies bulk water services to two customers. They are charged prices determined by the Independent Pricing and Regulatory Tribunal. The charges are consumption based and structured as two-part tariffs. In the light of additional information provided by New South Wales, the Council considers that this assessment issue has been addressed.

Consumption-based pricing – two-part tariffs

In 2001, the Council had concerns about the rate of progress by some nonmetropolitan urban water service providers, particularly Tweed Shire, in reviewing the cost effectiveness of two-part tariffs and winding back free water allowances. At that time, Tweed Shire had not conducted a review to demonstrate whether two-part tariffs were cost effective.

For 2002, therefore, the Council was looking for significant progress by nonmetropolitan urban water service providers (primarily by Tweed Shire) in reviewing the cost effectiveness of two-part tariffs, winding back free water allowances, and taking action if these reforms were found to be cost effective.

New South Wales has received written notification from Ballina Shire Council, Tweed Shire Council, Forbes Shire Council, and Parkes Shire Council confirming the elimination of across the board free water allowances and the implementation of full usage-based tariffs from 1 July 2002. Orange City Council has adopted two-part tariff pricing with a reduced general water allowance for landowners responsible for nature strip maintenance. New South Wales also reports that Bathurst Council implemented a fixed annual charge and an inclining block tariff during 2001-02.

New South Wales also advises that it has given priority over the past 12 months to encouraging noncomplying, large nonmetropolitan urban providers to move to two-part tariff pricing. New South Wales has continued its policy of encouraging smaller nonmetropolitan urban providers to move to two-part tariff pricing, where it is cost effective.

The Council is satisfied that New South Wales has made progress on the outstanding 2001 assessment issue, which required progress, primarily in relation to Tweed Shire Council, in reviewing the cost effectiveness of two-part tariffs and winding back free water allowances. Tweed Shire Council and other large councils, which had previously not moved to full usage based pricing, have provided commitments which satisfy these requirements. Tweed Shire is committed to eliminating free water allowances and the implementation of full consumption-based tariffs from 1 July 2002. The Council is satisfied that this issue has been met for this assessment. Further, New South Wales continues to make progress with a number of the larger local councils on this issue.

The Council, however, notes that a significant number of councils with more than 1 000 connections are yet to satisfy the CoAG commitment in relation to two-part tariffs, which was due for completion by the end of 1998. The Council expects this commitment to be virtually complete by the time of the 2003 NCP assessment.

In particular, the Council expects all remaining nonmetropolitan urban water providers with more than 1000 connections to have made a commitment to introducing two-part tariffs or adopting other usage based pricing policies which meet the CoAG requirements[11] within an appropriate timeframe where cost effective, and a significant reduction in the use of free water allowances and property value based charging.

Because of the low rate of compliance among smaller local governments, it is the Council's view that New South Wales needs to pursue a strategy to improve performance of these councils over the next 12 months. The Council notes in this regard that New South Wales has taken positive action by releasing the *Water Supply and Trade Waste Pricing* brochure. In order to meet the requirement to have implemented two-part tariffs by June 2003, New South Wales will need to implement such a strategy by the end of 2002 at the latest, in order for local governments to be in a position to make the necessary commitments by June 2003.

Consumption-based pricing – trade waste

While the Council has recognised that in most cases volumetric charging for wastewater is not cost effective, volumetric pricing should be considered for large dischargers or businesses with high strength waste in order to provide an incentive to minimise waste. In 2001, the Council found that trade waste charges were not extensively used in New South Wales and that the absence of such charges could lead to nontransparent and inefficient cross-subsidies between large and small dischargers.

[11] The Council will look at the structure of these tariffs in 2003 to ensure they are consistent with CoAG commitments.

New South Wales reports that, in general, local governments levy waste charges when discharges from commercial or industrial premises reach certain threshold levels. The Council notes the recent release of new guidelines for the operation of trade waste sewerage services and streamlined administrative arrangements for trade waste regulation in New South Wales. However, New South Wales did not provide evidence that thresholds are being set in a manner that promotes efficiency. The State has taken some measures to promote volumetric charging, including new pricing guidelines for water supply, sewerage and trade waste.

The new pricing guidelines for water supply, sewerage and trade waste are an advance in the processes used by New South Wales. The Council, however, ultimately needs to assess the outcomes of reform. For this reason, the Council will revisit the extent of adoption of trade waste charges in the 2003 NCP assessment for urban pricing. New South Wales has made sufficient progress in winding back property value based charges for nonmetropolitan providers for this assessment.

Consumption-based pricing – Sydney Water Corporation

In 1996, Sydney Water Corporation eliminated domestic property value based charges for water services and commenced phasing out the use of property values for commercial water charging.

The 1999 assessment reported that remaining property value based tariffs would be eliminated by 2002. For the current assessment, the Council required an update on progress in phasing out property based charges.

The current IPART determination for Sydney Water Corporation is due to end in June 2003. New South Wales expects there would be a further decline in the use of property values for pricing in the next determination. The Council is satisfied that the 2001 NCP commitment is being met.

Full cost recovery – rural price paths

In its 2001 assessment, the Council concluded that New South Wales had not met its commitment to achieve full cost recovery by rural water schemes or to provide a timetable for achievement. The Council committed to reassess this issue in 2002, when it expected guidance to be available from New South Wales on price paths for achieving full cost recovery.

In December 2001, the Independent Pricing and Regulatory Tribunal announced caps on annual price rises for bulk water supplied by State Water, a ringfenced business unit within the Department of Land and Water Conservation. The Tribunal's 2001 three year bulk water determination sets an increase in State Water's recovery of costs from 61 per cent in 2000-01 to 74 per cent in 2003-04. Further, the Council has found that when this figure is disaggregated by water source, the regulated rivers (80 per cent of all water use in New South Wales) will be achieving 94 per cent of costs by the end of the determination period. Only 31 and 32 per cent for unregulated and

groundwater sources respectively, however, will have met full cost recovery commitments. The Council recognises that full cost recovery for rural water supply will be largely an issue for unregulated and groundwater sources in future assessments.

The Council also notes that that the cost-base is likely to increase over time, due to the increasing need to mitigate environmental impacts. New South Wales has argued that this added variable makes an end date for full cost recovery difficult to determine. Whilst New South Wales has not proposed an end date for reaching full cost recovery, the Council has confidence in the mechanisms used in New South Wales to achieve it, particularly the independent role of the Tribunal in reaching full cost recovery which is tempered by the ability of customers to absorb these costs. The Council will reassess this issue in 2004 where it will expect New South Wales to have continued to pursue rural full cost recovery with the same previously displayed rigor.

A key issue for 2003 will be institutional reform arrangements between the Department of Land and Water Conservation and State Water as this may impact on determining the individual elements of full cost recovery. The New South Wales Government is proposing to conduct an independent review of the governance structure of State Water. Consequently, the Council has delayed its assessment of whether New South Wales has met the institutional reform commitments. This will be a significant issue for New South Wales in the 2003 NCP assessment.

Water allocations and property rights

In 2001, the Council had insufficient information to determine whether New South Wales had fully addressed its property rights obligations. The Council considered suspending the State's 2001-02 NCP payments, given the importance of property rights reforms and the delays in finalising these arrangements. Because the New South Wales Government committed to a comprehensive action plan for reform, however, the Council considered that the best approach was to allow an additional time period for implementation.

The Council called for a re-examination of progress by New South Wales through a supplementary assessment (January 2002) and as a key issue for the June 2002 assessment. The Council signalled its intention to consider payment recommendations if New South Wales had made insufficient progress by that time.

The January 2002 supplementary assessment considered the proposed form of the register of water entitlements. It concluded that the register model being developed was sound and that the consultation being undertaken was sufficient.

The property rights elements assessed in 2002 are: the water sharing plans; the State water management outcomes plan; the information systems for the interim register; and licence conversions and licence and approval policies

and processes. All these elements are important for defining water property rights.

In conducting the 2002 NCP assessment, some groups were continuing to express serious concerns about aspects of the New South Wales system of implementing water property rights reform. Irrigators, for example, are concerned about the certainty of their water allocations. The banking sector is concerned about mortgage security with the conversion to a new licensing system, because the owner of the land may not be the owner of a water licence. While there is broad support for the register, media articles have noted stakeholders' demands for a register to be established similar to that conducted by the Land Titles Office.

The State water management outcomes plan targets have not been finalised. New South Wales will not be able to confirm any targets until the Government has finalised the plan. The current target to reduce (or phase down) the total volume of water specified on licences to no more than 200 per cent of the long-term average diversion limit in surface water systems is still under consideration. The targets are being developed in consultation with communities, having regard to social and economic factors as well as scientific factors. If a large number of committees raise concerns about the same target then New South Wales may need to revisit the targets in finalising the State water management outcomes plan. The Council will need New South Wales to provide information to indicate that the final cap target is reasonable given the natural variability in the availability of water and high variability of use.

By the end of June 2002, 36 of the 39 draft water sharing plans had been made public. The Council has examined a number of the plans. The property rights approach in these plans is to set plan and cap limits for diversions over the life of the plan.

The Council's approach to property rights looks for all States to deliver certainty in ownership of the property right and surety as to its characteristics. The registry system is important, particularly for ownership. Further, the State water management outcomes plan, the water sharing planning process and the licence conversion process are important for defining property rights.

Water sharing plans, once finalised, will be legally binding for the next 10 years. The plans will provide security of access for environmental water and for all water users during the 10 year term. Licence holders will be able to claim compensation if their water access is reduced during a plan's term where the plan's bulk access regime is varied for unspecified purposes.

The Council is satisfied with the rollout by New South Wales of its new water property rights arrangements and considers that it is making every effort to comply with its CoAG commitments. For the 2001 NCP assessment, New South Wales provided a timetable of property rights commitments to be implemented over two years – the State is on track with implementing each element.

At this stage, however, the Council considers that there is insufficient information to conclude that New South Wales has complied with all its NCP commitments in this area for this assessment. There have been further delays, although New South Wales has been doing all it can to address this particularly difficult issue, and is making significant progress in meeting each of the relevant requirements.

The Council has examined the draft water sharing plans and considers that some of them are likely to change significantly before finalisation, given that they contain some aspects that are inconsistent with the Water Management Act 2000, State Government policy and that the targets in the State water management outcomes plan are yet to be finalised. There have also been a number of problems with the process involved in implementing this first round of plans. These process problems have complicated the transition to a new property rights system.

The water sharing plans represent significant progress in the management of water resources in New South Wales. Water management committees have undertaken considerable work in considering the gamut of issues raised and the nature of trade-offs that may be required. The Council recognises that the process of balancing the wide ranging views and opinions of interest groups with the technical information required for decision making is difficult.

The Council intends to conduct further assessments of the performance of New South Wales on this issue.

- The Council will conduct a supplementary assessment before the end of 2002 to consider the final State water management outcomes plan, the final water sharing plans and the first round of annual implementation programs. As part of that assessment, the Council wants to discuss with New South Wales the process and timeframe to develop the next round of water sharing plans.

- Progress against the property rights timetable will continue to be a key issue for New South Wales in the 2003 NCP assessment.

Provision for the environment – the State water management outcomes plan

In the 2001 NCP assessment, New South Wales notified its intention to develop a water management outcomes plan to set the overarching policy context, targets and strategic outcomes for the development, conservation, management and control of the State's water resources. The plan would set a clear direction for water management action and ensure that environmental, economic and social river flow objectives were specifically addressed.

In 1997, the New South Wales Government asked the water management committees to recommend a package of environmental flow rules. An upper limit on the impact the rules could have on irrigation supplies was set at 10 per cent of the long term average cap figure. Flow targets set by the State

water management outcomes plan would be referred to water management committees to ensure the water sharing plans comply. If an environmental target is adopted, the Council would need to be convinced of the scientific basis for the target. The Council undertook to assess this issue in the 2002 NCP assessment.

The Council has found that the New South Wales water reform process recognises that the science of water management is constantly improving. The State's legislation and the water sharing plans being developed recognise that a truly scientific approach must incorporate active adaptive management.

The Council's 1999 assessment forecast a 7 per cent reduction in diversions in the long term as a result of the 1998 interim environmental flow rules. The interim State water management outcomes plan shows the actual impact on diversions of the flow rules, ranges from 3 per cent (for the Namoi River) to 17 per cent (for the Macquarie River), and up to 5 per cent for the remaining rivers. The plan contains targets that call for a 10 per cent improvement in the frequency of 'end of system' flows where this is less than 60 per cent of predevelopment levels. At the time of writing, draft water sharing plans for the Namoi, Lachlan, Murrumbidgee, and Gwydir regulated rivers provide a marginal improvement in environmental allocations, but still are some way from reaching some of the targets in the State water management outcomes plan.

At the time of writing, the targets in the State water management outcomes plan were being reviewed. Some changes to the plan are expected, with many of the changes designed to clarify the intent of the targets. The revised targets will go back to water management committees with a view to the plan being finalised in September 2002. The Government believes that the changes made in finalising the State water management outcomes plan will not affect the viability of the water sharing plans.

The State water management outcomes plan sets both long term outcomes and five year management targets for water resource management. It is a guide for planning. The targets do not seek to establish an ultimate position or standard for each water sharing plan but rather to establish a significant but practical step in the process of continuous improvement. Not all targets will be relevant to every plan. The State water management outcomes plan process is being run in parallel with the water planning process on an iterative basis.

Given likely further movement on the targets between the interim State water management outcomes plan and the final plan, the Council has insufficient information to conclude that the State water management outcomes plan targets meet the State's NCP commitments. The Council does, however, support the direction the plan is taking. It will assess the final State water management outcomes plan as part of a 2002 NCP supplementary assessment to be conducted by the end of the year, including how the plan's targets are incorporated in the final water sharing plans.

Provision for the environment – water sharing plans

In 1999, the Council assessed the 1998 New South Wales interim environmental flow arrangements for all regulated rivers. The Council was satisfied that New South Wales had met minimum commitments to act on stressed rivers.

For the 2002 assessment, the Council undertook to examine the first round of New South Wales water sharing plans (which aim to improve the outcomes of the interim environmental flows decided in 1998 and establish new environmental flow provisions for key unregulated and groundwater systems). The Council would assess the timeliness and quality of the reforms in these plans against the national principles for the provision of water for ecosystems.

The Council considers that some plans may change significantly between the draft and the finals, particularly given that the State water management outcomes plan targets are still to be finalised and that the Minister's notes raise a range of issues. The Council is therefore not in a position to assess whether the final water sharing plans comply with CoAG commitments. This is not due to lack of effort on the part of New South Wales, but because the plans must be finalised before the Council can make a definite conclusion. The Council is therefore unable to assess at this time whether the water sharing plans comply with CoAG commitments.

The water sharing plans will build on the environmental flow rules already in place on the regulated rivers. The Council therefore thinks it is not unreasonable, given the State's efforts, to allow New South Wales extra time to properly complete this important reform. These efforts include embarking on the most comprehensive stressed rivers assessment process undertaken in Australia, passing legislation capable of providing significant outcomes for the environment, and progressing a process for delivering water plans for more than 80 per cent of the State's water resources. The Council will defer examination of the final water sharing plans to a supplementary assessment to be conducted by the end of 2002.

To aid all parties in the possible directions of the 2002 supplementary assessment, the Council believes it is useful to point out some observations on the process so far and to identify where a number of plans may evolve in a way that might not comply with CoAG commitments. The Council notes that the plans have not been finalised and that the New South Wales Government is working with committees to address these issues. The Council has limited its comments to those aspects of plans that are considered to be problematic.

In the 2001 NCP assessment, the Council deferred its assessment of New South Wales progress on stressed rivers against the national principles for the provision of water for ecosystems. For this 2002 NCP assessment, the Council has again decided to defer an assessment of progress against the national principles until the final water sharing plans are in place. A full assessment of the final plans against the national principles will occur in the 2002 supplementary assessment. On the basis of the draft water sharing

plans that have been publicly released, the Council can infer that some plans in their present state may not meet the requirements of the national principles.

With regard to the plans, the Council has raised concerns about timeframes for achieving sustainable resource use and the lack of transparency in water sharing decisions. New South Wales will need to address these matters in finalising the plans and they will be key areas for consideration in the 2002 NCP supplementary assessment to be conducted by the end of the year.

The Council believes that the proposed provisions in some draft plans may lead to a marginal improvement in the conditions of stressed river ecosystems. For the end of 2002 NCP supplementary assessment, the Council expects to see final plans contain environmental allocations that ultimately provide for an improvement in the condition of the rivers. The Council draws particular attention to the Namoi and Murrumbidgee river draft water sharing plans as needing modification before the Council can be satisfied the State has met its NCP obligations.

In relation to monitoring and performance indicators for the plans, at the time of writing the New South Wales Government was yet to develop generic performance indicators for each water source,[12] and so all drafts contain Minister's notes that these indicators are still to be finalised. These performance indicators have implications for the development of monitoring arrangements to deliver the objectives of the water sharing plans. These performance indicators will also be assessed in the 2002 supplementary assessment, as a key issue for the delivery of the final water sharing plans.

Victoria

Full cost recovery – urban

In 2001, the Council concluded that a number of nonmetropolitan urban providers (referred to in Victoria as regional urban water authorities) were not operating on a commercially viable basis as defined by the CoAG guidelines. The Victorian Government noted its intention to announce a price path that would establish full cost recovery within three years. Victoria also announced that an Essential Services Commission would be created as an independent economic regulator to oversee the implementation of the price paths.

[12] These are being developed and will include indicators for low flows, moderate to high flows, ecological health (generally or for specific ecological communities or habitats), water quality, the economic benefits of consumptive water use, equity among licence classes, basic rights, and town water supplies.

The Council noted that demonstration of further progress on full cost recovery, particularly among the regional urban water authorities, would be a significant issue for its 2002 assessment.

In late June 2001, the Minister for Environment and Conservation released details of a new framework for water pricing. It caps prices that Victorians will pay for water over the three years to June 2004. Victoria states that the price framework provides an appropriate balance between the need to meet the economic imperative of responsible financial management and the social imperative of protecting customer interests by minimising pricing impacts. It was introduced following extensive industry and community consultation.

Victoria expects all regional urban water authorities to be operating between the lower and upper CoAG pricing bounds by the end of the 2004 price path. The methodology used to calculate price paths for the regional urban water authorities appears to be consistent with the CoAG pricing principles.

Full cost recovery – rural

For the 2001 NCP assessment, Victoria provided indicative information only on the level of full cost recovery by the rural water authorities. For Goulburn–Murray Water, the largest rural authority, 25 of 34 schemes were recovering an amount consistent with the lower bound of the CoAG pricing guidelines. Goulburn–Murray Water advised that the nine schemes that were not operating on a commercially viable basis (10 per cent of Goulburn-Murray's total rural services), would be shown to be commercially viable for 2000-01.

Victoria has now provided information indicating that some districts supplied by Goulburn–Murray Water are still not recovering full costs. For the fourth consecutive year, sales revenue was well below normal due to drought conditions reducing the amount of water available in the Goulburn system. In 2001, Goulburn–Muray Water reviewed and revised its tariffs to achieve full cost recovery.

Victoria is in the process of developing several initiatives that will enhance its approach to cost recovery in the rural sector. While the role and responsibilities of the Essential Services Commission for the rural water sector are yet to be determined, a proposals paper foreshadowed special arrangements to apply to the rural water authorities. These authorities, in consultation with their rural customer committees, will prepare and submit pricing proposals (consistent with a set of pricing principles defined by the Government) to the Essential Services Commission for review. Where the principles are complied with, the Commission will recommend to the Government that it accept the proposed prices. Where proposed tariffs are not consistent with the pricing principles, the Commission will recommend to the Government that it reject the prices and that the rural water authority be required to submit revised tariffs.

Victoria's 2002 NCP annual report stated that an asset valuation practice statement which adopts the deprival value concept has been developed. For

the time being, the new accounting policy excludes water businesses due to uncertainty about the application of fair value measurement of the infrastructure assets they hold. Consultation with these businesses will be undertaken to resolve these issues.

Victoria reports that an initial draft of the guidelines for renewals annuities was developed late in 2001. Further work is required, however, before consultation with rural water businesses can commence. The Council will reassess the situation when Victoria has finalised its approach.

Renewal annuities are the preferred approach to reflecting the future requirement for refurbishing and replacing water and wastewater infrastructure assets. The Council is satisfied that Victoria's draft guidelines for renewals annuities reflect the CoAG pricing commitments. These are, however, non-prescriptive guidelines subject to change, and the extent of adoption of this methodology by water and wastewater businesses remains to be seen.

Victoria states that, on average, all rural water services achieve full cost recovery. Victoria also intends the Essential Services Commission to oversight the prices of all rural water authorities from 2004. Given Victoria's intention that recent changes in its pricing policy will reduce temporary under recovery in some schemes in the Goulburn-Murray region, the Council will conduct a progress report on this issue in 2003.

Full cost recovery – rural dividend payments

In its 2001 assessment, the Council noted that dividends paid by rural water authorities were not based on the CoAG commercial principles – these state that dividends should be set at a level that reflects commercial realities and simulate a competitive market outcome.

Victoria has committed to work on a commercially based dividend framework, and will consult with the rural and regional urban water authorities as part of that process. Victoria intends that a framework for dividends will apply to regional urban water authorities for 2002-03.

The Council has not received sufficient information from Victoria to determine whether the current methodology for determining dividends and actual dividend payments are consistent with commercial principles. Given Victoria's intention to develop a dividend framework, the Council will reassess Victoria's progress on dividend payments for both regional urban water authorities and rural service providers in 2003.

Rural full cost recovery – community service obligations and cross-subsidies

In its 2001 NCP assessment, the Council was concerned about the lack of transparency in community service obligations (CSOs) among rural water

authorities. It accordingly suggested that the noncommercial elements of the rural water authorities be separately identified and reported.

The Council was also of the view that Victoria had yet to meet cross-subsidy commitments in full. While progress in reforming cost recovery and consumption based pricing had decreased the scope for nontransparent cross-subsidies, a more rigorous consideration of this issue was needed to meet CoAG commitments. At that time, Victoria advised that it would consider the issue of identifying and reporting cross-subsidies over the twelve to eighteen months period following the 2001 NCP assessment, with a view to establishing a preferred approach before the Essential Services Commission assumed responsibility for regulating water prices. Victoria will also require rural water businesses to report CSOs in their annual reports, commencing in 2001-02.

In its 2002 NCP annual report, Victoria indicates that it is yet to develop guidelines on the identification, measurement and reporting of cross-subsidies. It may do so, however, subject to finalising new regulatory arrangements to transfer prices oversight to the Essential Services Commission.

While the regulatory arrangements for the Commission have yet to be finalised, Victoria expects the pricing principles under the framework will ensure that cross-subsidies are identified and transparent. If the Commission's regulation reveals significant cross-subsidies between services and/or customers, Victoria will reconsider the need for guidelines for its water businesses.

The Council is satisfied with the actions Victoria proposes for the reporting of CSOs by rural water businesses. The Council remains concerned, however, about the lack of a rigorous consideration of cross-subsidisation. In 2001, Victoria advised that it would consider the issue over the next 12–18 months. There has been no progress on this commitment over the past 12 months, but Victoria argues that there are few, if any, rural cross-subsidies.

The Council recognises that some mechanisms are now in place to reduce the occurrence of cross-subsidies in the rural water sector. The Council will reassess this issue in 2003.

Water allocations and property rights

In June 2001, the Council found that Victoria's system of water property rights met the CoAG commitments. The Council considered, however, that progress in the rollout of Victoria's implementation program of bulk entitlements, streamflow management plans and groundwater management plans had been slower than anticipated. The Council undertook to reassess Victoria's progress in June 2002.

An issue that emerged in 2001 concerned the cumulative impacts on property rights and the environment of the capture of surface runoff by farm dams. At

that time, Victoria was in the process of developing a policy on this issue, so the Council committed to reassess this issue in 2002.

For the 2002 NCP assessment, the Council also undertook to assess the property rights aspects of Victoria's proposed river health strategy. Further, the Sunraysia rural water authority had announced that the tenure of private diverters' licences would be reduced from 15 years to five years on renewal. The Council was concerned that this decision effectively undermined irrigators' property rights.

The Council considers that the Farm Dams Act 2002 is a significant achievement by Victoria in reaffirming water property rights and addressing environmental river health. Prior to the Act, there was no mechanism to control irrigation dams constructed off waterways to capture overland flow. Landholders could build farm dams on their properties to capture such flow with no consideration of the effect on downstream users. The Council commends Victoria on the manner in which it has addressed its commitment.

Victoria's progress on its bulk entitlement program and streamflow management plans has further slowed. No more plans have been finalised beyond the three that were endorsed and in operation in June 2001. Nevertheless, the Victorian river health strategy has set some robust targets for completing the bulk entitlement program and advancing the key streamflow management and groundwater management plans.

The Victorian river health strategy requires winter sustainable diversion limits to be in place by December 2002 and proposes that overall sustainable catchment limits be in place by 2005 for all catchments and aquifers. Limiting extractions protects the security of existing consumptive users and environmental flows, and provides for the sustainable use of groundwater systems. The Council considers that the system of diversion and catchment limits proposed by Victoria provides a suitable mechanism to protect the environment from excessive diversions and to ensure water users understand the limits of the available resource.

Victoria is progressing arrangements with the Sunraysia Rural Water Authority, although the path to resolving this issue remains uncertain.

The Council is satisfied that Victoria is addressing property right issues and will re-examine progress in this area in 2004.

Provision for the environment

In 2001, the Council concluded that Victoria had made insufficient progress in increasing environmental allocations and restoring the health of its stressed rivers. In that assessment, however, Victoria committed to a comprehensive program over three years to address its most stressed rivers. By June 2002, Victoria was to have completed a publicly endorsed river health strategy and begun implementing action plans for its stressed rivers.

Given the delays and the importance of allocating sufficient water to Victoria's stressed rivers, the Council made the reassessment of this issue a priority for 2002. The Council signalled its intention to consider payment recommendations if Victoria made insufficient progress.

In March 2002, the Victorian Government released the draft Victorian river health strategy for public consultation. The strategy was developed to protect and restore Victorian rivers over the long term.

A key question for this assessment was how Victoria sets an appropriate environmental flow regime. Clarifying current entitlements to divert water for consumption sets bulk entitlements, which are legal entitlements under the Victorian system. Environmental flow needs are then assessed and a trade-off is made based on an analysis of the predicted environmental benefits and the impact on the security of users. Victoria has argued that this process complies with the CoAG requirement of achieving a better balance in water resource use (including allocations for the environment).

Victoria also advised that for catchments that are relatively undeveloped with ecologically healthy rivers, the Government's emphasis is on protecting existing environmental values. In rivers where the water resources are highly developed and generating significant economic activity, the emphasis needs to be on achieving an appropriate balance between the needs of the environment and consumptive users.

Another key issue is the nature of the trade-offs made in deciding what the environment receives. In making a decision on an appropriate environmental flow regime that either does not meet (or does not meet in the short term) the scientifically recommended one, Victoria's view is that the community has agreed to accept a higher level of environment risk and/or a certain level of environmental degradation as a consequence. It is the Council's view, however, that to do this properly there needs to be independent science that models scenarios that identify levels of risk to the environment to allow the community to make informed choices.

The Council has been concerned to ensure the risks to the environment posed by the negotiated environmental flow regimes are explicitly and transparently acknowledged. The Council has seen the terms of reference for the recently announced independent technical review panel that is to provide advice on environmental flow requirements to consultative committees. The environmental flow studies, the draft water management plans, and the reports of the independent technical review panel will be made publicly available. The Victorian Government has also committed to include in the draft guidelines to be used by consultative committees the need for plans to incorporate a description of the risks both to the environment and to the users of an agreed flow regime. The Council has also sought to ensure that the Victorian system provides for a balance of broader community interests.

While generally satisfied with the mechanisms in the Victorian river health strategy, the Council has been concerned that the timeframes may be too long. The strategy provides two stages to provide water for the environment

in developing individual river health strategies, but it is the Council's view that the consultative committees may need to consider the two stages simultaneously, especially for the stressed rivers of high value identified in regional river health strategies.

With regard to the nominated stressed rivers program, Victoria has advised that there are a number of flow rehabilitation studies under way, and it is not possible to commit to stage 2 funding at this stage until the costs are known and weighed against the environmental benefits. Victoria expects, however, to deliver stage 2 flow regimes in more than the nominated rivers over the next three years.

The Council is satisfied that the mechanisms contained in the river health strategy provide the tools for Victoria to meet its stressed rivers commitment. The 2001 commitment to develop an overarching river health strategy has been met. The Council will assess the first round of five stressed river plans in the 2003 NCP assessment against the stage 1 and 2 mechanisms of the river health strategy. To prepare for that assessment, the Council's Secretariat will hold quarterly consultative meetings with Victorian officials to monitor progress in developing these plans in accordance with the proposed reform path.

Compliance with principle 3

Principle 3 of the national principles for the provision of water for ecosystems requires the legal recognition of environmental water provisions.

In 2001, the Council found that the Water Act explicitly recognises environmental conditions on bulk entitlements, but the environmental allocations set by streamflow management plans were not statutory based. For the 2002 NCP assessment, the Council undertook to review this issue.

The Farm Dams Act 2002 has provided statutory backing for the provisions of streamflow and groundwater management plans. The Minister may now decide to accept or reject a plan if it is not consistent with the legislation, or the proper process has not been followed. The Council is satisfied that the changes embodied in the Farm Dams Act 2002 address principle 3 and meet the outstanding issue raised in the 2001 NCP assessment.

Compliance with principle 5

Principle 5 states that where environmental water requirements cannot be met due to existing uses, action (including re-allocation) should be taken to meet environmental needs.

In the 2001 NCP assessment, the Council found that the streamflow management plans and bulk entitlement provisions were insufficient in providing environmental water requirements for the stressed rivers. For this assessment, the Council committed to reassess progress against principle 5 in

the light of the Victorian river health strategy and the three year action plan for stressed rivers that appeared in the 2001 NCP assessment.

It is the Council's view that the bulk entitlement and streamflow management plan processes alone will not be sufficient to meet this principle. Nevertheless, Victoria has agreed that the consultative committees may simultaneously consider and recommend stage 2 proposals for stressed rivers identified to be of high value in regional health strategies. The Council will therefore be looking for Victoria to invest in stage 2 proposals, with priority consideration being given to rivers in the nominated three year stressed rivers program.

In 2001, Victoria was given an extension of time to meet its commitments on stressed rivers. In future NCP assessments, the Council will need to assess whether the environmental outcomes in individual plans are being delivered, given that the State has yet to meet the 2001 commitment for action on stressed rivers. Progress on the initial five stressed river plans will be a key issue for Victoria in the 2003 assessment.

Compliance with principle 6

Principle 6 states that further allocation of water for any use should only be on the basis that natural ecological processes and biodiversity are sustained.

In 2001, the Council found that Victoria was meeting principle 6. The Water Act requires a water authority to consider the impact on the environment and other users before issuing a licence. An emerging issue in 2001, however, was the cumulative impact of winterfill dams on water resources. The Farm Dams Review recommended processes to deal with this impact. In indicating its intention to reassess compliance with principle 6 in 2002, the Council advised that it would examine the Government's response to the 2001 Farm Dams Review recommendations.

As a result of the Farm Dams Act, streamflow management plans and groundwater management plans will specify monitoring and compliance conditions, and rural water authorities must publicly report on compliance with the provisions of plans. The Council, accordingly, is satisfied that Victoria is meeting principle 6 and has addressed the outstanding 2001 issue.

Queensland

Full cost recovery – urban

Queensland has reported that all local governments with more than 5000 retail water connections, but outside the big 18 local governments, have now implemented, or are committed to implementing full cost pricing. For local governments with between 1000 and 5000 connections, the Council's 2001

NCP assessment noted that there were still a significant number that were either still considering full cost pricing or that had decided not to introduce it.

The Queensland Government has now reported a significant improvement in reform implementation by these local governments – all but one have decided to implement full cost recovery. There are 125 local governments in Queensland. Of these only six have neither implemented water reforms nor committed to their implementation. Of these six, five are small service providers with less than 1000 connections.

Queensland has achieved a high degree of success through the Government's Business Management Assistance Program. There has also been a substantial increase in the level of understanding within local government about the reforms and their benefits. The Council considers that Queensland has met its 2002 NCP commitments for the implementation of full cost recovery by local government.

Full cost recovery – water boards

At the time of the Council's 2001 assessment, information on cost recovery levels for certain water boards was only available for the period prior to commercialisation. The Council then proposed to look for competitive neutrality adjustments, such as tax equivalent regimes and commercial rates of return, by these boards in its 2002 assessment.

The information provided by Queensland indicates that prices for both Gladstone Water Board and Mount Isa Water Board include competitive neutrality adjustments and a positive rate of return, and therefore meet the CoAG commitments. The Townsville–Thuringowa Water Board has indicated its intention to comply with the CoAG full cost recovery obligations.

Consumption-based pricing

In the 2001 NCP assessment, the Townsville Council failed to demonstrate that it had objectively analysed the cost effectiveness of two-part tariffs and provided a public interest justification on why it would not implement price reforms. Two years had passed since the Council first expressed its concerns and this matter was still unresolved. Consequently, the Council recommended a permanent reduction in Queensland's NCP payments of $270 000 from 2001-02.

The Council stated it would reconsider Townsville's approach to two-part tariffs in its 2002 NCP assessment, and whether a continued reduction in NCP payments was warranted.

Townsville City Council commissioned independent consultants to carry out a second assessment of the two-part tariff pricing policy. The Council has reviewed this assessment and raised several concerns with the Queensland Government. The findings of the second report are currently being assessed by the Queensland Competition Authority as part of its assessment of local

governments' progress in implementing competition reforms. The Authority will be assessing whether Townsville's second report meets the requirements set down in the Government's guidelines for evaluating two-part tariffs, and whether the report's recommendations rejecting two-part tariffs are supported by rigorous analysis.

There has been some progress on this issue since the 2001 NCP assessment, and the Council supports the Queensland Government's decision to have the Queensland Competition Authority review the report. It is now three years, however, since the Council first expressed its concern regarding this issue and hence the Council has found that Townsville is still non-compliant. The implications of this issue for Queensland's NCP payments are considered in the Council's findings and recommendations section in this NCP assessment report.

Consumption-based pricing – trade waste charges

At the time of the 2001 NCP assessment, the Council understood that some local governments levied trade waste charges but no details of the charging arrangements had been provided. The Council stated that it would further consider the issue of trade waste charges in its next assessment.

Queensland has advised that legislation requires local governments operating sewerage systems to develop a trade waste environmental plan by 1 July 2003. To support this legislation, Queensland has produced a model trade waste environmental plan.

Under the plan, local governments are encouraged to operate their trade waste services on a full cost recovery basis. All local governments must have a complying trade waste environmental plan in place by 30 June 2003 if they operate a sewerage business. Advice indicates that the model plan has widespread industry support and is seen as the benchmark for sewerage business pricing throughout Queensland.

Fifteen of the big 18 local governments are operating a charging structure similar to the model plan. The remaining three are in the process of adopting a policy and pricing structure similar to the plan.

The Council is satisfied that Queensland has a program in place to encourage the adoption of trade waste charges, that the program is being implemented by local government and that Queensland has a mechanism to review and assess the level of implementation. The Council concludes that Queensland has met this reform commitment.

Allocations – provision for the environment

In 2001, the Council concluded that Queensland had generally met its environmental commitments with the exception of the Condamine–Balonne Basin. The Council found emerging evidence that the basin is a stressed river system. It examined the adequacy of the three options contained in the draft

Condamine–Balonne water resource plan (WRP) to address the environmental problems identified, but concluded that if any of the three options were implemented it may be appropriate to recommend a substantial penalty in the 2002 NCP assessment for noncompliance with reform commitments.

For the 2002 NCP assessment, the Council was expecting to see a final WRP for the Condamine–Balonne consistent with CoAG water reform commitments.

In September 2000, a comprehensive moratorium was placed on the starting of any new works in the Condamine–Balonne catchment that would lead to an increase in the taking of water, either in watercourses or as overland flow water. This moratorium has effectively put an interim cap on the capacity to divert and store water in the basin.

A satisfactory Condamine–Balonne WRP is critical for Queensland's compliance with the water reform framework, and as a means to set Queensland's diversion limits under the Murray–Darling Basin cap. Work is currently underway on attaining appropriate environmental allocations of water in the Condamine-Balonne Basin, including negotiations with the Commonwealth on financial assistance for the purchase of Cubbie Station in order to achieve environmental flows. Queensland has advised that finalising the Condamine–Balonne WRP is on hold whilst these negotiations continue. In this context, the State Government has commissioned a six-month independent review of the science associated with the impact on the environment from water use in the Basin and committed to act on the findings of the review.

At the time of writing, the Queensland Government released a salinity hazard map for Queensland's section of the Murray–Darling Basin, including the Condamine–Balonne Basin. The map shows some 26 million hectares of land have the potential to develop significant salinity problems in the next 30–50 years. Extensive public consultation with key stakeholders was underway to develop urgent solutions to the problem. This consultation is to culminate in a forum on 2 August 2002 to discuss solutions. The Government stated that without urgent changes to land practices, serious salinity problems will threaten the environment as well as the existence of towns such as Dirranbandi and St George in the Condamine–Balonne Basin. The Queensland Government has recognised that salinity is but one issue that must be addressed in the broader context of water, vegetation management and land use issues.

Queensland has been discussing a wide range of possible options for addressing these issues with the Commonwealth and the New South Wales Governments. As noted above, options include the Queensland Government acquiring Cubbie Station, Australia's biggest cotton producer, as part of its efforts to restore the Condamine–Balonne river system. The volumes of water extracted and stored, and the way water is used will be considered. Further, the suitability of certain land uses and the need for industry incentives, readjustment, and restructuring will also be assessed. Any Queensland

proposal is expected to provide end of valley flows for the Narran Lakes in Northern New South Wales, a wetland of international importance, a national park on the Queensland-New South Wales border and other areas of national importance.

A question the Council has raised during this assessment is what Queensland would do in the event the Commonwealth did not provide any assistance. Queensland advised that it would then have to reconsider its approach.

The Council notes that the Condamine–Balonne is a Queensland river system and it is Queensland's obligation to address its stressed condition. Given that a proposal to address this issue is presently being considered by governments, the Council has decided, on balance, that there are grounds for delaying judgement until more information is available. The Council has therefore decided it appropriate to conduct a supplementary NCP assessment on the Condamine–Balonne WRP in February 2003.

The Council considers this is an appropriate approach given that evidence emerged only in 2001 that the basin was stressed and given the efforts being made by the Queensland Government to address this issue.

Nevertheless, the river system is stressed and should insufficient progress be made on this issue by the time of the supplementary assessment the Council would consider an NCP payments recommendation.

Burnett Basin WRP

In 2001, the Council examined the Burnett Basin WRP and found that it met CoAG commitments. In December 2001, however, the Queensland Government passed legislation that amended a number of the environment objectives in the WRP. The Council needed to re-examine the modified WRP to be satisfied that it still complies with Queensland's CoAG commitments.

The Queensland Government has argued that the legislative amendments resulted in small changes to a handful of objectives in the original Burnett Basin WRP, and that those changes have not, in any way, threatened the integrity of the WRP or its effectiveness as a tool for managing the water resources of the Burnett Basin.

The Council notes that while the modifications have not altered the stated general outcomes of the WRP, they enable an additional 66 000 megalitres per year to be allocated for consumptive use, resulting in an alteration to the plan's ecological outcomes. In this regard, Queensland has indicated that it is considering measures to address this alteration.

It is the Council's view that the revised WRP incorporates a minor level of change in the medium and high water flow objectives. In a number of instances, however, the flow objectives have moved further away from those presented as the environmental flow limits, and this is a potential concern.

The Council does not consider that the modification of the WRP means the Burnett is now a stressed system. Given that the amended WRP has resulted in only minor changes from the outcomes contained in the original WRP, the Council reaffirms its 2001 finding that the WRP complies with CoAG commitments. To be certain, however, the Council will review the provisions of the forthcoming Burnett Basin resource operation plan (ROP). This is consistent with the Council's findings in the 2001 assessment in relation to the Burnett WRP. The Burnett ROP will need to show how it will achieve the general and ecological outcomes stated in the WRP to ensure that ecologically sustainable outcomes will be realised.

Compliance with national principle 4

Principle 4 of the national principles for the provision of water for ecosystems states that in systems where there are existing users, provision of water for ecosystems should go as far as possible to meet the water regime necessary to sustain the ecological values of aquatic ecosystems while recognising the existing rights of other water users.

The 2001 NCP assessment found that no ROPs were advanced enough for examination at that time, so the Council deferred examination of compliance with this principle until the 2002 NCP assessment when the Fitzroy Basin ROP was expected to be in place.

Queensland has advised that work is progressing to release a draft ROP for the Fitzroy Basin in August 2002. Some 40 submissions on the proposal are being considered. The ROP will be released for three months public consultation. Subject to any further studies that may be necessary, the ROP process is expected to be finalised in early 2003.

The Council will examine ROPs for the Fitzroy Basin, and possibly the Burnett Basin, against principle 4 in its next NCP assessment.

Compliance with principle 5

Principle 5 states that where environmental water requirements cannot be met due to existing uses, action (including reallocation) should be taken to meet environmental needs.

The 2001 NCP assessment concluded that the Council would look to Queensland's response on the development of a new Condamine–Balonne WRP to assess whether the State had met principle 5. Queensland committed to treat this issue as a priority, so the Council undertook to review the WRP against principle 5 in 2002.

The new WRP will contain the new environmental flow objectives. The Council will assess developments and compliance with principle 5 in the February 2003 supplementary assessment of the new Condamine–Balonne WRP.

Compliance with principle 8

Principle 8 states that environmental water provisions should be responsive to monitoring and improvements in understanding of environmental water requirements.

The 2001 NCP assessment found that Queensland was undertaking scientific assessments to determine future monitoring programs to ensure the data collected measure the performance of WRPs. A pilot program was being applied in the Condamine–Balonne Basin and, if successful, would be applied to other river systems in the State. The Council decided to consider the application of principle 8 in the 2002 NCP assessment as further developments occurred.

The Council will assess the new Condamine–Balonne Basin WRP and the Fitzroy Basin ROP against principle 8 in 2003. The Council may also examine other WRPs and ROPs, monitoring reports and any other relevant documents with regard to this principle.

WRPs for other stressed systems

In 2001, the Council concluded that the process of setting environmental flows is an adaptive one and that the results from Queensland's WRPs, ROPs and monitoring of ecological outcomes were yet to be seen.

Queensland has a moratorium on withdrawals from its portion of the Murray–Darling Basin system, which includes the Border Rivers. The finalisation of the Condamine–Balonne Basin WRP will define Queensland's adoption of the Murray–Darling Basin cap. The Condamine–Balonne Basin accounts for the bulk of the Murray–Darling Basin water sourced from Queensland.

The Condamine–Balonne Basin is the only area in Queensland where a WRP is being developed that is acknowledged as being, or at risk of becoming, stressed or overallocated.

Public consultation

In 2001, the Council found that Queensland continued to actively consult with all stakeholders in all aspects of its reforms and had ongoing consultation and education mechanisms. The Council was satisfied that Queensland had met its commitments in this area.

The Council found, however, a need for greater transparency in the WRP process. For the 2002 NCP assessment, the Council committed to monitor developments in public consultation on WRPs.

In relation to the modified Burnett WRP, the Queensland Government had enacted legislation to amend the Water Act requirement for public consultation, for reasons of administrative expediency, but the Council

considers that such processes do not help to instil public faith in the transparency of Queensland's WRP arrangements.

Queensland has reaffirmed its commitment to transparency. In particular, reports required by legislation will now be augmented. The next such report (on the Condamine–Balonne) will include the augmented information. The Council will reconsider this issue in 2003 when it assesses the final Condamine–Balonne WRP.

Progress report issue: new rural schemes – the Paradise Dam

In 2001, the Queensland Government announced an intention to proceed with the design of the Paradise Dam project in the Burnett Basin region. The development proposals include a major dam on the Burnett River (with a capacity of up to 300 000 megalitres) to support agriculture and industrial expansion in the lower Burnett region.

After assessing all relevant material, including over 200 public submissions, the Coordinator-General recommended in October 2001 that the Burnett River Dam proceed. The Coordinator-General determined that the adoption of a series of mitigation measures could adequately address the detrimental impacts of the development. The project has received Commonwealth environmental approvals subject to certain conditions.

Completion of an environmental impact assessment process does not automatically lead to a decision to invest in the project. This decision will occur when the potential investors (public or private sector) have established that appropriate rates of return will be achieved on their investment.

The results of testing have demonstrated that the outcomes specified in the Burnett Basin WRP would be retained following the development of the dam project, given that the flow release strategy associated with the dam will essentially comply with the WRP's environmental flow objectives. Any departures from the WRP objectives are minor.

The Queensland Government allocated $35 million for the Burnett River infrastructure development project in the 2002 State Budget. The Government cited this decision as evidence of its commitment to build a major dam on the Burnett River. A final decision has not been taken, but the Queensland Government has projected a starting date for construction of late 2003 or early 2004.

The Government is aware of its obligations in terms of CoAG water reform that should the dam proceed it will need to be shown it is economically viable and ecologically sustainable.

Western Australia

Provision for the environment

In its 2001 assessment, the Council noted that Western Australia might need to revise its 1999 implementation plan for developing water management plans and environmental provisions, to align it with new data and priorities. The Council indicated that it would continue to monitor both the progress made in developing water management plans and any increased water use that may require particular plans to be completed earlier than scheduled. Western Australia has provided an updated implementation plan for the 2002 NCP assessment.

Western Australia continues to progress water allocations for the environment. Its revised program for the implementation of water management plans shows no stressed or overallocated surface water systems that required action by June 2001. The State has until 2005 to fully implement its implementation program. The Council is satisfied that Western Australia has met the 2001 NCP commitment.

Environment and water quality – integrated catchment management

In the 2001 NCP assessment, the Council was concerned with Western Australia's slow progress in implementing actions to address broader catchment management issues. It undertook to review the State's implementation of integrated catchment management in the 2002 NCP assessment.

Western Australia has endorsed an integrated catchment management–natural resource management policy. Partnership agreements between the Western Australian Government and natural resource management groups are in development to provide support, clarify expectations and quantify deliverables.

Since June 2001, there has been some progress in the development of regional strategies. Western Australia has signed an intergovernmental partnership agreement with the Commonwealth as part of the National Action Plan on Salinity and Water Quality. The development of the regional strategies to achieve integrated catchment management objectives, including salinity management, will be negotiated as part of final bilateral agreements under the National Action Plan. The Council is satisfied that Western Australia has met the 2001 NCP commitment.

Environment and water quality – National Water Quality Management Strategy

In 2000, Western Australia developed a State Water Quality Management Strategy as the framework to implement the requirements of the

intergovernmental National Water Quality Management Strategy. The endorsement of the strategy meant Western Australia met minimum commitments for the 2001 NCP assessment, but the Council expressed concern at the rate at which the State was adopting the strategy.

In 2001, Western Australia provided the Council with a provisional timetable outlining a process to implement the strategy. Given the delays in implementation, the Council determined that it needed to examine evidence of progress against the timetable over the next three NCP assessments. In the 2001 NCP assessment, the Council stated that it would expect certain outcomes for the 2002 assessment.

Western Australia has since advised that the State Water Quality Implementation Plan was not released in 2001-02 due to priorities associated with the recent drought. Work by Western Australia on ten of the guidelines scheduled for commencement in 2001-02 has not started and is not scheduled to commence in 2002-03 either.

Western Australia has argued there is a need to change the agreed timetable it provided in the 2001 NCP assessment and that it does not believe that noncompliance with the timetable should be the sole basis for assessment of its commitment to implementing the strategy.

Western Australia also submits that it has applied the national water quality management strategy in a variety of practical and meaningful ways outside the program submitted to the Council in 2001. It is also Western Australia's position that development of implementation plans for some of the national guidelines is not warranted at this time given the low numbers of relevant industries in Western Australia.

Western Australia has not met the outstanding 2001 NCP commitment and has made little progress against its water quality commitments in the water reform agreements. Western Australia has made little progress against its three-year timetable and has withdrawn from some of the commitments it made. The Council is not aware of any good reasons why the national strategy has not been implemented in Western Australia by now.

While Western Australia's failure would ordinarily be a significant consideration in the Council's decision on whether the State should receive all of its NCP payments, the Council is prepared to allow the State more time for the implementation of its water quality commitments and to get the program back on track.

The Council agreed that Western Australia would fully meet its relevant 2002 NCP assessment commitments if it can complete and implement those plans identified by the Council in the 2001 assessment. Such action would give the Council confidence that Western Australia can deliver the outcomes of the national strategy and meet its water quality commitments.

Consultative meetings will be held in December 2002 and March 2003 between the Council's Secretariat and Western Australian officials to ensure

sufficient progress is being achieved. It is proposed that a number of milestones be reached by the time of those meetings.

Should the Council consider insufficient progress has been made by those meetings, it may submit a report to the Treasurer recommending a suspension of some of Western Australia's quarterly NCP payments. In 2003, the Council will consider, as part of the assessment of compliance by all States with the National Water Quality Management Strategy, whether Western Australia continues to make sufficient progress against its commitment.

South Australia

Pricing and cost recovery

In 2001, the Council recognised the sound financial performance of SA Water and commended its efforts to improve service quality and efficiency. It was concerned, however, that the increasing proportion of profits being returned to the Government as dividends may limit the scope for future investment by the business.

SA Water paid dividends of $175.2 million in 1999-2000, representing 124 per cent of profit after tax. The Water Services Association of Australia reported SA Water's 1999-2000 dividend payment as the highest (relative to profits) among the country's large metropolitan services.

The Council stated that it would review the matter in 2002 to ensure South Australia's dividend policy is consistent with the CoAG pricing guidelines, which require that dividends where paid reflect 'commercial realities and simulate a competitive market outcome'. Two primary considerations in this regard are the potential impact of limited reserves being retained within SA Water for the funding of future investment from retained earnings, and the erosion of the asset base of SA Water.

The Council considers that a reasonable upper bound for the dividend distribution policy of a government water service business is the corporations law requirement that dividends may be paid only out of profits, given, among other considerations, the CoAG requirement that dividends reflect commercial realities. The adoption of the limit in the corporations law would safeguard the authorities against being left with insufficient financial resources, which could undermine service quality. This approach would also help satisfy competitive neutrality principles.

In some limited circumstances a dividend distribution that exceeds 100 per cent of the after tax profits of a statutory authority service provider may not have adverse consequences. It may be warranted, for example, by an authority wanting to move to a better capital structure by increasing its debt ratio. Such a move could help minimise the authority's weighted average cost of capital. SA Water's gearing ratio is low (at approximately 23 per cent), but

South Australia has not indicated that its dividend policy is a means of moving to a more efficient capital structure.

Overall, the Council has concerns about South Australia's dividend policy. Its approach runs the risk of running down assets, reducing financial viability and reducing service standards below minimum requirements. The Council will be reviewing the dividend payment policies of all jurisdictions in 2003. At that time, it expects that South Australia will have in place appropriate safeguard mechanisms against the potential adverse effects of high dividend payout ratios.

Consumption-based pricing

In the September 2000 supplementary assessment, South Australia undertook to reform the pricing of commercial water. In the 2001 NCP assessment, the Council decided to monitor the implementation of these water pricing reforms. With regard to commercial wastewater, however, South Australia found that consumption-based wastewater charges were not cost-effective. The Council, however, remained concerned that the use of charges based on property values may result in nontransparent cross-subsidies that are inconsistent with CoAG commitments, and that the pricing arrangements made transparent consideration of the issue virtually impossible.

With regard to trade waste, the Council considered that the new trade waste arrangements represented a significant improvement on the existing system.

South Australia is continuing to implement the reforms envisaged in the September 2000 supplementary assessment, consistent with the timetables provided in that assessment. It now has a legislated price path that will eliminate commercial free water allowances over a five-year period.

In the absence of an independent process for reviewing prices, however, the Council will continue to monitor prices in South Australia, particularly those that contain components based on property values because there is a risk of nontransparent cross-subsidies.

Arrangements to implement the new broader trade waste charges are well advanced. South Australia is continuing to implement the reforms envisaged in the supplementary NCP assessment of September 2000, consistent with the timetables developed in that assessment. The Council remains concerned that property values are being used as a basis for allocating costs among customers, albeit reducing in proportion to total cost. This process has the potential to result in nontransparent cross-subsidies that are not consistent with CoAG commitments.

The Council is satisfied that South Australia has made adequate progress in meeting its 2002 wastewater and trade waste commitments. For the reasons outlined above, however, the Council will re-assess commercial charging arrangements in South Australia when it assesses urban price reform in 2003.

New rural schemes

In 2001, South Australia was considering two proposals for the supply of irrigation water to existing high value adding irrigation areas. It had continued to transfer the remaining two Government-owned irrigation areas to irrigation trusts managed by the irrigators and, as part of the transfer process, each district's water supply infrastructure was being refurbished. At the time of the 2001 assessment, the Council noted progress on these four projects. For the 2002 NCP assessment, the Council sought further information and evidence to demonstrate the ecological sustainability of the projects.

In relation to the Loxton rehabilitation project, the Council is satisfied that the studies of the project demonstrate that South Australia has met commitments to ensure its ecological sustainability. In relation to the Barossa Infrastructure project, water allocations will be purchased from the trading market to ensure the proposal is consistent with all necessary management plans for the Murray–Darling Basin. The Council considers that the project complies with the CoAG commitment regarding ecological sustainability. A decision to proceed with the Clare Valley project and Lower Murray rehabilitation project has yet to occur.

Provision for the environment

In 2001, South Australia identified a need to improve knowledge of environmental water needs and definitions of stress. As called for by the State Water Plan 2000, a stressed resources assessment review was to be conducted, with the outcomes to be used to advise the Government on how to identify water resources under stress (or at risk of stress) and how to respond appropriately. This review was expected to occur in late 2001. The Council undertook to report on developments in South Australia's progress, including the stressed resources assessment review, in the 2002 NCP assessment.

The review is to commence in July 2002. A 12-month timeframe has been allocated for it and the outcomes will be considered when the current water management plans are reviewed, with the first reviews expected to begin in 18 months.

South Australia is continuing to improve its knowledge of environmental water requirements, with a number of new investigations and research activities underway. In addition, in October 2001 the River Murray catchment water management board released the draft water allocation plan for the River Murray. The plan sets a total volume of River Murray water that may be allocated each year. Specific volumes are defined for particular uses pursuant to South Australia's compliance with the Murray–Darling Basin Ministerial cap. The plan also proposes a maximum of 200 gigalitres each year for wetland management purposes.

The plan sets a target to increase median flows for South Australia's portion of the River Murray. The current median flow of the River Murray is

4850 gigalitres per year, or 38 per cent of the natural median. The median flow target of 7025 gigalitres over the life of the plan would improve the flow to 55 per cent of the natural median and enhance river health.[13] The water allocation plan is scheduled to be finalised in July 2002.

In addition to the draft water allocation plan, in April 2002 South Australia and Victoria agreed to establish a $25 million joint fund to improve the environmental health of the River Murray. The aim of the fund is to achieve an additional 30 gigalitres of environmental flows for the river. South Australia has committed to provide $10 million to the fund by 1 July 2005.

Finalisation of the draft water allocation plan for the River Murray will complete South Australia's implementation program to establish water allocation plans. Fourteen of the original 15 water allocation plans were complete in January 2002, with only the River Murray plan remaining.

The Council continues to be satisfied that South Australia is making satisfactory progress and has met its NCP commitments.

Compliance with principle 5

Principle 5 of the national principles for the provision of water for ecosystems provides that where environmental water requirements cannot be met due to existing uses, the jurisdiction needs to take action (including reallocation) to meet environmental needs.

At the time of the 2001 NCP assessment, evidence indicated that the Marne River and the Inman River may be stressed. The Marne River and potentially other river systems in the eastern Mount Lofty Ranges have become stressed by high levels of water extraction. The Inman River has been identified as stressed in terms of water quality.

CoAG commitments require action, including reallocation for the environment, in stressed and overallocated rivers by 2001. The Council considered that action to re-allocate water to the environment should occur by 2002 and called for a reassessment against this CoAG principle in 2002.

In relation to the Marne River, South Australia advised that a research project looking at science and use information is being undertaken to determine the river's environmental water requirements, as well as those of other eastern Mount Lofty Ranges watercourses. The Minister has declared an intention to prescribe the Marne River and Saunders Creek as a result of concerns about sustainability. Public consultation — due to end in May 2002 but extended — is being undertaken on the need for prescription to set legally

[13] The Council notes that achievement of these targets may require actions from other Murray–Darling Basin States, because the proportions exceed South Australia's allocation under the Murray–Darling Basin cap.

binding mechanisms to provide water for the environment in accordance with a water allocation plan.

If these water resources are prescribed, water allocation plans will be developed for these systems. The Council considers that the Marne River and any other eastern Mount Lofty system that may be prescribed are additions to South Australia's implementation program, so the Council will assess the water allocation plans for these systems as they are completed.

Environment and water quality – integrated catchment management

In 2001, the Council found that South Australia was well advanced in the development of catchment water management plans in the areas surrounding Adelaide. It noted, however, the seemingly slow planning and implementation of catchment management in areas further away. South Australia has advised that the initial focus of catchment water management boards was the preparation of water allocation plans. With these plans now endorsed, the boards are now completing their catchment water management plans. South Australia provided a timetable for the development of the remaining plans, and the Council undertook to reassess progress against this timetable in the 2002 and 2003 NCP assessments.

The Water Resources Act requires the South Australian Water Resources Council to develop a report on the implementation of the State Water Plan 2000. This will include the development of catchment water management plans. A consistent report card framework has been developed for the review of these plans, and it is being trialled as part of the reporting process. The Water Resources Council will make recommendations to the Minister based on the outcomes of the reviews.

The Government is considering new arrangements for integrated catchment management. The broad vision is to ensure integrated natural resource management is based on the development of water catchment areas and the continuation of 'skill-based boards'.

Since June 2001, South Australia has made some progress in developing catchment water management plans. It is on track to have all plans completed by mid-2003. The Council considers that South Australia has met the outstanding commitment for this assessment.

Environment and water quality – National Water Quality Management Strategy

In 2001, South Australia released a draft environmental protection (water quality) policy to implement the policies and principles that comprise the intergovernmental National Water Quality Management Strategy. The Council then found that South Australia showed an ongoing commitment to a coordinated approach to water quality management. The Council was concerned, however, about the slow pace of finalisation of the policy to

implement the national strategy. The Council undertook to reassess this issue in 2002 and expected the policy to be implemented by then.

South Australia has advised that development of the policy has taken longer than anticipated because a large number of submissions were received during the extensive consultation period required under the Environment Protection Act. Changes made as a result of the submissions must be subject to a further round of consultation. In May 2002, South Australia provided the Council with a timetable for the completion of the policy.

The Council notes, nevertheless, that governments first agreed on the National Water Quality Management Strategy for freshwater and marine water quality in 1992. South Australia has not met the outstanding commitment and has made little progress. The Council, however, accepts the Government's reasons for the delay in implementing the reform, including the need for full consultation.

The Council will next assess compliance by all States with the National Water Quality Management Strategy guidelines in the 2003 NCP assessment. In 2003, it will assess South Australia's compliance against the timetable published in this assessment and expects the Government to have released draft modules for public consultation, showing the proposed implementation of specific guidelines for freshwater and marine water quality, drinking water, and water quality monitoring and reporting. If the environmental protection (water quality) policy is not in place for the 2003 NCP assessment, the Council will need to take this aspect of noncompliance into account in its NCP payments recommendations.

In 2001, the Council found that the Inman River was a stressed system in terms of water quality. The development of a new treatment plant by SA Water should address the water quality concerns with the Inman River.

Progress report issue: institutional reform – structural separation

The Minister for Government Enterprises is the owner of SA Water and has the authority to decide water prices. The Council's 2001 assessment framework noted that if the same Minister is responsible for regulation and service provision, the Council would require information about how any resulting potential conflicts of interest were addressed.

In 2001, the Council concluded that South Australia appears to have processes for transparency in setting and monitoring customer service standards. With pricing, however, there is no similar transparency. This makes it difficult for the Council to be confident that pricing decisions will be consistently based on the principles set out in the CoAG water agreement. The Council accordingly needs to closely monitor all pricing issues in South Australia and review all changes to confirm their consistency with the water reform agreements. This includes continuing to seek information to confirm that cross-subsidies are transparently reported.

All of these issues would be resolved if there were an independent body to review the pricing arrangements and publicly release a report. The government could respond to that report and present a statement of reasons if it decided to adopt an approach divergent from the recommendations of the report. All other jurisdictions have introduced, or have committed to introduce, independent processes for monitoring or regulating prices.

The South Australian Government released a position paper on *Establishing the Essential Services Commission* in June 2002. The paper states that the role for the Commission in water will be restricted to providing oversight of the quality and reliability of services provided by SA Water. The government has decided that the economic regulation of water will be excluded from the initial functions undertaken by the Commission.

Tasmania

Full cost recovery – urban

In 2001, the Council was concerned that a substantial number of the largest urban water and wastewater businesses were not operating on a commercially viable basis. The Council committed to revisiting progress by all service providers in 2002, when the Government Prices Oversight Commission would have completed its 2000-01 audit of the commercial viability of local government water providers.

The Council also decided that it would look for further information on Tasmania's progress with asset valuation and competitive neutrality costing.

The Tasmanian Government has since provided the Council with the results of the Government Prices Oversight Commission's audit of local government compliance with its urban water pricing guidelines. The focus of the audit is to determine whether local governments have achieved full cost recovery consistent with the CoAG water reform commitments.

Tasmania provided the Council with full cost recovery information that shows:

- 19 of 28 local government water businesses were commercially viable (as defined by the CoAG guidelines) in 2000-01 — an improvement from 14 for 1999-2000; and
- 20 of 27 local government wastewater businesses were commercially viable in 2000-01 — an improvement from nine for 1999-2000.

Despite progress toward full cost recovery by local government water service providers, the Council is concerned that a significant proportion of Tasmania's largest service providers are still not commercially viable. Moreover, of the five large local government service providers highlighted in

the 2001 NCP assessment, none operated within the bounds of full cost recovery in 2000-01.

The Council has concerns about the level of transparency in the Commission's audit process. The audit reports provide no detail on the actual costing approaches used by local governments. The results of the audit are not publicly available and no formal mechanism exists to ensure problems identified by the Commission are rectified.

Given that the Commission's role is to make recommendations only and its report is not made public, it is difficult to see how the current process can generate the momentum to ensure reforms are implemented. The Council is looking for jurisdictions to demonstrate that they have processes in place that will continue to achieve the objectives of water reform beyond the life of the Council's assessment process.

In respect of asset valuation methods, Tasmania has developed guidelines for local governments to apply, but the Council is unaware whether local governments are adopting these methods. It is difficult to compare performance across providers and to determine whether CoAG full cost recovery against the bottom of the pricing band is being achieved.

The Commission's audit discusses asset values only in general terms. Further, Tasmania has not provided sufficient information on asset values or asset valuation methods applied by local government water services for the Council to determine whether the approaches used are consistent with the water reform commitments.

The Council has three key concerns with urban pricing in Tasmania.

- Insufficient information has been provided to make a full assessment of the extent of urban pricing reform.
- Based on the available information, a significant number of local governments still appear to have levels of cost recovery outside the CoAG pricing band.
- There is insufficient transparency in the Government Prices Oversight Commission's audit process to deliver ongoing reform.

The Council recognises that Tasmania has a number of mechanisms in place to support the implementation of water reform by local governments, but the Council's assessment is based on whether these programs and processes are producing outcomes. Nevertheless, the Tasmanian Government has committed to working with the Council to resolve concerns about urban pricing. In a letter to the Council, it noted that in the area of urban pricing it would provide by 31 August 2002:

- a report on local governments' adoption of asset valuation methodologies consistent with CoAG guidelines;
- reasons for alternative valuation approaches being adopted; and

- responses to any assessment issues emerging from this information.

Tasmanian also undertook to provide the strategy that will be adopted to improve the rate of progress in cost recovery for those businesses identified in the GPOC audit as either under-recovering or over-recovering their costs. The GPOC audit will be made publicly available by 31 August 2002.

Based on this commitment, the Council has decided that it will conduct a supplementary assessment in October 2002 on all issues raised in this section relating to full cost recovery. The Council is expecting significant outcomes from this supplementary assessment, and believes its expectations are warranted given cost recovery reforms for urban water and wastewater services are now three years overdue.

Consumption-based pricing

In 2001, Tasmania provided a report on local government water service providers' progress against the two-part tariff implementation timetable. In that assessment, the Council was satisfied that Tasmania had continued to achieve progress in implementing two-part tariffs. Given that this reform commitment was initially due by the end of 1998, however, the Council decided to review progress again in 2002. For any delays in implementation, the Council would need a robust justification.

Tasmania has now reported significant progress in two-part tariff reform, with 17 of the 18 schemes now having implemented two-part tariffs, in line with targets. The remaining scheme was due to commence two-part tariffs in July 2002. The lack of transparency in costing, price calculations and community service obligations is, however, resulting in concerns on the part of some customers.

In the 2001 NCP assessment, the Council had not been advised whether any service providers levied trade waste charges. The Council considers that significant gains would result from a rigorous investigation of the introduction of trade waste charges where cost effective.

The Council has found that the application of trade waste charges appears to be *ad hoc*. There is a system of managing waste, but no consistent approach to pricing. The Council strongly urges Tasmania to adopt a trade waste charge that captures those customers who pay less than the incremental cost of discharges into local government sewerage infrastructure. The absence of a charging regime that reflects the quantity and/or toxicity of the waste provides scope for nontransparent cross-subsidies and has the potential to undermine the CoAG endorsed principle of consumption-based pricing.

Water allocations and property rights

In June 2001, the Council considered that Tasmania's system of water property rights met CoAG commitments. The Council noted, however, the cumulative impacts on property rights and the environment of the capture of

surface runoff by Tasmanian farm dams. Tasmania was in the process of developing a farm dams policy to be in place by mid-2002. The Council then undertook to review developments with this policy in the 2002 NCP assessment.

There is no statutory requirement to consider the cumulative impacts of farm dams. Tasmania recognised, however, that it needed to develop, in consultation with stakeholders, a policy to manage these impacts. The aim of the policy is to:

- provide a strategic framework to improve the management of the impacts of incremental dam development; and
- guide decision-makers in assessing the cumulative impacts of new dam permit and water licence applications.

The policy will address the farm dams issue in two ways:

- managing the impact that allocations have on high flushing environmental flows; and
- specifying mitigating physical requirements in the building of dams, such as fish passage.

Public consultation on a discussion paper and policy options will be undertaken in July–August 2002 and the policy is now due for completion by September 2002. Interim guidelines are being used until the policy is finalised.

The Council is satisfied that Tasmania is addressing this issue and has implemented appropriate interim measures while developing a final position. The Council considers that the development of this policy is very important, especially given that the Tasmanian Government has established a $10 million program for water development.

Provision for the environment

The Council noted last year that the South Esk and Meander rivers could be classified as overdeveloped during the summer months. The Council undertook to review the management plans for these rivers to determine whether Tasmania has addressed the issue of allocations for the environment over this critical period.

The Council also noted that the processes for determining environmental water requirements have been slower than Tasmania anticipated. At the time of the 2001 NCP assessment, no water management plans had been developed. While Tasmania was confident that water management plans would be completed by 2005, the Council undertook to reassess this year Tasmania's progress against the implementation program.

Tasmania has made substantial progress in identifying environmental flow requirements in river systems. The State is currently finalising the Great Forester Water Management Plan, which will be the first such plan to be completed. The environmental flows work was completed and the catchment was deemed to be a good model for the water management planning process.

Tasmania advised that there had been a great deal of opposition to the Great Forester draft plan on the grounds that it would have a severe economic impact on water users. An independent analysis of the impact of the proposed water flow regime in the draft plan was accordingly commissioned.

This consultancy concluded that the increase in environmental flows would reduce the amount of water available to irrigators and potentially reduce agricultural production by $2.3 million per year at the farm gate level and have flow-on losses of a further $4.7 million and 22 jobs at the State level.

These findings have resulted in Tasmania announcing a review of the Great Forester Plan and a proposed change in the method for developing water management plans in general. As a result, more time and resources than anticipated have been needed for negotiations on the draft Great Forester and other water management plans. The environmental water provisions contained in the draft plan are therefore to be reviewed in light of the study. A working group of major stakeholders has been formed to further consider the plan.

As a result of the controversy surrounding the release of the original draft Great Forester Water Management Plan, some other catchments across the State have shown an unwillingness to engage in developing water management plans until a clearer picture emerges of the Government's direction in reviewing the Great Forester Plan.

The Council has reviewed the consultants report and has some concerns with it and the possible direction Tasmania may be taking in relation to the development of water management plans. The Council is concerned about the precedent that may be created by the plan for the circumstances in which such socio-economic assessments are used. While such studies are a necessary input to the decision-making processes and may help determine transition paths to reform, attempts to use socio-economic arguments to put off or relegate the legitimate needs of the environment could raise a question about Tasmania's compliance with the environmental obligations of the CoAG water reforms.

The Council is highly concerned at the emergence of this issue across a number of jurisdictions, namely, the use of socio-economic studies based on protecting current consumption putting off or watering down the legitimate needs of the environment, resulting in ongoing environmental degradation.

The Council also does not accept the argument that the science for the environment has to be perfect before environmental provisions are decided. All governments have committed to the precautionary principle. This states that in order to protect the environment, a precautionary approach should be widely applied by States in setting allocations according to their capabilities.

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to address environmental degradation.

This assessment issue has not been satisfied. Nevertheless, the Great Forester Plan is still a draft and the Council needs to ascertain the extent of the proposed changes to it. Given the precedent value of the plan, the Council is of the view that another examination needs to occur in the 2003 NCP assessment to consider the final plan and any other plans, such as the proposed Meander River plan, as well as the direction Tasmania proposes to take to meet its CoAG obligations. The Council, however, does not want to see environmental water provisions and the water management plan process diluted by the inappropriate use of socio-economic studies.

Environment and water quality – integrated catchment management

In 2001, the Council found Tasmania had met the minimum NCP requirement for this reform commitment. At that time, the major relevant development was a proposal to prepare a State Natural Resource Management Strategy to coordinate the development of catchment management plans at the regional level. Given the importance of the Strategy, the Council undertook to review developments this year.

Following extensive consultation with stakeholders, the Tasmanian Government finalised and endorsed the Tasmanian Natural Resource Management Framework in February 2002. The framework covers issues such as administrative arrangements at State and regional levels, proposed legislation, natural resource management principles and priorities, and integration with relevant statutory and nonstatutory instruments.

Tasmania is on track to have regional strategies completed and in place by mid-2003. The Council is satisfied that Tasmania has met its outstanding commitment.

Progress report issue: new rural schemes – the Meander Dam

The 2001 State Budget provided $10 million to finalise a Water Development Plan to recommend the construction of new water storages across the State. One of the aims of the plan is to support the Government's objective of doubling the value of Tasmania's primary production over the 10 years to 2008. The 2002 State Budget allocated an additional $4.5 million to progress water development in partnership with private enterprise. The plan was finalised and released in August 2001.

The Tasmanian Government subsequently announced its intention to proceed with the design of the Meander Dam project, 50 kilometres south west of Launceston. The 43-gigalitre dam will inundate 332 hectares of land. The dam has been designated under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

A decision on whether the Meander Dam will proceed cannot be made until 2 August 2002 at the earliest, when all environmental clearances (including those by the Commonwealth Government) are obtained. If all approvals for the dam are forthcoming, Tasmania intends to let the contract for design and construction in August 2002 and aim for construction to be completed by August 2004.

In responding to the consultants report that shows the dam is not financially viable, Tasmania advised the Council that further work will be done to demonstrate the *economic viability* of the dam proposal, including the additional benefits the dam will generate for environmental flows and the public good. The Government is aware of its obligations in terms of CoAG water reform to show that any new investment is economically viable and ecologically sustainable.

A number of submissions expressed concern about the Meander Dam development. The Council will consider and assess these issues in a future NCP assessment if the Tasmanian Government decides to construct the dam.

Based on the above timeframe, the development of the Meander Dam and all issues raised by submissions may be a significant 2003 NCP assessment issue.

Australian Capital Territory

Full cost recovery – urban

ACTEW's (the ACT's electricity and water provider) dividend to the ACT Government in 1999-2000 amounted to the whole of ACTEW's earnings in that year. The previous year's dividend payment also accounted for all of ACTEW's earnings.

Last year, the Council noted its concern that limited reserves were being retained within ACTEW for future investment, including to make provision for population growth or unexpected capital costs, such as a facility breakdown. In such circumstances, ACTEW would have to increase its debt or the Government would have to provide an injection of capital.

In its current assessment, the Council considered whether the ACT's dividend policy is consistent with the CoAG reform commitment that requires dividends, where paid, to reflect commercial realities and simulate a competitive market outcome.

The ACT argues that dividend policy should be driven by the objective of a competitive capital structure. ACTEW's planned debt ratio for the end of 2001-02 is 38 per cent and has been much less in past periods. The 100 per cent dividend policy has assisted in moving ACTEW's capital structure closer to an efficient level based on industry practice. The ACT also argues that ACTEW has numerous options for financing changes to its capital base.

The Council remains concerned about ACTEW's dividend payout ratio of 100 per cent of after tax profits. There are, however, some mitigating factors relevant to the Council's assessment. For instance, the governing legislation and licences for ACTEW set appropriate standards (including investment in replacing, upgrading and maintaining the infrastructure needed to provide services at those standards) and enforceable penalties for any breach of a service standard. Also, the ACT is using high dividend payouts as a means of capital restructuring. Whilst this practice is not ideal because of its lack of transparency, it is one way of raising ACTEW's debt ratio from the low levels of the past.

Given these considerations, the Council is satisfied that the ACT's current dividend policy is not inconsistent with the CoAG commitment. There is, nevertheless, a question whether full distributions should continue in the longer term and once ACTEW's debt ratio is in line with the market average. The Council will revisit this issue in 2003 when a broad review of dividend policy of all jurisdictions will take place.

Consumption-based pricing

In 2001, ACTEW did not levy trade waste charges. A control was available through the need to apply to ACTEW for permission to discharge trade waste into the wastewater system, and ACTEW could place conditions on the application's approval.

The absence of a charge reflecting both the quantity and quality of the waste provides scope for nontransparent cross-subsidies and has the potential to undermine the CoAG endorsed principle of consumption-based pricing.

The ACT Government has since reported that ACTEW had previously reviewed the need for such a charge and found it would have no significant impact. This stems predominantly from the absence of industry with substantial discharges in the ACT. ACTEW's trade waste approvals system, however, is now operational and, in a few instances, ACTEW has applied a specific charge tied to the volume and toxicity of the discharge.

The Council agrees with the ACT view that the Government needs to properly evaluate the merits of a charge. The ACT Government has committed to reviewing the merits of a systematic charging arrangement for trade waste. The time period suggested for completing this task is 18 months. Such a period, however, would extend beyond the 2003 NCP assessment, when full implementation of urban pricing reform is required.

To meet the reform commitments for the 2003 NCP assessment, the Council expects the ACT Government to have independently analysed and, if cost effective, developed systematic charging arrangements for trade waste, and have a clear implementation strategy by June 2003.

Northern Territory

Provision for the environment

In 2001, the Council found that the Northern Territory continued to set contingency allocations for the environment in the absence of a scientific basis for determining environmental water requirements. The Northern Territory advised at that time that five major research projects on environmental flows in the Daly and Douglas rivers were expected to report their findings in 2002. This is the only river system in the Northern Territory where significant levels of development are planned. The Council noted that it would monitor developments in this area, including the research results, to ensure provision of water for the environment is being adequately addressed.

The research projects are expected to be finalised by July 2002, and recommendations about specific environmental water requirements will then be made. Northern Territory agencies will consider these recommendations by the end of September 2002. Public workshops will be held in November–December 2002.

The Northern Territory advised in 2001 that unless the findings of the projects show the existing environmental allocations are significantly inadequate, the projects will not have an impact on existing allocations. These contingency allocations have been set on a conservative basis. Any variations to environmental water requirements as a result of the projects would occur as part of the five-year review of the operation of a water allocation plan.

The Council notes that Environment Australia endorsed the approach taken in a project selected from the five as suitable to the circumstances of the Northern Territory. The Council has reviewed the findings of the project and is satisfied that the Northern Territory is meeting its outstanding 2001 NCP commitment.

Public consultation

In 2001, the Council found that the Northern Territory was beginning to develop community materials on the water reform process and water issues generally, including introducing a range of materials for schools. The WaterWise NT program was piloted in 2001 and rolled out in Alice Springs. The aim was to introduce the program progressively to other regional centres.

The primary objectives of WaterWise NT are to raise awareness of the importance of water to communities and natural ecosystems, to improve public awareness of the various impacts of water use on the environment, to introduce water saving programs, and to promote water conservation principles. Official recognition as a WaterWise School is granted and schools receive accreditation for actively contributing to each of the program's objectives. Public education activities in Alice Springs have been complemented by ongoing consultation with irrigators in the Katherine and

Ti Tree regions regarding the Northern Territory's interim policy on environmental flows.

The Council is satisfied that the Northern Territory has made sufficient progress to address this assessment issue.

Murray-Darling Basin Commission

Pricing and cost recovery – rural

The Murray–Darling Basin Commission (MDBC) recovers from its member Governments the full cost of constructing, operating, maintaining and renewing assets. These arrangements ensure the costs borne by the States relate to the level of service received from River Murray Water, the MDBC water business. River Murray Water recovers 75 per cent of the cost of asset refurbishment and replacement from the States.

In 2001, the Council identified two issues with the current MDBC approach to cost recovery and pricing, to be reconsidered in the 2002 NCP assessment:

- the outcomes of the independent audit of cost sharing arrangements, including the issue of transparency in asset management; and
- consumption-based pricing.

The MDBC Ministerial Council considered in April 2002 the recommendations of an independent review of pricing arrangements. The review recommended changes to the current approach to planning and financing capital investment. It also concluded that the current cost-sharing arrangements developed by River Murray Water are appropriate. It argued that there would be little gain, at this stage, from moving to consumption-based pricing for River Murray Water.

The Council considers that the review satisfactorily covered all the pricing issues identified for consideration in the 2002 NCP assessment. The recommendations contained in the review, if implemented, would effectively address these issues. The Ministerial Council has endorsed in principle these recommendations and directed the Commission to develop an implementation program.

The Ministerial Council will not consider the implementation program until November 2002, so the Council cannot confirm how the MDBC will implement the recommendations. Nevertheless, the Council concludes that the MDBC has met its 2002 reform commitments. If the MDBC decides not to adopt some recommendations, it will need to provide a clear public justification of its alternative approach and demonstrate that the alternative is consistent with CoAG water reform commitments.

The Council notes that the States have very different policies on passing on River Murray Water costs to water users. In New South Wales and Victoria, rural water users are required to pay a significant proportion of the costs passed on from River Murray Water. In contrast, South Australia does not pass on these costs to irrigators. This issue is not one for the MDBC, but the Council will need to consider it further in 2004 when assessing each State's approach to rural water pricing.

Trade

The MDBC has been running a pilot project on interstate trading since 1998. In its 2001 NCP assessment, the Council recognised that the pilot project was a significant advance in interstate trade in Australia. There were constraints, however, on the expansion of the pilot to different regions and types of water right. The Council undertook to reassess in 2002 progress in resolving the property rights issues associated with trade and developing mechanisms to facilitate interstate trade.

The MDBC has not progressed the pilot project. It is, however, focusing on developing water accounting systems to allow it to track trade, develop exchange rates along the river and between different water rights, and adjust the State caps in response to interstate trade. These efforts will allow the MDBC to extend trading across the Basin.

The MDBC, moreover, has now committed at the Ministerial Council level to adopt comprehensive interstate water trading and placed priority on implementing trading arrangements. The Council considers that full interstate trading should be implemented as soon as possible and that the systems that support trading should be efficient and effective. Such systems need to: allow for trading between different water rights in different States; account for the environmental consequences of trade; and facilitate timely trading, including providing access to State-based water registry information in a way that facilitates interstate trades.

The Council concludes that the MDBC has met its 2002 commitments. It expects, however, significant progress in the development and implementation of trading arrangements between now and the next full assessment of interstate trading in 2004.

Progress report issue: water allocations and the environment

The cap on diversions from the Murray–Darling Basin continues to make an important contribution to ensuring environmental flows in the river system. It is an essential first step in establishing management systems to achieve healthy rivers and sustainable consumptive uses. It represents a balance between the significant economic and social benefits that have been obtained from developing the basin's water resources on one hand and seeking to improve the environmental health of the river system on the other.

The MDBC Ministerial Council formally adopted the cap in August 2000 as part of the Murray–Darling Basin Agreement. Under the Agreement, States' water allocations are independently audited each year and any breaches of the cap are declared by the MDBC and referred to the Ministerial Council.

The Independent Audit Group's 2000-01 review of cap implementation (MDBC 2002) has been completed. The transparency in reporting cap compliance is resulting in pressure on those communities that are over the cap, and also on their governments. When assessing individual compliance with the cap, the Council will continue to raise any review concerns with jurisdictions. The Council will consider the implications for NCP payments where jurisdictions persistently breach the cap and do not rectify those breaches in later years.

The Audit Group found that Queensland has yet to complete its water resource planning process (which will define the cap in Queensland), although the moratorium on the construction of works has slowed water use development.

It also found that the cap has been exceeded in the Namoi Valley, the Barwon/Darling/Lower Darling Valleys and the Lachlan Valley. New South Wales is to address this issue and report to the next MDBC Ministerial Council meeting on action taken to bring diversions into balance, including the period over which this correction will occur.

Progress report issue: provision for the environment

The Council recognises that the complexity of the issues, as well as the number of governments involved, has led to progress on environmental flows for the River Murray being slow. Given the national significance of this issue, however, the Council is expecting tangible progress in future NCP assessments.

The Council expects, in particular, that agreement on and implementation of environmental allocations for the River Murray will be in place by 2005. The MDBC Ministerial Council's decision at its October 2003 meeting on flow options for the River Murray should provide a timeframe in which to deliver environmental flows.

Under the terms of the Ministerial Council decision, the MDBC will develop a business case for the recovery of 350, 750 or 1500 gigalitres of environmental flows for the River Murray. The development of the plan will consider issues of equity, property rights and water trading. A reduction in consumptive use of 750 gigalitres would equate to about 10 per cent of allocation and 7 per cent of use. It would increase the median flow at the river mouth by about 20–25 per cent to a total of 35 per cent of the river's median natural flow.

Importantly, in deciding to proceed with consultation on the three environmental flow options, the Ministerial Council effectively ruled out the 'no allocation' option.

National road transport reform

Each State and Territory is responsible for road transport regulation in its jurisdiction. This approach has led to diverse regulations for driver and vehicle operations and standards, weights and dimensions. In the early 1990s governments agreed to measures to address the differences in regulation, establishing the Heavy Vehicles Agreement and the Light Vehicles Agreement in 1991 and 1992 respectively. The former agreement provides for the development of uniform or consistent national regulatory arrangements for vehicles over 4.5 tonnes gross vehicle mass; the latter extends the national regulatory approach to cover light vehicles.

The National Road Transport Commission developed the national road transport reform package; comprising 31 initiatives in six modules (registration charges for heavy vehicles; transport of dangerous goods; vehicle operations; heavy vehicle registration; driver licensing; and compliance and enforcement). The Australian Transport Council oversees implementation of the reforms. CoAG endorsed a framework of 19 of the 31 reforms, criteria for assessing implementation and target dates for the 1999 NCP assessment and another framework of six reforms for the 2001 NCP assessment.

Governments have not listed several reforms from the original package — notably the speeding heavy vehicle policy and the higher mass limits reforms — for assessment under the NCP. (Some governments have implemented these reforms, however, in part or in whole.) Governments have also not listed for NCP assessment the national road transport reforms (such as the second and third heavy vehicle reform packages) that have been developed subsequently to the original six-module package.

Governments did not endorse a road transport reform framework for NCP assessment in 2002. The Council has assessed road transport reform implementation in the 2002 NCP assessment, however, considering governments' progress with reforms that were not implemented and operational at the time of the 2001 NCP assessment. In the 2001 assessment, the Council found that:

- all governments had implemented uniform heavy vehicle registration charges and had updated these in 2000;
- the 19 second tranche (1999) reforms were about 93 per cent implemented on the ground; and
- the six third tranche (2001) reforms were about 80 per cent implemented on the ground.

The 2001 NCP assessment found that all governments had ongoing implementation work to complete. This meant that some governments were

technically in breach of their road transport reform obligations.[14] The Council found, however, that implementation was well advanced in all jurisdictions. Given this progress, the Council considered that governments warranted additional time to complete their reform programs. It decided to reassess implementation in the 2002 NCP assessment. Tables 3.4 and 3.5 list the 1999 and 2001 reforms outstanding at 30 June 2001, by jurisdiction.

The overriding consideration for the Council in the 2002 NCP assessment is the importance of each government achieving a common regulatory platform consistent with the Australian Transport Council assessment frameworks. Accordingly, for a government to be assessed as fully complying, it needed to have made its agreed contribution to achieving the common platform. Except where there are formal exemptions or accepted alternatives, jurisdictions must have implemented every reform element and success criterion identified in the assessment frameworks for the reform to be assessed as completed.

[14] Governments accepted that the ongoing implementation work in both New South Wales and Victoria would take several years. Consequently, the Council considered that neither New South Wales nor Victoria was in breach of their NCP road transport obligations.

Table 3.4: Incomplete or delayed 1999 NCP reforms, at 30 June 2001

Jurisdiction	*Reform*	*Likely date*	*Action required to complete reform*
Queensland	3 Driver licensing	December 2001	System changes to be completed to incorporate the national graduated suspension scheme for demerit points.
Western Australia	2 Registration scheme	December 2001	Amendment to be re-introduced to Parliament. Amendment had not been passed when Parliament was prorogued before the 2001 Western Australia State election.
	3 Driver licensing	December 2001	Additional amendments to the Act and Regulations to be passed, for the element pertaining to mutual recognition of licences and offences.
	4 Vehicle operations	June 2001	Some amendments being drafted but others first require amended legislation to provide regulation-making powers. Amended Act and Regulations then need to be promulgated.
	5 In-service standards	June 2001	Some amendments being drafted but others first require amended legislation to provide regulation-making powers. Amended Act and Regulations then need to be promulgated.
	9 One driver/one licence	December 2001	Additional amendment to the Act and Regulations to be passed.
	13 Safe carriage and restraint of load	June 2001	Additional amendments to the Act and Regulations to be passed, although reform is occurring in practice through administrative process.
South Australia	2 Registration scheme	July 2001	Systems completed. Parliament passed the remaining regulations on 16 July 2001.
	3 Driver licensing	June 2001	Systems completed. Parliament passed the remaining regulations on 16 July 2001.
ACT	2 Registration scheme		Regulations implementing continuous registration rejected by Legislative Assembly.
Commonwealth	2 Registration scheme	early 2002	Legislation to be drafted and passed by Parliament.

Table 3.5: Incomplete or delayed 2001 NCP reforms, at 30 June 2001

Jurisdiction	*Reform*	*Likely date*	*Action required to complete reform*
New South Wales	2 Australian road rules	Several years	Replacement of 'No Standing' signs to be completed.
	3 Combined bus and truck driving hours	–	*New South Wales noted that it would not be increasing bus driving hours to match truck driving hours.*
Victoria	2 Australian road rules	Several years	Repainting of continuous white lines on roads completed.
Queensland	6 Axle mass increases for ultra-low floor buses	November 2001	
Western Australia	1 Combined vehicle standards	Not known	Mudguard spray suppression and 90 kilometres per hour speed limiters still to be considered by the Government. No certain commitment or implementation date for these elements.
South Australia	4 Consistent on-road enforcement for roadworthiness	July 2001	Parliament passed legislation on 16 July 2001.
	6 Axle mass increases for ultra-low floor buses	June 2001	Regulations to be promulgated.
Tasmania	1 Combined vehicle standards	July 2001	
	6 Axle mass increases for ultra-low floor buses	December 2001	The mass increase for ultra-low floor buses being allowed by permit until the Vehicle Operations Regulations are amended.
Northern Territory	1 Combined vehicle standards	July 2001	Regulations to be passed by the Executive Council.

Implementation of reforms outstanding at 30 June 2001

Accounting for the formalised and practical exemptions from the road transport reform program, the Council considers that governments had satisfactorily implemented 182 of 192 assessable reforms (95 per cent of all reforms across all jurisdictions) at 30 June 2002. Of the 147 reforms in the 1999 NCP framework across all jurisdictions, 139 (95 per cent) were satisfactorily implemented at 30 June 2002. Western Australia has six remaining reforms, and the ACT and Commonwealth each have one outstanding. Most of these reforms are expected to be implemented by the end of 2002. Queensland and South Australia implemented all outstanding reforms during the past 12 months and both have fully complied with the 1999 reform obligations.

Of the 45 reforms in the 2001 NCP assessment framework, 43 (96 per cent) were implemented at 30 June 2002. Western Australia and the Northern Territory each have one remaining reform: Western Australia expects to have fully implemented its remaining reform by October 2002 and the Northern Territory is likely to complete its remaining reform by 2003. Since the 2001 NCP assessment, Queensland, South Australia and Tasmania have completed their reform obligations. New South Wales, Victoria and South Australia have continued to comply through their ongoing implementation of changes to street signage and continuous centre line markings on roads, in line with their 2006 target completion date.

Table 3.6 indicates the reforms that were incomplete at 30 June 2002, the jurisdictions still to complete these reforms and the expected completion dates.

Table 3.6: Reform implementation, at 30 June 2002

Road reform	*Jurisdiction still to complete implementation (expected completion date)*
1997 NCP assessment	
First heavy vehicle registration charges determination	
1999 NCP assessment	
1 Dangerous goods — nationally consistent registrations and code	
2 Heavy vehicle registration schemes — national consistency	Western Australia (mid-2003), the ACT (December 2002) and the Commonwealth (2003).
3 Driver licensing — uniform classes, procedures, renewals, cancellations, medical guidelines, exemptions, demerit points etc.	Western Australia (spring 2002).

(continued)

Table 3.6: continued

Road reform	*Jurisdiction still to complete implementation (expected completion date)*
4 Vehicle operations — uniform mass and load registrations; consistent oversize/overmass regulations/exemptions/pilots/escorts; restricted access vehicle	Western Australia (October 2002).
5 Uniform heavy vehicle standards (superseded by combined vehicle standards)	Western Australia (October 2002).
6 Truck driving hours	
7 Bus driving hours	
8 Common mass and load rules — axle mass spacing schedule up to 42.5 tonnes gross vehicle tonnes for 6 axles; 62.5 tonnes for tri-tri-B-doubles; set fines for exceeding these limits	
9 One Driver/one licence	Western Australia (October 2002).
10 Improved network access — expanded gazetted rotes for B-doubles and approved large vehicles (road trains and 4.6 metre high trucks) in lieu of permits	
11 Common pre-registration standards — nationwide acceptance to enable trucks to be sold and used in any jurisdiction	
12 Common roadworthiness standards — mutual recognition of standards and enforcement practices	
13 Safe carriage and restraint of loads	Western Australia (October 2002).
14 National bus driving hours	
15 Interstate conversions of driver licences free of cost	
16 Alternative compliance — support for trial and endorsement of model legislation for mass and maintenance management	
17 Three- month and six-month short-term registration	
18 Driver offences/licence status — information provision to employers with employee's consent	
19 National exchange of vehicle and driver information system stage 1 — in-principle agreement to link driver and vehicle information nationally	
2001 NCP assessment	
1 Combined vehicle standards — uniform vehicle design and construction standards	Western Australia (October 2002), Northern Territory (2003).
2 Australian road rules — national rules obeyed by all road users	
3 Combined truck and bus driving hours — nationally consistent driving hours (14 hours, including 12 in any 24-hour period etc.), Chain of responsibility (extended offences) provisions; transitional fatigue management scheme etc.	
4 Consistent on-road enforcement for roadworthiness — written warning; minor defect notice; major defect notice	
5 Second heavy vehicles registration charges determination	
6 Rear axle mass increase of one tonne for ultra-low-floor buses within the overall 16 tonne gross vehicle mass limit	

Assessment

The Council is satisfied that New South Wales, Victoria, Queensland, South Australia and Tasmania had completed all NCP road transport reform obligations at 30 June 2002. Implementation is ongoing in Western Australia, the ACT, the Northern Territory and the Commonwealth, which have not met completion targets advised in earlier NCP assessments. Each of these jurisdictions is continuing to implement the remaining reform elements.

Related matters warranting consideration by governments

The Council found that governments had substantially completed the 26 specific reform initiatives of the road transport assessment frameworks endorsed by CoAG at 30 June 2002. The Council's consultation during this assessment nevertheless found widespread dissatisfaction within the road transport industry about the implementation of national road reform program and the processes involved. The following are the industry's main concerns.

- The 26 assessable reform elements approved by CoAG for NCP assessment represent only about 13 full reforms out of the 30 to 40 that have resulted from the National Road Transport Commission's research and development programs. CoAG has not endorsed NCP assessment of fundamental productivity reforms such as the heavy vehicle axle mass increases recommended in the 1995 Mass Limits Review and the Second Heavy Vehicle Reform Package. The industry is concerned that progress with implementing these reforms may be slower as a result.

- The benefits of uniformity and consistency for businesses across Australia are not being fully realised because scope of some endorsed reforms is insufficient (particularly the scope of the first transport reform — uniform heavy vehicle registration charges). Differences among jurisdictions in relation to stamp duty and third party insurance, and the staggered dates for registration charge updates and adjustments across jurisdictions provide incentives for business to register vehicles in different jurisdictions. Car and truck hire companies in New South Wales, for example, commonly register their vehicles interstate.

- While the 26 CoAG-endorsed reforms have target implementation dates to facilitate uniformity, several other road transport reforms have not. Implementation of these reforms is generally occurring at different times in different jurisdictions. Consequently, the potential benefits to government, industry and the community from greater consistency in laws nationwide are not being achieved until the reform is implemented in the last jurisdiction. Governments' implementation of reforms at different times militates against competitive neutrality and tends to offset some of the realisable gains and reduce the credibility of the reform programs overall.

- Several reforms, such as those dealing with dangerous goods, heavy vehicle standards and vehicle operations, are interim measures that require subsequent reforms or updates. This requirement increases the importance of timely and consistent implementation by all governments.

- Many reforms are ultimately directed at changing behaviour at the owner-driver or driver levels. At these levels, minimum pay rates (charge rates) are increasingly perceived to be central to achieving safety and compliance objectives. Adequate remuneration of drivers and owner-drivers will reduce the incentives for overloading, speeding and other substandard practices.

In addition to the industry concerns, the Council's consultations indicate that some drivers legally hold licences concurrently from different jurisdictions. This indicates a deficiency in the implementation of the one driver/one licence reform, perhaps due to administrative inconsistencies among jurisdictions. (This reform is intended to ensure, among other objectives, that there are checks, particularly at the time of licence renewal or transfer, made to eliminate multiple licence holding.)[15]

The ability of authorities to apply the one driver/one licence policy across all jurisdictions is likely to be diminished by delays in the full implementation of the National Exchange of Vehicle and Driver Information System (NEVDIS).[16] NEVDIS stage 1 involved in-principle agreement by governments to develop systems and link databases. The follow-on system development and linking stages (stages 2 and 3 respectively) have been implemented in all jurisdictions except Tasmania. (The ACT expects to be linked by July 2002.) Tasmania is committed to NEVDIS, but its system development and linking may require the redevelopment of its motor vehicle registry system, which means that stage 3 could take up to three years. Tasmania is examining the need for system redevelopment and how best it can participate in NEVDIS in the interim. It is expected to implement various subsystems (such as the Written-Off Vehicle Register) by agreed target dates. While CoAG did not endorse NCP assessment of NEVDIS stages 2 and 3 and related requirements, delays in implementation by one jurisdiction can significantly compromise the integrity of programs across all jurisdictions.

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[15] Some objectives of the one driver/one licence reform have been achieved. A driver can no longer lose their licence in one jurisdiction and legally obtain a licence in another jurisdiction, for example.

[16] NEVDIS provides the foundation for national road reforms relating to vehicle registration and driver licensing, motor vehicle theft reduction strategies and other national initiatives that depend on the interchange of information among the States and Territories.

4 Primary industries

This chapter assesses governments' fulfilment of their Competition Principles Agreement (CPA) obligations as these arise in:

- agricultural commodity supply management and marketing;
- agriculture-related products and services;
- mining;
- fisheries; and
- forestry.

The review and reform of anticompetitive regulation (CPA clause 5) dominates National Competition Policy (NCP) activity in these areas. Also important is the application of competitive neutrality (CPA clause 3) in forestry and structural reform (CPA clause 4) in sugar marketing.

Agricultural product marketing

Governments have a long history of involvement in the marketing of agricultural products. A Productivity Commission staff research paper (PC 2000d) recently reviewed this history, noting that farmers began to voluntarily form State or regional cooperatives at the turn of the twentieth century. Following World War I, agricultural product prices boomed and then collapsed, sparking State governments into legislating compulsory membership of formerly voluntary cooperatives. Following World War II, when a similar price collapse was feared, farmers embraced national statutory price stabilisation and marketing arrangements. These arrangements guaranteed average returns via Commonwealth Government underwriting of export receipts and domestic price setting. In the 1970s and 1980s, in response to growing evidence of production inefficiencies and costs to taxpayers and domestic consumers, the Commonwealth Government reformed and, in some cases, phased out these schemes. Statutory marketing authorities, commonly referred to as 'single desks', nevertheless remain for some key agricultural products. Table 4.1 sets out the principal agricultural activities with 'single desks' at the time governments introduced NCP.

Table 4.1: Key agricultural products with statutory marketing arrangements when the NCP was introduced

Product	*Jurisdiction(s)*
Coarse grains and oilseeds	New South Wales, Victoria, Queensland, Western Australia and South Australia
Dairy	Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and the ACT
Eggs	Queensland, Western Australia and Tasmania
Horticulture	Commonwealth
Poultry meat	New South Wales, Victoria, Queensland, Western Australia and South Australia
Potatoes	Western Australia
Rice	New South Wales
Sugar	Queensland
Wheat	Commonwealth, New South Wales, Victoria, Queensland, Western Australia and South Australia

Legislative restrictions on competition

In terms of the NCP, the relevant feature of most 'single desks' is the monopoly they hold on selling an agricultural product grown within their jurisdiction. This may be a domestic sales monopoly (such as for potatoes in Western Australia) or an export sales monopoly (such as that held by AWB Limited, formerly the Australian Wheat Board) or both (such as those held by the Queensland Sugar Corporation and the New South Wales Rice Marketing Board).

A 'single desk' generally pays farmers a price that reflects an average of the prices it receives, less its marketing and transport costs. It also usually determines such matters as crop varieties planted and quality grades. A 'single desk' with a domestic sales monopoly usually has rights to acquire produce compulsorily from farmers, to prevent farmers from selling their produce interstate. 'Single desks' thus require individual farmers to give up a considerable degree of choice in how they operate their business, what they produce and how they market their production. In return, farmers expect to benefit from earning a higher net income over the long term.

Regulating in the public interest

The Productivity Commission assessed at some length the arguments for 'single desks' (PC 2000d). In summary, it argued that a *prima facie* case for restricting competition in export marketing exists where:

- a country's demand for imports from Australia is relatively insensitive to price, supply from competing sources is constrained and there are limited substitute products; or

- a country imposes a quota on imports of the product(s) from Australia.

In either of these circumstances, restricting competition between rival Australian exporters is expected to raise national income received from the particular export market. This will be in the overall public interest so long as income forgone in other export markets and any productivity losses in Australia do not exceed this additional income. Productivity losses may arise through pooling – which may increase domestic prices, reduce rewards for quality and innovation, and foster inefficient logistical arrangements – and reduced risk spreading opportunities for producers and competing domestic marketers.

Any net benefit from restricting competition in export marketing should be maximised by allowing competition in:

- those export markets that do not clearly match the above circumstances; and

- Australia's domestic markets as much as possible (that is, markets for the product, substitutes, intermediate goods, associated services and factor markets).

This is more likely to be achieved through export licensing or export taxes than through maintaining a conventional 'single desk'.

Restricting competition in domestic marketing may be in the public interest where this would achieve benefits such as:

- allowing consumers to make informed product choices;

- supporting consumer confidence in product safety;

- promoting equitable dealing with small businesses; and

- assisting small businesses to become more efficient;

and where costs (such as increased prices or reduced product quality) do not exceed the value of these benefits.

Governments' review and reform activity relating to agricultural product marketing regulation is discussed and their compliance with CPA obligations assessed for the following products:

- wheat, barley and other grains;

- poultry meat; and

- other products — dairy, eggs, horticulture, rice, sugar and potatoes.

Wheat, barley and other grains

For many years, the Commonwealth and most States and Territories maintained grain marketing authorities with an exclusive right within their jurisdiction to acquire prescribed grains and to sell in domestic and/or export markets (table 4.2). The central aim of these statutory grain marketing monopolies was to establish market power and thereby raise prices received for the regulated commodities.

Table 4.2: Grains subject to marketing restrictions before NCP review and reform

Jurisdiction	*Legislation*	*Marketing board*	*Domestic*	*Export*
Commonwealth	*Wheat Marketing Act 1989*	Australian Wheat Board		Wheat
New South Wales	*Grain Marketing Act 1991*	NSW Grains Board	Barley Sorghum Oats Canola Safflower Sunflower Linseed Soybeans	Barley Sorghum Oats Canola Safflower Sunflower Linseed Soybeans
Victoria	*Barley Marketing Act 1993*	Australian Barley Board	Barley	Barley
Queensland	*Grain Industry (Restructuring) Act 1993*	Grainco Australia Limited	Barley Sorghum	Barley Sorghum
Western Australia	*Grain Marketing Act 1975*	Grain Pool of Western Australia		Barley Canola Lupins
South Australia	*Barley Marketing Act 1993*	Australian Barley Board	Barley Oats	Barley Oats
Northern Territory	*Grain Marketing Act 1983*	NT Grain Marketing Board	Various	Various

As well as their own grain marketing monopolies, most States also had legislation importing the Commonwealth *Wheat Marketing Act 1989* into State jurisdiction. This State legislation generally has no significant practical restrictive effect beyond the Commonwealth Act, so is not a priority competition matter.

In the seven years since the signing of the CPA, there has been much change. Victoria and the Northern Territory have removed all restrictions on coarse grain marketing, to be followed by Queensland on 1 July 2002 and New South Wales on 30 September 2005. The Commonwealth has allowed limited competition in export marketing of wheat. Western Australia is finalising a

review of its restrictions and South Australia is to complete a further review by November 2002.

Commonwealth

Review and reform activity

The National Competition Council found in the 1999 NCP assessment that the Commonwealth Government had not met its obligations under the CPA clause 4 (structural reform of public monopolies) in relation to the privatisation of the Australian Wheat Board (AWB). The Commonwealth did not show that it had reviewed matters such as the appropriateness of granting a monopoly to a private company and the most effective means of separating regulatory functions from commercial functions of the public monopoly (clause 4[3][d]).

In early 2000, the Commonwealth Government commissioned a three-member committee to review the Wheat Marketing Act against CPA clauses 4 and 5 and other policy principles. The committee received some 3000 submissions and conducted consultations throughout the country and overseas. It released a draft report for comment in mid-October 2000, and the Commonwealth Minister for Agriculture released the final report on 22 December 2000.

In relation to the CPA clause 5, the committee argued that introducing more competition was more likely to deliver greater net benefits to growers and the wider community than would continuing the export controls (Irving, Arney and Lindner 2000). It found that:

- any price premiums earned by virtue of the 'single desk' are likely to be small (estimated at around US$1 per tonne in the period 1997–99);
- the 'single desk' is inhibiting innovation in marketing; and
- the 'single desk' is impeding cost savings in the grain supply chain.

Estimates of the economic impact of the 'single desk' arrangements ranged from a gain of $71 million per year to a loss of $233 million. The committee felt, however, that it would be premature to repeal the Act without a further, relatively short evaluation period. The committee was concerned that the estimation of benefits and costs is complex and that some uncertainty remained. It also believed there is a 'possibility that the new more commercial arrangements for wheat marketing might achieve more clearly demonstrable net benefits than was evident during this review' (Irving, Arney and Lindner 2000, p. 7). The committee therefore recommended that:

- the Commonwealth retain the 'single desk' until the 2004 review required by the Act;

- this review be the final opportunity to show a net community benefit from the arrangements, and that it incorporate NCP principles; and

- the Commonwealth convene a joint industry/government forum to develop performance indicators for the 2004 review.

The committee also recommended that the Wheat Export Authority (WEA) trial for the three years until the 2004 review a simplified export control system whereby it licenses exporters annually. It believed that the freight rate differential between bulk exports and exports in containers and bags provided a high degree of protection for bulk exports by AWB International (AWBI) to all markets except Japan, and that opening up the export of wheat in containers and bags would allow highly desirable innovation in the discovery, development and expansion of markets for wheat exports.

In relation to the CPA clause 4 structural reform obligation, the committee found that the Act has not achieved a clear separation of the regulatory and commercial functions of the former AWB. It recommended that the Commonwealth amend the Act to:

- ensure the WEA is totally independent; and

- allow, for the three years until the 2004 review, the authority to consent to the export of:

  – wheat in bags and containers without consulting AWBI; and

  – durum wheat without obtaining AWBI's written approval.

The Commonwealth's response to the review recommendations was announced on 4 April 2001. It retained the 'single desk' but declined to conduct the 2004 review under NCP principles. It argued that the latter decision is necessary to avoid further uncertainty in the industry and for wheat growers.

The Commonwealth also declined to amend the Act to ensure the independence of the WEA, particularly in relation to the export consent arrangements. According to the Commonwealth, removal of the AWBI's role would have significantly changed the balance between the operations of the WEA and AWBI, which might have affected the AWB's then proposed listing on the Australian Stock Exchange.

The Commonwealth asked the WEA to develop rigorous and transparent performance indicators, however, to ensure the 2004 review accurately measures the benefits to industry and the community. On 4 September 2001, the authority released a framework for monitoring AWBI's performance in:

- its role in the export consent arrangements; and

- its own export marketing and supply chain management.

The WEA will annually report the results of its monitoring to the Minister for Agriculture and the Grains Council of Australia. It also releases a summary report to the public. A working group — comprising the WEA, AWBI, the Department of Agriculture, Fisheries and Forestry, and the Grains Council of Australia — developed the framework. It considered the views of the other industry representatives.

Finally, the Commonwealth agreed to improve the export consent system based on the licensing arrangements proposed in the review. On 28 September 2001, the WEA announced changes to the export consent arrangements from 1 October. The changes included specified consent criteria, a quarterly application cycle, a 12-month consent for shipments to niche markets and a 3-month consent for other shipments. The above working group developed these changes too.

Assessment

The Council is satisfied that the Commonwealth's review of the Wheat Marketing Act was open, independent and rigorous. It involved extensive public consultation, the review committee was generally accepted as capable of undertaking an independent and objective assessment of all relevant matters, and the recommendations were well grounded in the available evidence. Nevertheless, the Commonwealth has not yet fulfilled its CPA clause 5 obligation. The 2000 review did not show that retaining the wheat export 'single desk' is in the public interest; as noted above, it found that allowing competition is more likely to be of net benefit to the community. The CPA clause 5 obligation therefore remains outstanding.

The wheat export 'single desk' will be subject to review again in 2004. The Council is not confident, however, that this review will meet the standard expected of a CPA clause 5 review and deliver a robust outcome. First, the Minister for Agriculture has ruled out conducting the 2004 review under NCP principles, 'to avoid further uncertainty in the industry and for wheat growers' (Truss 2001). Second, the Minister was reported as saying that the wheat export 'single desk' will continue beyond the 2004 review (Rayner 2002). Third, the performance monitoring framework developed for the 2004 review is inadequate.

The framework does not appear to consider the benefits and costs of the 'single desk' to sections of the community other than growers. Analysis for the 2000 review indicated there would be net gains from removing the wheat export 'single desk' including that:

- domestic consumers of wheat (such as flour millers, stock feed processors and intensive livestock farmers) would gain slightly from a reduction in domestic wheat prices; and

- regional communities would be better off in the long term.

The framework's measures of price discrimination — the central means by which a 'single desk' might improve returns to growers — are unlikely to be conclusive. These measures rely on the Wheat Industry Benchmark[1] developed by AWBI. The 2000 review found that similar measures did not explain whether observed price differences were due to competition restrictions or other factors.

Fourth, the Council is concerned that the WEA may not be sufficiently independent. The Productivity Commission recently said of the authority's equivalent in the horticulture industry, Horticulture Australia Limited (HAL), that:

> *HAL could not be regarded as a suitably independent body to conduct reviews, for two important reasons:*
>
> - *first, HAL administers the export control powers, which raises the risk that it may tend to favour outcomes that maintain or expand its role; and*
>
> - *second, HAL is an industry-owned company, with peak grower bodies as its shareholders, which could raise perceptions (at least) that it may tend to favour grower interests over the interests of others.*
>
> *It is a well established principle that those who develop policy should be different from those who administer it.'* (PC 2002a, p. 175)

The first critique certainly applies to the WEA. The second critique is not directly applicable but there is a clear parallel. The authority is not an industry-owned company, but two of its board members are representatives of the Grains Council of Australia, which has a longstanding policy of support for the wheat export 'single desk'.

The Council therefore concludes that the Commonwealth has not offered a reasonable prospect of meeting its CPA clause 5 obligation relating to the regulation of wheat export marketing.

For now, the WEA's export consent arrangements will govern the degree of competition in the export of Australian wheat. The Council is concerned that the revised arrangements are substantially more restrictive than the regime recommended by the 2000 review. Under the revised arrangements, exporters are not, as the 2000 review recommended, granted a licence to export subject to certain conditions (such as destination, shipment method and reporting). Rather, the WEA requires exporters to obtain its consent for every individual export shipment, although it now allows exporters to make one application

[1] The Wheat Industry Benchmark principally compares the actual US dollar price received by AWBI with the average US dollar price for a basket of similar US and foreign wheat grades. It also benchmarks AWBI's management of its foreign exchange exposure and supply chain costs.

covering multiple proposed shipments. Thus, an exporter holding a 12-month 'niche market' consent (principally for bagged/packaged wheat) is permitted to export only the shipments specified in their consent application, which must be submitted two months before the consent period begins. Exporters must make further applications for any other proposed shipments. This imposes a significant compliance burden on exporters and hampers their ability to pursue export opportunities that arise at short notice and to meet changes in customer requirements.

In addition, the guidelines to the revised arrangements leave considerable uncertainty for exporters about whether a proposed shipment will be granted a consent and for what volume. In determining the eligibility of an exporter, the WEA is to have regard to 'Australia's reputation in overseas markets as a reliable supplier of wheat' and is to assess 'the exporter's history in international commodity trade, especially in the export of wheat and grain from Australia', and 'any other relevant matter'. The WEA thus appears to have a wide scope for discretion. Moreover, protecting Australia's reputation is not an objective or function specified in the Act or identified by the 2000 review or the Commonwealth response on 4 April 2001.

The Commonwealth Office of Regulation Review reported that the regulation impact statement prepared for these revised guidelines was inadequate.

In relation to CPA clause 4, while the Commonwealth has now undertaken the review that it was obliged to do before privatising the AWB, it has not addressed the 2000 review committee's recommendations to amend the Act to ensure the independence of the WEA, particularly its role in controlling exports. In the Council's view, it is not sufficient to argue that this would have significantly changed the balance between the operations of the WEA and AWBI, and might have affected the AWB's then proposed listing on the Australian Stock Exchange. This argument by the Commonwealth simply underlines its failure to conduct a CPA clause 4 review before privatising the AWB. Structural reform pre-privatisation is generally much more likely to be successful than reform post-privatisation (as recognised by CPA clause 4). The Council therefore finds that the Commonwealth is still to meet its CPA clause 4 obligations. The Council will not revisit these matters unless the Commonwealth moves towards meeting its CPA obligations.

New South Wales

Review and reform activity

The Government of New South Wales appointed a group of four Government representatives and four industry representatives to review the *Grains Marketing Act 1991*. The review group reported to the Government in July 1999. A majority of the review group found that there is no market failure or other justification for domestic market restrictions, and

recommended removing the restrictions by no later than 31 August 2001 for malting barley and no later than 31 August 2000 for all other grains.

In relation to export market restrictions, a majority of the review group found that the statutory status of the NSW Grains Board gave it privileged access to premium prices available in the Japanese market for feed and malting barley, and that this is of net benefit to the New South Wales economy. A majority also favoured retaining restrictions on sales of malting barley to China, although the evidence to justify this restriction was inconclusive. Consequently, the majority recommended that restrictions be retained only for:

- sales of feed and malting barley to Japan and sales of malting barley to China; or
- all export sales of feed and malting barley if discriminating between countries proves to be impractical.

The majority of the review group further recommended that these restrictions be reviewed again by August 2004.

Following release of the review report, the solvency of the NSW Grains Board came under mounting press and industry speculation. On 16 August 2000, the Minister for Agriculture announced that the board would retain its vesting powers for another five years and that the New South Wales Government would help it restructure its financial and trading arrangements.

Subsequently, however, the NSW Grains Board collapsed. Given that the Grain Marketing Act excluded other major grain buyers, growers were left without any buyer for regulated grain crops that were approaching harvest. On 26 October 2000, the Minister announced that 'Grainco Australia Limited will act as the sole agent for the NSW Grains Board on future trading and marketing of export barley, canola and sorghum, and domestic malting barley' and that 'this agency agreement will operate within the framework of the NSW Grain Marketing Act until 2005' (Amery 2000). The Minister also noted that 'Grainco Australia was the most favourable of the four tenderers to act as the Board's agent and the agreement ensures that all outstanding payments to growers will be met'. Grainco Australia bid $25.2 million for the right which it exercises under constraints set out in a Deed with the Government and the Administrator of the Grains Board.

All restrictions on the marketing of sunflower, safflower, linseed and soybeans, and domestic marketing restrictions for feed barley, canola and sorghum were subsequently removed. These changes, initially implemented administratively, were formalised by the *Grain Marketing Amendment Act 2001* assented to on 14 December 2001. The Amendment Act provides for the remaining restrictions on domestic marketing of malting barley and export marketing of feed barley, malting barley, sorghum and canola to expire on 30 September 2005.

Recently there has been significant grower disquiet about the pool prices offered by Grainco Australia in comparison with those available to Victorian growers. In response the Government has established an independent monitoring committee to scrutinise Grainco Australia's prices.

Assessment

From October 2005, there will be no restrictions on the marketing of grain in New South Wales. In the interim, however, restrictions remain on domestic marketing of malting barley and export marketing of feed barley, malting barley, sorghum and canola. New South Wales is obliged to show that the temporary retention of the remaining grain marketing restrictions is in the public interest.

As noted earlier, the only restrictions found by the 1999 review to be in the public interest were those on marketing of feed and malting barley to Japan and malting barley to China. These recommendations could not be considered to be reasonable on the basis of the evidence, however, for the following reasons.

The review group commissioned econometric analysis by the Department of Agriculture, but the only robust conclusion was that the NSW Grains Board had imposed a small net public cost by raising domestic prices for malting barley above export prices.

The review group's finding of a net benefit from restricting competition in marketing barley to Japan ultimately rested on:

- an observation that the Japanese market returned premium prices; and
- a judgment that continued access to this market depended on maintaining a statutory monopoly marketer.

Given that price premiums can be attributed to many factors other than market power — such as additional quality, service or reliability — and can occur in competitive markets, they are not sufficient as evidence of a benefit from restricting competition.

Also, the evidence on market access is questionable. The report notes that a Japanese representative (credentials undisclosed) told the government members of the review group that NSW Grains Board's access to market quota (and premium prices) is largely attributable to its quasi-government status. A quasi-government grain marketer need not necessarily have a monopoly, however, as recognised by the 1997 review of Victoria's and South Australia's barley marketing monopoly.[2] The New South Wales review report

[2] The review suggested that, if necessary to retain access to the Japanese barley market, the Australian Barley Board could have been retained as a statutory authority without single desk and compulsory acquisition powers (CIE 1997, p. 75).

notes that the Victorian/South Australian review and Queensland's 1995 review of its barley marketing monopoly, which recommended retaining the export monopoly (which expired on 30 June 2002). The New South Wales review report does not critically evaluate the evidence and findings in any of these other reports, but simply concludes that the review group made its finding 'on the weight of evidence'.

The review group did not find a net public benefit from restricting competition in marketing malting barley to China. It nevertheless recommended continuing the monopoly on exports to this market as a precaution in view of residual uncertainty about whether price premiums exist. As discussed above, any price premiums that exist are not sufficient evidence of a benefit from restricting competition.

The membership of the review group may explain why it made these recommendations without robust evidence. The review group included a representative from each of four parties with a direct stake in the outcome: the NSW Grains Board, the NSW Farmers Association, the Australian Grain Exporters Association and the Rural Marketing and Supply Association. These stakeholder representatives were unable to reach agreed positions on key issues, so the four Government members were left to determine the review group's majority findings and recommendations. This 'balanced stakeholder' model for constituting review groups may be appropriate for finding compromises between conflicting interests, but such compromises will not always be well grounded in evidence or in the best interests of the wider community.

In conclusion, the Council considers the 1999 review did not establish a robust net community benefit case for the temporary retention of restrictions on barley, canola and sorghum until September 2005.

In its 2002 NCP annual report, the New South Wales Government made a separate case for temporarily retaining these restrictions. It argued that:

- the NSW Grains Board's insolvency had the potential to undermine the State's entire coarse grain industry; and

- introducing arrangements substantially different from the existing legislative framework would have involved significant delays when it needed to act quickly.

The sudden collapse of the NSW Grains Board shortly before the 2000-01 harvest placed grain growers and their associated communities in a very difficult position: the restrictions imposed by the Grain Marketing Act meant they had no immediate buyer for their crops of regulated grain. It remains unclear to the Council, however, why the collapse necessitated the temporary retention of these restrictions until 2005. Other grain marketers operating in and around New South Wales could have been expected to quickly fill the gap left by the NSW Grains Board, much as Qantas and Virgin Blue did in the air transport market when Ansett collapsed. Amending the Act to facilitate such entry might not have been possible immediately, but there may have been

administrative solutions (such as the appointment of authorised agents or buyers) until amending legislation was passed. This was how the Government allowed Grainco Australia to enter the market in place of the NSW Grains Board.

In response to concern from some growers about the temporary retention of these restrictions, the Government stated that this arrangement ensured growers received the money they were owed from the 1999-2000 grain pools. The Council understands that the Government put in place a Treasury Corp loan to allow payments of money owed to growers and that growers are repaying this loan via an authorised buyer fee of $1.50 per tonne collected by Grainco Australia. Again, it is not clear to the Council why this necessitated the temporary retention of the marketing restrictions until 2005. There appears to be no reason to suggest that multiple authorised buyers could not have collected the levy almost as readily as one buyer.

In light of these questions, the Council considers that New South Wales has not adequately demonstrated that these remaining restrictions are in the public interest, and thus has not met its CPA clause 5 obligations in relation to this legislation. This failure is limiting the availability to barley, sorghum and canola growers of marketing options that may suit some growers better than do those options currently on offer. It is also limiting the growth opportunities for other grain marketers, including private traders who are often based in rural areas.

The Council acknowledges that the New South Wales Government went further in one instance than the 1999 review recommended — that is, the Government legislated the sunset of the barley export marketing restrictions, rather than extending them subject to further review in 2004. The Council also acknowledges that, while the Government considers this establishes a practical way of achieving outcomes that are consistent with NCP principles by September 2005, the New South Wales Cabinet Office has undertaken to consider and respond to suggestions put forward by the Council on bringing forward the September 2005 deadline for the 2003 NCP assessment. This is a positive step. The Council considers however, that responsibility for identifying and assessing options for bringing forward the removal of the remaining marketing monopoly rights appropriately rests with the New South Wales Government, which holds the necessary information about the terms of the arrangement with Grainco Australia.

The economic cost of retaining the remaining restrictions is not trivial. In 2000-01 New South Wales farmers produced an estimated $654 million of barley, sorghum and canola (ABS 2001b). For illustration, a productivity gain equivalent to 1 per cent of this production would benefit the New South Wales community by around $6.5 million per year.

The Council does not intend to consider this matter again unless New South Wales moves to meet its CPA clause 5 obligation, either by removing the monopoly powers, or by presenting evidence that clearly demonstrates the extension to September 2005 is in the public interest.

Victoria

Review and reform activity

In 1997 the Government of Victoria (with the Government of South Australia) commissioned an independent review by the Centre for International Economics of the *Barley Marketing Act 1993*. The review found, taking into account uncertainty about price sensitivities, the Australian Barley Board had only a 36 per cent chance of earning a premium in export feed barley markets by attempting to price discriminate. It found that any potential for a premium arose solely in the Japanese market. It considered however that even if a premium were available, the Australian Barley Board did not need 'single desk' powers to capture it.

Victoria accepted the review recommendations to:

- remove the domestic barley marketing monopoly;
- retain the export barley marketing monopoly for only the 'shortest possible transition period';
- restructure the Australian Barley Board as a private grower-owned company.

Domestic market reform for feed and malting barley was completed in mid-1999 and the Australian Barley Board transferred to grower ownership as ABB Grain Limited. Victoria passed legislation sunsetting ABB Grain Limited's export monopoly over barley from July 2001. In 2000 the new Victorian Government reconsidered the sunsetting of the barley export 'single desk'. It released a paper that explored three options: extending the arrangements beyond mid-2001; extending the arrangements beyond mid-2001 but broadening exemptions; and sunsetting the arrangements in mid-2001. The Government confirmed on 15 December 2000 that Victoria's barley export restrictions would cease on 30 June 2001. As a result Victorian barley growers have had from 1 July 2001 unrestricted choice as to whom they sell their barley.

So far there has not been a comprehensive evaluation of the impact of deregulation on Victorian barley growers and the wider community. There is considerable anecdotal evidence of benefits, however. Prices offered to barley growers in Victoria have generally exceeded those in New South Wales and South Australia, reportedly prompting some growers in those States to truck their grain to Victorian storages, although there inevitably remains debate about the extent to which deregulation is responsible, versus other factors such as local shortages and freight cost changes. Victorian growers have certainly enjoyed many more risk management options, with a variety of forward cash offers available in addition to traditional pools, allowing them to better align marketing risk with their cropping programs and individual

preferences. Deregulation has also been associated with investment in new more efficient storage and handling facilities in regional areas.

Assessment

As reported in the Council's 2001 NCP assessment, Victoria has met its CPA obligation relating to the Barley Marketing Act by allowing it to sunset on 30 June 2001.

Queensland

Review and reform activity

In 1997 the Government of Queensland submitted the *Grain Industry (Restructuring) Act 1993* to review by a panel of industry and Government representatives, including one from Grainco Australia, the operator of the barley marketing monopoly. The Government accepted the review recommendations to remove the domestic market restrictions and to extend the export market restrictions until at least mid-2002. The Act was amended to provide for the barley export restrictions to expire on 30 June 2002. Queensland has confirmed that it will not extend these restrictions.

Assessment

Queensland has met its CPA clause 5 obligation relating to the Grain Industry (Restructuring) Act, with the sunsetting of the export monopoly on vested grains (barley and wheat) on 30 June 2002.

Western Australia

Review and reform activity

The Western Australian Government initiated a Department of Agriculture review of the *Grain Marketing Act 1975* in 1999. A draft report released later that year recommended that the Government retain the coarse grain export marketing monopoly held by the Grain Pool of Western Australia (Grain Pool) pending the Commonwealth removal of the AWB Limited's wheat export marketing powers. The former Western Australia Government deferred a decision in light of various criticisms of the draft report's analysis.

The current Government returned the Act to review and, on 12 April 2002, released a Department of Agriculture discussion paper on the future of grain marketing regulation in the State. In the discussion paper, the department stated that:

- various studies of grain marketing show that it is difficult to identify conclusively the premiums from the exercise of market power; but

- in the case of the Grain Pool, any such premiums that exist are likely to be small.

The department concluded that removing the grain export monopoly would not be in the best interests of the Western Australian grain industry, however, because growers' investment in the Grain Pool would be threatened if AWB Limited was able to compete in the coarse grain market while enjoying a near-monopoly in the wheat market and because growers would be at an information disadvantage in open markets. The department instead proposed to establish a Grain Licensing Authority, which would:

- license a privatised Grain Pool to export bulk barley, lupins and canola; and

- grant permits for the bulk export of value-added grain products and for bulk grain exports not in competition with the Grain Pool.

In addition, export of grains in bags and small containers would be unrestricted, formalising current practice.

The Government is currently drafting legislation to restrict the export in bulk of prescribed grains (barley, lupins and canola and any other grains that regulations specify to be a prescribed grain) and to allow unrestricted export of all grains in bags and shipping containers. The legislation will establish the Grain Licensing Authority to grant special purpose for export licences under which agents other than the Grain Pool may export prescribed grain in bulk.

The Western Australian Premier wrote to the Council on 1 August 2002 to advise that the Government is 'committed to removal of the monopoly marketing powers of Grain Pool' and will 'take that step immediately the Australian Wheat Board is deregulated'. This statement indicates that the Government considers there is an overall benefit to the Western Australian community from removing all restrictions on grain marketing including for export.

In subsequent discussions, the Minister for Agriculture confirmed that the Government will legislate as soon as possible to remove all restrictions on how growers can market their grain, with date of effect the day after the Commonwealth removes the statutory monopoly held by AWB Limited. The Minister committed to ensuring that the approach in the interim, whereby the Grain Licensing Authority licences purchases of grain for bulk export, would be pro-competitive, with licences granted provided they did not undermine price premiums that would otherwise result from the market power available to the State's single desk.

To facilitate this, the Government undertook to ensure that the Grain Licensing Authority is independent from the Grain Pool and that the Grain

Pool would have not have veto power over the authority's decision to grant a purchase for export licence. In this regard, while the authority may consult with the Grain Pool, it would not refuse the grant of a purchase for export licence to another marketer because the Grain Pool objects to the grant of the licence. It may however reject the grant of a licence if it believes granting the licence would undermine price premiums achieved because of the market power held by the single desk.

Assessment

The Department of Agriculture's April 2002 discussion paper suggests that the Grain Pool would lose substantial market share (to AWB Limited) and therefore scale economies if its bulk export marketing monopoly is removed while the Commonwealth wheat export restrictions remain. If these arguments are correct, the consequence would be that the Grain Pool could not compete successfully with AWB Limited and others if the arrangements underpinning the Grain Pool monopoly are removed while wheat export marketing restrictions are in place.

The available evidence casts considerable doubt on the strength of the argument that the Grain Pool would not be able to compete with AWB Limited if Western Australia's export marketing arrangements are deregulated. The experience from deregulation of other agricultural markets is that the former statutory monopoly typically remains a major player. Incumbents generally enjoy important advantages over new entrants, such as established supplier and customer relationships, and sunk investment in infrastructure. Factors such as innovative customer service, closer integration with growers and distinctive product lines, all of which tend to be enhanced by market competition, are also important. Further, if the Grain Pool believes that increasing scale is important, then it could seek commercial alliances with other grain industry players, as it is already doing via the proposed merger with Cooperative Bulk Handling Limited and the marketing alliance with ABB Grain Limited (Grain Australia).

The other defining argument in the discussion paper is that growers are unfamiliar with exercising choice in how they should best market their grain and therefore are at risk of being disadvantaged by marketers. Grower inexperience is clearly an important consideration in any decision to remove the restrictions. The better response, however, is to mount an education program for growers, as Victoria did when its marketing restrictions ended. Given such a program, the disciplines of a competitive grain acquisition market on marketers, and the ready availability of price benchmarks, there is every reason to expect growers would adapt readily to the expansion of production and marketing choices that would arise from the removal of the grain export marketing restrictions.

Notwithstanding these questions about the strength of the rationale for retaining Western Australia's grains export monopoly, the Council accepts that the interim course of action proposed by Western Australia will enable parties other than the Grain Pool to export grain in bags and containers and

in bulk (except where price premiums deriving from market power are likely to be affected) in competition with the Grain Pool. The Government's statements suggest that the Grain Licensing Authority will grant a licence for the bulk export of prescribed grains in all cases except where it believes that this would undermine genuine market power available to the single desk. Given this, and the Western Australian Government's commitment to legislate now for the deregulation of its grain export monopoly immediately the Commonwealth deregulates wheat marketing arrangements, the Council accepts that Western Australia has met its NCP obligations for 2002 in relation to grain marketing. The Council will assess Western Australia's new legislation against the Government's commitments (set out above) in the 2003 NCP assessment.

South Australia

Review and reform activity

As noted above, in 1997 South Australia commissioned (with Victoria) an independent review of the *Barley Marketing Act 1993* and subsequently accepted the recommendations to remove domestic market restrictions and to retain the barley export monopoly for the shortest possible transition period – determined by both governments to be until 30 June 2001. In September 2000, however, the South Australian Government announced that it would extend the monopoly indefinitely, citing 'overwhelming grower support' and a report for ABB Grain Limited which concluded that the company could extract price premiums in the Japanese barley market. The South Australian Parliament then passed the *Barley Marketing (Miscellaneous) Amendment Act 2000*, which removed the sunset clause but required a review of the barley export monopoly in two years (by November 2002).

Assessment

The report on which the South Australian Government based its decision to extend the barley export monopoly found that the monopoly returned a $15 million gain to national economic welfare, including $11 million from the Japanese market (EconTech 2000). The case made by this report has several important flaws however.

First, the report assumes that import quotas fix the volume of sales to Japan, so competing Australian exporters could not increase sales to that market. No evidence is offered to support this assumption, which is not consistent with information available to the Council. The Council understands that the Japan Food Agency controls barley exports to Japan, but that there are no fixed quotas or contracts. Rather, the agency:

- decides the total import volume each year following discussions with end users;

- discusses prices and volumes annually with suppliers; and
- periodically calls for tenders from those suppliers with which it reached in-principle agreement.

Further, the Council understands that while the agency prefers suppliers with good track records, new suppliers are not excluded and enter the market each year. Any premiums observed in the Japanese barley market are likely to reflect, at least in part, the agency's strong preference for reliability of supply and quality throughout the year. There seems little evidence of the conditions necessary for ABB Grain Limited to have significant power to increase prices.

Second, in evaluating ABB Grain Limited's cost efficiency, the EconTech report compared the company with two other grain export monopolies, rather than with marketers sourcing grain competitively.

Third, the report did not consider alternative, less restrictive marketing arrangements, such as:

- having no 'single export desk', but ABB Grain Limited continuing to sell to the agency on the basis of its track record and grower loyalty; and
- licensing only ABB Grain Limited to export to Japan and allowing competition in exporting to other markets.

Fourth, the EconTech report cannot be considered a properly constituted NCP review. The report was commissioned by ABB Grain Limited, not by the Government. ABB Grain Limited has a clear direct interest in preserving its monopoly and, as a result, may have reduced incentive to seek an independent and objective analysis. Further, the public and other interested parties were not invited to participate in the review through appropriate consultative processes.

The Council considers that the EconTech report provides insufficient support for the proposition that restricting competition in the export marketing of South Australian barley is in the public interest. The most credible review remains that undertaken in 1997 by the Centre for International Economics, which recommended removal of the export monopoly after the shortest possible transition period. By failing to remove the export monopoly, or produce credible evidence that retaining the monopoly is in the public interest, South Australia has failed to meet its CPA clause 5 obligations in relation to the Barley Marketing Act.

Consequently, South Australian barley growers have fewer options for the sale of their output, and alternative export marketers are denied the opportunity to expand. Domestic barley users may also be disadvantaged, if export pooling by ABB Grain Ltd (that is, averaging of export returns) is distorting domestic prices. The net economic cost to the community is uncertain. It could be significant, though: South Australia farmers produced barley valued at $486 million in 2000-01 (ABS 2001b), accounting for 35 per

cent of Australia's total production. As noted earlier, Victorian growers appear to have benefited from deregulation, with anecdotal evidence of better barley prices, as well as more market risk management options and investment in more efficient storage and handling infrastructure.

The South Australian Government has provided a written commitment to the Council that the review due by November 2002 will be open, independent and robust and with terms of reference consistent with CPA clause 5(9). The Council will therefore finalise the assessment of South Australia's compliance in the 2003 NCP assessment. It will closely examine:

- the 2002 review process, analysis, conclusions and recommendations; and
- the Government's subsequent response, and its implementation of appropriate reform.

For the Council to find in 2003 that South Australia has met its CPA clause 5 obligations, the Government will need to have either:

- legislated to remove the export monopoly at the earliest practical date; or
- clearly and credibly demonstrated that its retention is in the public interest.

Table 4.3: Review and reform of legislation regulating wheat, barley and other grain marketing

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Wheat Marketing Act 1989*	Prohibits the export of wheat except with consent of the Wheat Export Authority or by AWBI.	Reviewed was completed in 2000 by an independent review committee. It found that introducing competition was more likely to deliver net benefits than continuing the export controls. It also found, however, that it would be premature to repeal the Act before a relatively short evaluation period of new commercial arrangements. It recommended: • retaining the export monopoly until the 2004 review; • incorporating NCP principles into the 2004 review; • developing performance indicators for the 2004 review; • moving from export consents to export licensing; • removing for a three-year trial the requirement that the Wheat Export Authority consult AWBI on consents for export of bagged and containerised wheat; and • removing for a three-year trial the requirement that the Wheat Export Authority obtain written approval from AWBI for the export of durum wheat.	In April 2001, the Commonwealth announced its acceptance of recommendations, except that it: • declined to incorporate NCP principles in the 2004 review; • retained the requirement for consultation with AWBI on consents for export of bagged and containerised wheat; and • retained the requirement for written approval of AWBI for export of durum wheat. Performance indicators for the 2004 review are yet to be released.	Does not comply with CPA obligations.

(*continued*)

Table 4.3: continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Grain Marketing Act 1991*	Grants monopoly to NSW Grains Board over domestic and export marketing of all barley, sorghum, oats, canola, safflower, sunflower linseed and soybeans grown in the State.	Review was completed in July 1999. It recommended that restrictions on: • all domestic sales be removed, by no later than 31 August 2001 for malting barley and by no later than 31 August 2000 for all other grains; • export sales of feed and malting barley remain for only overseas markets where market power or access premiums can be demonstrated, to be reviewed again by 31 August 2004; and • export sales of all other grains be removed by 31 August 2001 for canola and by 31 August 2000 for sorghum, oats, safflowers, linseed and soybeans.	In October 2000 the Government announced that it would retain restrictions until 2005 on: • domestic sales of malting barley; • all export sales of feed and malting barley; and • all export sales of sorghum and canola. There will be no further review and Grainco Australia acts as agent to the insolvent Grains Board. An Independent Monitoring Committee will scrutinise prices achieved by Grainco Australia.	Does not comply with CPA obligations.
Victoria	*Barley Marketing Act 1993*	Granted monopoly to Australian Barley Board over domestic and export marketing of all barley grown in the State.	Review was completed in 1998 jointly with South Australia, recommending that Victoria: • remove the domestic barley marketing monopoly; • retain the export barley marketing monopoly for only the 'shortest possible transition period'; and • restructure the Australian Barley Board as a private grower-owned company.	Act was amended in 1999 to remove monopoly on: • domestic barley from1 July 1999; and • export barley from 1 July 2001. The board was transferred into grower ownership on 1 July 1999. It has no regulatory powers.	Meets CPA obligations (June 2001).

(*continued*)

Table 4.3: continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Grain Industry (Restructuring) Act 1993*	Granted monopoly to Grainco Australia Limited over domestic and export marketing of all barley grown in the State.	Review was completed in 1997, recommending that Queensland: • remove the domestic monopoly; and • extend the export monopoly until at least mid-2002.	The Government accepted the recommendations and amended the legislation accordingly, including sunsetting the export monopoly on 30 June 2002.	Meets CPA obligations (June 2002).
Western Australia	*Grain Marketing Act 1975*	Grants monopoly to the Grain Pool of Western Australia over export marketing of all barley, lupins and canola grown in the State.	The Government has revisited the review begun by previous Government. Discussion paper released in 2002 proposed largely retaining export marketing restrictions under a Grain Licensing Authority. However it did not establish an adequate public interest case.	None. The Government has agreed to remove the Grain Pool's export monopoly upon removal of the AWB's export monopoly.	Does not comply with CPA obligations (June 2002).
South Australia	*Barley Marketing Act 1993*	Grants monopoly to Australian Barley Board over domestic and export marketing of all barley and oats grown in the State.	As for Victoria, plus removal of the oats marketing monopoly.	As for Victoria. In 2000, the Government removed the export monopoly sunset (thus continuing the export monopoly) and agreed to a further review after two years.	Council to finalise assessment in 2003.
Northern Territory	*Grain Marketing Act 1983*	Granted monopoly to the Grain Marketing Board over domestic and export marketing of all barley and coarse grains grown in the Territory.	Review was completed in 1997, recommending repeal of the Act.	Act was repealed in 1997.	Meets CPA obligations (June 2001).

Poultry meat

New South Wales, Victoria, Queensland, Western Australia and South Australia have all regulated the commercial relationships between poultry meat producers and processors. The regulation has generally established an industry committee of producer and processor representatives to negotiate standard contract terms (including fees) for the supply of poultry meat to processors. All relevant States have completed reviews of this legislation.

New South Wales

Review and reform activity

New South Wales submitted its *Poultry Meat Industry Act 1986* to review in 1998 by a group representing the Government, producers and processors. The review group was unable to reach agreement, however, and in March 2001 the Government commissioned Hassall & Associates to undertake a public benefit assessment. According to the Government, this assessment (which it has not released) found that the Act imposes a small net public cost, equivalent to 1 per cent of the retail price of poultry meat.

On 13 November 2001, the Government announced that it would not remove centralised bargaining and that it would amend the Act to exempt centralised bargaining in the industry from challenge under the Commonwealth *Trade Practices Act 1974* (TPA). On 29 May 2002, it introduced the Poultry Meat Industry Amendment (Price Determination) Bill 2002. Under the amended Act, the industry committee, with the agreement of the responsible Minister, continues to determine base growing fees and to approve all agreements between processors and growers. The committee may approve certain agreements, known as 'efficiency incentive agreements', that establish the maximum variations (upwards or downwards) from the relevant base growing fee. The Act also authorises conduct for the purposes of the TPA.

Assessment

The amendments made to the Poultry Meat Industry Act introduce additional flexibility into the regulation of commercial relations between New South Wales poultry growers and processors. The Act now allows processors and growers to agree on growing fees that are different from those determined by the industry committee. The Council understands that the amendment brings the Act into line with longstanding practice.

Nevertheless, the Act still restricts competition in the chicken growing services market by allowing the industry committee to approve base fees and to approve all agreements between growers and processors.

- Base fees are likely to remain a reference point for negotiations between processors and growers, and will apply to poultry deliveries where processors and growers have been unable to agree on the terms of an 'efficiency incentive agreement'.

- The industry committee may reject some agreements that otherwise would have been made. Further, the disclosure of agreement terms may discourage processors or growers (existing and potential) from reaching innovative agreements.

Neither of these restrictions on competition are features of negotiating arrangements authorised by the ACCC in other States to date. Further, New South Wales has not presented evidence to show that these restrictions are in the public interest. It also has not conducted an open NCP review process, because it has not made available the review committee's report or the report of Hassall & Associates. The Council concludes that New South Wales has not met its CPA clause 5 obligations relating to this Act.

The Government acknowledges that the restrictions are likely to raise the price of poultry meat (New South Wales Government 2002, p. 13). They are also likely to limit or even reduce the size of the poultry growing industry in New South Wales if processors shift capacity elsewhere. An NCP review of Victoria's similar poultry industry legislation estimated a net cost to the community of $2.8 million (Cousins, Noone and Overall 1999). The New South Wales industry produced $425 million of poultry meat in 2000-01 (ABS 2001b) and is 50 per cent larger than Victoria's. This indicates that the net cost to the New South Wales community of the retained restrictions on competition may be well in excess of $3 million per year.

The Council will consider this matter again in the 2003 NCP assessment if the New South Wales Government produces evidence that these restrictions are in the public interest or it further reforms regulation of the industry.

Victoria

Review and reform activity

Victoria completed a review of its *Broiler Chicken Industry Act 1978* in November 1999. The review by independent adviser KPMG found that the price determination arrangements impose a net cost on the community as a whole and, moreover, are likely to be in breach of the TPA. It recommended that producers seek authorisation from the Australian Competition and Consumer Commission (ACCC) for collective bargaining arrangements and that the Victorian Government repeal the Act and its regulations.

Subsequently, Marven Poultry, also representing five other Victorian processors, applied to the ACCC for authorisation of collective negotiations by growers with their individual processors. The ACCC granted an authorisation

on 29 June 2001, for five years. The industry committee has ceased to be involved in contract negotiations.

Assessment

The Council is satisfied that Victoria has met its CPA clause 5 obligation in relation to the Broiler Chicken Industry Act. Victoria's review of the Act was open, independent and robust. It has facilitated the move by processors to negotiate individually with their growers. Victoria has not yet moved to repeal the Act, but no longer applies the provisions for determining the industry-wide growing fee.

Queensland

Review and reform activity

Queensland completed a review of its *Chicken Meat Industry Committee Act 1976* in 1997. The review recommended that the Act be amended to:

- shift the industry committee's role from a prescriptive one to facilitative one, whereby it convenes representative groups of producers to negotiate with each processor and refers disputes to mediation or arbitration; and
- specifically prohibits the industry committee from recommending or providing information on growing fees.

The Government agreed in December 1998 to implement the recommendations. The necessary amendments took effect from October 1999.

Assessment

The Council's 1999 NCP assessment found Queensland's then proposed amendments to the Chicken Meat Industry Committee Act were in accord with the recommendations of its review, which appeared to have been open and objective. With the passage of these amendments, Queensland has met its CPA clause 5 obligation in relation to this legislation.

Western Australia

Review and reform activity

Western Australia reviewed its *Chicken Meat Industry Act 1977* in 1996. The review by Agriculture Western Australia (now the Department of Agriculture) recommended:

- retaining the industry committee's power to set industry-wide supply fees, subject to:
  - allowing growers to opt out of industry-wide negotiations; and
  - a further review of this restriction being conducted in five years.
- removing controls on entry to the processing and growing sectors.

The then Government endorsed these recommendations and introduced an amendment Bill into Parliament in 2000. The Bill also removed the obligation to enter into a prescribed form of contract. It lapsed at the 2001 state election. The current Government expects to introduce a new Bill in the spring 2002 session of Parliament.

Assessment

The Council's 1999 NCP assessment stated that Western Australia will have met its CPA clause 5 obligation in relation to the Chicken Meat Industry Act when it passes amendments consistent with the recommendations of the 1996 review. As noted above, Western Australia is still to make such amendments and, therefore, is yet to fulfil its related obligations under the CPA. Nevertheless, the Council understands that Western Australia is committed to making the necessary amendments.

The 1999 NCP assessment also urged Western Australia to consider further amending the Act to facilitate (but not require) collective bargaining of growers with their respective processor rather than with all processors. Restricting competition between processors seems unnecessary if the principal objective of the legislation is to improve the bargaining power of growers. It is also inconsistent with reforms in Victoria, Queensland and South Australia.

The Council will consider Western Australia's reform performance in the 2003 NCP assessment. It will look for robust public interest evidence if industry-wide bargaining is retained.

South Australia

Review and reform activity

South Australia reviewed its *Poultry Meat Industry Act 1969* in 1994. The review found that general competition law is sufficient to protect producers and that industry-specific legislation is not required. Subsequently, each of the South Australian processors and their respective grower groups obtained five-year authorisations from the ACCC for collective negotiation of standard contractual arrangements, with provision for growers to 'opt out' and negotiate as individual operators. The Government is currently consulting on

a proposal to replace the existing inoperative Act with new legislation that provides for collective bargaining of growers with individual processors subject to industry-wide minimum standards and mediation processes. A competition policy analysis of the proposal has been made available and submissions sought by 13 September 2002.

Assessment

South Australia's Poultry Meat Industry Act, while still not repealed, in practice does not restrict competition because it does not shelter collective bargaining activity from challenge under the TPA. If South Australia brings in new legislation, then the Council will assess the legislation for compliance with CPA clause 5.

Table 4.4: Review and reform of legislation regulating poultry meat marketing

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Poultry Meat Industry Act 1986*	Prohibits supply of chickens unless under an agreement approved by the industry committee.	First review by government, processor and grower representatives failed to reach agreement. Independent review found the Act imposed a small net cost on the community. No report has been released.	The Act was amended in June 2002 but these amendments essentially retained existing restrictions (and protected the arrangements from challenge under the TPA).	Does not comply with CPA obligations.
Victoria	*Broiler Chicken Industry Act 1978*	Prohibits supply of chickens unless under an agreement consistent with terms determined by the industry negotiation committee.	Review was completed in 1999, recommending that producers seek ACCC authorisation for collective bargaining and that the Government repeal the Act.	Act has been retained but the industry committee is not to be involved in collective bargaining. The ACCC has authorised grower collective bargaining by processor.	Meets CPA obligations (June 2002).
Queensland	*Chicken Meat Industry Committee Act 1976*	Prohibited supply of chickens unless under an agreement approved by the industry committee.	Review was completed in 1997, recommending the industry committee convene groups of producers to negotiate with processors, but that it be barred from intervening in negotiations on growing fees.	Recommended amendments were made to the Act in 1999.	Meets CPA obligations (June 2002).

(*continued*)

Table 4.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Chicken Meat Industry Act 1976*	Prohibits supply of chickens unless under an agreement approved by the industry committee. Requires approval of processing plants and growing facilities.	Review was completed in 1996, recommending that the Government retain industry-wide collective bargaining (subject to allowing growers to opt out and to review after five years) and remove controls on grower and processor entry.	The Government intends to amend the Act accordingly in the spring 2002 Parliamentary session.	Council to finalise assessment in 2003.
South Australia	*Poultry Meat Industry Act 1969*	Prohibits processing of chickens unless from approved farms and under an approved agreement.	Review was completed in 1994, recommending that producers seek ACCC authorisation for collective bargaining with each processor and that the Government repeal the Act.	ACCC authorised grower collective bargaining by processor in 1997. Act has not been repealed but is not operational. The Government is consulting on a proposed new Bill.	Meets CPA obligations (June 2002). Council to assess any new restrictive legislation in 2003.

Other products

Dairy (exports)[3]

The Commonwealth's *Dairy Produce Act 1986* provides for the Australian Dairy Corporation to license the export of dairy products to overseas markets with access restrictions and for the former Domestic Market Support Scheme (which expired on 30 June 2000).

The Commonwealth deferred the review of this Act until early 2002, in light of the significant reforms to domestic dairy markets from 30 June 2000. In February 2002 the Australian Dairy Corporation announced the cessation from June 2002 of restrictions on cheese exports to Japan. It is considering the future of similar restrictions on skim milk powder and butter exports to Japan, and cheese exports to the European Union. The Council understands that review of these restrictions may be deferred again.

The Commonwealth is yet to fulfil its CPA clause 5 obligations in relation to the Dairy Produce Act. Given the developments in the various dairy product export markets, the Council will assess this matter in 2003.

Eggs

Queensland, Western Australia and Tasmania scheduled for NCP review their legislation establishing producer licensing, production quotas and marketing boards with monopoly powers in the egg industry. The Council understands other jurisdictions removed similar regulatory arrangements well before the commencement of the NCP.

Queensland

The Queensland Government decided not to review its *Egg Industry (Restructuring) Act 1993*, allowing it to sunset on 31 December 1998. The Act was not replaced. Vesting and production quotas had been removed two years earlier. The sunsetting of the Egg Industry (Restructuring) Act meets Queensland's CPA clause 5 obligations.

[3] The Council found in the 2001 NCP assessment that State and Territory review and reform of milk marketing arrangements met CPA clause 5 obligations.

Western Australia

Western Australia's *Marketing of Eggs Act 1945* was scheduled for review in 1999. The Government released a discussion paper in June 2002 that invited submissions on four options:

- the status quo (including a further review in five years);
- removing the marketing monopoly while retaining licensing and production quotas;
- removing all regulation and transferring the board's business to a grower co-operative; or
- removing all regulation and transferring the board's business to a grower-owned company. Submissions to the review closed in July 2002.

Western Australia is still to meet its CPA clause 5 obligations relating to its Marketing of Eggs Act. An open, independent and robust review of Western Australia's statutory egg supply and marketing arrangements is most unlikely to find these to be in the public interest. Given Western Australia's review is now under way, albeit after some delay, the Council will finalise the assessment of Western Australia's review and reform performance in relation to egg supply management and marketing arrangements in 2003.

Tasmania

Tasmania's *Egg Industry Act 1988* has been reviewed. In May 2001 the Act was amended to allow the marketing board to withdraw from egg processing. The Tasmanian Parliament has considered this year a Bill to replace this Act. The Council is still to confirm what if any restrictions the Bill will retain and the supporting public interest case.

Tasmania is yet to meet its CPA clause 5 obligations related to its Egg Industry Act although its review and reform activity appears to be well progressed. The Council will consider the outcome of Tasmania's review and reform activity again in the 2003 NCP assessment.

Horticulture

The Commonwealth has regulated the production and export marketing of various horticultural products.

It listed for review under NCP several pieces of legislation related to dried vine fruit:

- the *Dried Vine Fruits Equalization Act 1978*, which equalises returns from the export of dried fruit;

- the *Dried Sultana Production Underwriting Act 1982*, which underwrites the production of sultanas; and
- regulations under the *Australian Horticultural Corporation Act 1987*, which restrict the export of dried vine fruit.

The Australian Horticulture Corporation Act itself, and other regulations made under the Act, were not listed for NCP review. These provided for the Australian Horticultural Corporation to control the export of horticultural products, including citrus fruits, pears, apples and stone fruits. These controls operated via licences and/or permissions with attached conditions such as:

- the nomination of import agents;
- prices, quality and grades;
- packaging, labelling and description; and
- the form of consignment, exporter commissions, carriage and insurance arrangements.

These powers are applied to the export of oranges to the United States and the export of peaches and plums to Taiwan.

Review and reform activity

The entire dried vine fruit legislation, other than the export control regulations made under the Australian Horticulture Corporation Act, has been repealed without review.

The Australian Horticulture Corporation Act was in late 2000 repealed and replaced by the *Horticulture Marketing and Research and Development Services Act 2000*.[4] The new Act allowed the formation of Horticulture Australia Limited to succeed the Australian Horticulture Corporation, the Horticulture Research and Development Corporation and the Australian Dried Fruits Board. An agreement made under the Act between the Commonwealth and Horticulture Australia Limited provides that any proposals by the company to impose new export controls must show a net public benefit and meet minimum standards for consultation. Such proposals may only be approved by the Commonwealth Department of Agriculture, Fisheries and Forestry after it has prepared a regulation impact statement and obtained clearance from the ACCC on trade practices compliance. Horticulture Australia Limited must report on the performance of export controls annually and, with the department, review the powers under NCP principles every three years.

[4] The new Act also replaces the *Horticultural Research and Development Corporation Act 1987*, which concerned the provision of research and development services to the horticulture industry.

The Act itself was subject to the preparation of a regulation impact statement. The statement, drawing on a 1999 review by a government-industry working party, identified four alternative conditions under which the horticulture export control powers may provide a net community benefit, and gave the controls over orange exports to the United States as an example. This statement was however assessed as inadequate by the Office of Regulation Review, because in its view the independent economic analysis obtained by the review showed that in most cases the identified conditions had not been met.

The export control powers and process for applying these was subject to further scrutiny this year by the Productivity Commission in its recent inquiry into the citrus industry (PC 2002a). The Productivity Commission inquiry was critical of the arrangements.

- It questioned whether the controls on orange exports to the United States are in the interests of growers or the community more generally.

- It highlighted that the key question in reviewing export controls is whether export control arrangements generate additional benefits for Australian growers in general beyond those achievable by other means — such as multiple agents, voluntary cooperation, or well informed growers and exporters making commercial business decisions.

- It argued that Horticulture Australia Limited could not be regarded as a suitably independent body to review export controls.

It recommended that future reviews of export control arrangements should be conducted in an independent and transparent manner, including effective consultation with all interested parties. Assessment criteria and the results of the review should be publicly available, together with the reasons for recommendations.

All regulations made under the former Act continue for a two-year transitional period (ending 31 January 2003) and must be reviewed before they can be extended. The Commonwealth is yet to complete its review of the dried vine fruit export control regulations.

Assessment

The Council considers that the Commonwealth has not met its CPA clause 5 obligations to review and, where appropriate, reform the dried vine fruit export control regulations made under the now repealed Australian Horticultural Corporation Act. This might have denied dried vine fruit growers and exporters opportunities to export more fruit and to develop new and profitable export links. The Council will reconsider the review and reform of dried vine fruit export control regulations in 2003 by which time these will have expired or been extended.

With the Horticulture Marketing and Research and Development Services Act the arrangements for making and reviewing horticultural export controls are much improved. Nevertheless the Productivity Commission has identified some remaining weaknesses in these arrangements. Addressing these weaknesses will reduce the chance in the future that controls are imposed or retained where this is not in the public interest.

Potatoes

The growing and marketing of potatoes in Western Australia is controlled under the *Marketing of Potatoes Act 1946*. The Act establishes the Potato Marketing Corporation, reserves to it a monopoly over the domestic wholesale marketing of all potatoes grown in the State for fresh consumption, and empowers it to licence growing areas.

Review and reform activity

The former Western Australian Government commissioned the Department of Agriculture to review the Act in 1998. The review recommended that the Government retain the domestic monopoly held by the Potato Marketing Corporation. In response to criticisms of the review the then Government asked the Department to re-examine its recommendations. In May 2002 the Department released a discussion paper inviting submissions on the future regulation of the industry. It proposed two options: the status quo and development of an industry based model which separates the current regulatory and commercial functions of the Potato Marketing Corporation. Under the industry model, industry regulation would be conducted within government (the Department of Agriculture is the generic regulator for several industries) while commercial activity would be undertaken by a private entity such as a grower owned cooperative. The model proposed in the discussion paper would retain for five years industry-wide controls on potato supply and minimum price setting (Department of Agriculture, Western Australia 2002, pp. 36-37).

Assessment

The current review, if it is sufficiently robust, is most unlikely to find that the existing supply management and market monopoly arrangements are in the public interest. The discussion paper asserts that consumers benefit through more stable retail pricing but does not acknowledge that consumers are accustomed to regular price changes in other fresh commodities and hence are unlikely to place more than a small value on this benefit.

In contrast the costs of the arrangements may be substantial. As acknowledged by the discussion paper, prices paid by Western Australian consumers for fresh potatoes generally exceed comparable prices in most other States and Territories, and Western Australian consumers have less

choice in potato varieties. There is no evidence to support the paper's claim that retail prices would not fall if the arrangements were removed. Indeed, removal of similar arrangements in the fresh milk industry saw supermarket plain milk prices drop by 22 cents per litre (after the Commonwealth levy of 11 cents per litre to recover the cost of adjustment assistance). Moreover, supermarket milk sales margins dropped by 19 per cent (ACCC 2001b).

Existing growers clearly enjoy higher returns because of these arrangements — as evidenced by the trading of production quota at $6000–7000 per hectare. On the other hand, the quota system seems to encourage more costly production to increase area yields. According to the discussion paper for example Western Australian growers spend three times more on fertiliser than do South Australian growers. The quota system also makes it difficult for growers to expand production area or to switch between crops to suit their farming program.

In the Council's view, the future policy directions proposed in the discussion paper raise questions about whether the Government is complying with its CPA clause 5 obligations in relation to the regulation of potato supply and marketing. Even if the Government decided to remove the domestic monopoly held by the Potato Marketing Corporation, the scenario proposed in the Department of Agriculture discussion paper suggests that full removal may not occur for five years. The delay in removal would mean further substantial costs for consumers and may divert grower effort from adjusting to the new market environment to seeking to overturn a reform program. The delay is unlikely to be in the public interest because there appear to be feasible alternatives; the Government could assist growers to adjust (where assistance is justified) without extending the supply and marketing arrangements for more than a minimum practical implementation period. Possible alternatives include:

- providing growers with expertise in business planning and developing new supply and marketing structures;
- providing grants or loans to growers who choose to exit the industry and growers who remain to adopt new technology or capture scale economies;
- transferring marketing assets to grower ownership.

In preparing this assessment the Council raised its concerns with the Western Australian Government and sought the Government's commitment to examining earlier removal of the supply management and marketing arrangements, with adjustment assistance for growers as appropriate. In response to the Council, the Western Australian Premier noted that the regulation of potato supply and marketing arrangements are currently under review. The Council considers that Western Australia has not met its CPA clause 5 obligations relating to the Marketing of Potatoes Act. The Council will consider this matter further in the 2003 NCP assessment.

Rice

The *Marketing of Primary Products Act 1983* establishes a monopoly, conferred on the New South Wales Rice Marketing Board (NSWRMB), over the domestic and export marketing of rice grown in New South Wales. The board delegates its marketing functions to the Ricegrowers Co-operative Limited (RCL) under an exclusive licensing arrangement. The co-operative also controls the production, storage and milling of rice via its six milling plants.

Review and reform activity

In 1995 New South Wales commissioned a Government/industry review of its rice marketing arrangements. The review recommended removing the NSWRMB's monopoly over domestic marketing, but retaining the export monopoly. It proposed that the Government achieve this change by repealing the State-based arrangements and establishing an export monopoly under Commonwealth jurisdiction. In April 1996 the Government extended the existing regulatory arrangements until 5 January 2004 arguing that:

- export premiums significantly exceed domestic costs;
- export licensing by the Commonwealth is unnecessary as most rice is produced in New South Wales; and
- alternative State-based arrangements are unlikely to be feasible.

The Council's 1997 NCP assessment and 1998 supplementary NCP assessment found that New South Wales had not implemented the recommendations of its review and, therefore, had not met its CPA clause 5 obligations in relation to domestic rice marketing arrangements. Following this assessment, a working party comprising Commonwealth and New South Wales officials, industry representatives and Council staff was established to examine Commonwealth-based options for ensuring a 'single export desk', while removing the domestic rice market monopoly.

In January 1999 the working party recommended a preferred model to the Commonwealth Government. The model included the Commonwealth's creation of a rice export authority to manage the 'single desk', with RCL holding an automatic export right for three to five years. Under the model, third parties would be able to seek export licences where this arrangement does not diminish the benefits of the 'single desk'.

In April 1999 the New South Wales Premier' agreed to the model, in-principle, and subject to it:

- being feasible, practical and not jeopardising export premiums;

- taking into account industry arguments on the need for a transition period before implementation and a further period during which RCL would hold an exclusive export license; and

- being agreed to by all other States.

The Premier also reserved the right to retain the existing arrangements to protect export premiums if these conditions are not satisfactorily met.

Following this the Commonwealth and New South Wales Governments further developed the model. At the time of the Council's 2000 supplementary assessment, however, the New South Wales Government had not responded to a refined proposal from the Commonwealth. The Council considered this to be insufficient progress and recommended withholding part of the 2000-01 NCP payments otherwise due to New South Wales. On 31 August 2000 the Council was advised that the New South Wales Premier accepted the Commonwealth's proposal, subject to two minor qualifications. Consequently, the Council withdrew its recommendation to withhold 2000-01 NCP payments, but indicated that it would revisit the matter in later assessments.

The model has since been further developed and, on 27 March 2001, New South Wales agreed to the Commonwealth commencing consultation on the model with other States and Territories. New South Wales requested that the consultations be on the basis of:

- the model being in place for three to five years; and

- the Ricegrowers Co-operative Limited holding, for a transitional period, a veto over rice exports by other parties.

The Commonwealth began formal consultations with other States and Territories in May 2002. At the time of reporting, these consultations had not concluded.

Assessment

New South Wales is yet to fulfil its CPA clause 5 obligations relating to domestic rice marketing. This is partly because of the time taken by New South Wales in agreeing to an approach to reform; more recently, there have been delays by the Commonwealth in starting consultations with the other States and Territories. The NCP review was completed almost seven years ago and yet the recommended deregulation of domestic rice marketing still has not occurred. The review estimated the annual cost to domestic consumers of rice at $2–12 million per year (New South Wales Government 1995), equivalent to $14–84 million in the seven years since the review. It has also seriously disadvantaged those growers who wish to make their own processing and marketing decisions, particularly several growers of organic rice.

The Council will consider this matter again in the 2003 NCP assessment, when it expects that either:

- the Commonwealth will have passed legislation establishing the rice export authority, and New South Wales will have repealed the Marketing of Primary Products Act insofar as it regulates rice marketing; or
- New South Wales will have deregulated the domestic marketing of rice, via a scheme under s. 57 of the Act for granting exemptions from vesting.

Sugar

Queensland's *Sugar Industry Act 1991* provided for a monopoly marketer of raw sugar produced in the State — that is, the Queensland Sugar Corporation. The Act also extensively regulated commercial arrangements between cane growers and millers. The Commonwealth imposed a tariff of $55 per tonne that effectively excluded sugar imports.

Review and reform activity

In 1995 the Commonwealth and Queensland governments commissioned a working party of government, grower, miller, marketer and user representatives to review the Act and the sugar import tariff. The working party reported in July 1996, recommending that:

- the Queensland Government:
  - retain the domestic and export monopoly, subject to the pricing of domestic sales at export price parity;
  - permit growers to negotiate individual agreements with mills and transfer their supply to other mills, when collective supply agreements expire;
  - place a 10-year moratorium on further review of the marketing arrangements; and
- the Commonwealth Government remove the tariff on raw sugar imports.

The Queensland and Commonwealth Governments endorsed the recommendations. In July 1997 the Commonwealth removed the import tariff and the Corporation priced its domestic sales at export price parity. These moves, along with falls in world sugar prices, led domestic prices to fall by more than $200 per tonne.

In November 1999 the Queensland Parliament passed the *Sugar Industry Act 1999*, which encapsulated the regulatory changes agreed with the industry and repealed the Sugar Industry Act 1991. The new Act was amended in June

2000 by the *Sugar Industry Amendment Act 2000*, which introduced further structural changes for the industry. The most important changes were:

- the transfer of the Queensland Sugar Corporation's marketing assets and liabilities to the producer-owned Queensland Sugar Limited;
- the establishment of the Sugar Authority to monitor the performance of Queensland Sugar Limited and to assume its monopoly role if the industry gives up control of the company;
- the establishment of a review of the sugar vesting arrangements by no later than 1 December 2006 (or earlier if the company requests) for completion by 31 December 2007;
- the clarification that a cane grower is able to move from a collective supply agreement to an individual agreement; and
- the transfer of the bulk sugar terminals to Sugar Terminals Limited and the distribution of shares in this company to eligible growers and millers.

Since these changes, the sugar industry has faced several seasons of much reduced returns due to low world sugar prices, poor seasonal conditions and cane disease. Notwithstanding the substantial financial and other assistance made available to cane growers by the Commonwealth and Queensland governments, the prospects for better returns look poor without substantial gains in industry productivity. These governments are currently exploring with the industry how best to adjust to international market conditions, drawing on an independent assessment prepared for the Commonwealth by Mr Clive Hildebrand, Chair of the Sugar Research and Development Corporation. Options include greater devolution to local mill areas, facilitating aggregation of sugar farms and seeking diversification of products.

Assessment

With the passage of the Sugar Industry Act and subsequent amendments, the Queensland Government has substantively implemented the relevant recommendations of the 1996 Sugar Industry Review Working Party. The one notable departure from the review recommendations was highlighted in the 1999 NCP assessment. The Act restricts the ability of growers to transfer cane supply between mills. Such transfers can occur only with the agreement of both cane production boards — that is, the grower and mill representatives for both the grower's existing and intended mills. The review recommended that such transfers require the consent of only the cane production board for the intended mill. The Queensland Government argues that this is only a minor departure and is in the public interest. It notes that mills and growers are highly interdependent and that maximising returns to both requires precise forward programming of cane delivery and processing.

The Council acknowledges the strong interdependence between growers and mills. In the absence of specific regulation, private contractual arrangements would evolve that would require a grower at least to give due notice (perhaps one or two seasons) of their intention to withdraw supply, whether to transfer to another mill or to change land use. The Council accepts that this departure from the review recommendation is unlikely to have a practical restriction on competition. The Council concludes that Queensland has met its CPA clause 5 obligations relating to the regulation of the sugar industry.

The transfer of the marketing assets and liabilities of the former Queensland Sugar Corporation to Queensland Sugar Limited, and the transfer of the bulk sugar terminals to Sugar Terminals Limited are relevant to CPA clause 4. This clause obliges governments, before privatising a public monopoly, to remove from it any industry regulation functions and to undertake other structural reforms necessary to establish effective competition where these are in the public interest.

The Queensland Government has met its CPA clause 4 obligation in relation to the privatisation of the Queensland Sugar Corporation. In particular, the regulatory functions of the corporation, retained by the Sugar Industry Act 1999, have been devolved to either local cane production boards or the Sugar Industry Commissioner. Queensland Sugar Limited also continues to be subject to the export parity pricing rule while it retains a State monopoly on domestic raw sugar sales.

The privatisation of the bulk sugar terminals did not affect any regulatory functions. While Bulk Sugar Terminals Limited controls all sugar terminals in Queensland, the interests of growers and mills in its pricing and service standards are addressed through their joint ownership of the company.

Table 4.5: Review and reform of legislating regulating other agricultural product markets

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Dairy Produce Act 1986*	Provides for licensing of dairy exports and support for domestic manufacture of dairy products.	Australian Dairy Corporation is reviewing the export licensing arrangements but completion of this review may be delayed.	The domestic market support scheme expired on 30 June 2000. Licensing of cheese exports to Japan ends on 30 June 2002.	Council to finalise assessment in 2003.
	Dried Vine Fruits Equalization Act 1978 *Dried Sultana Production Underwriting Act 1982* Dried vine fruit export control regulations under the *Australian Horticulture Corporation Act 1987*	Equalises returns from the export of dried vine fruit. Underwrites production of sultanas. Restrict the export of dried vine fruits.	The dried vine fruit export control regulations expire in 2003 (under the transitional arrangements associated with the replacement of the Act by the Horticulture Marketing and Research and Development Services Act 2000). The Commonwealth intends to review whether these should be extended in some form. The Productivity Commission recently proposed further improvements to the way such export controls are made and reviewed.	The Acts were repealed without review.	Council to finalise assessment in 2003.

(*continued*)

Table 4.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Marketing of Primary Products Act 1983*	Grants monopoly granted to the Rice Marketing Board over domestic and export marketing of all rice grown in the State.	Review was completed in 1995 by a government/industry panel. It recommended retaining the export monopoly under Commonwealth jurisdiction and removing the domestic monopoly (and State legislation).	With New South Wales's conditional agreement the Commonwealth is consulting other States on a proposal to establish a Rice Export Authority to control rice exports, with Ricegrowers Co-operative Limited to hold an export right for 3–5 years, and licensing of noncompeting exports.	Council to finalise assessment in 2003.
Queensland	*Sugar Industry Act 1991*	Grants monopoly to the Queensland Sugar Corporation over domestic and export marketing of all sugar produced in the State. Local boards control cane production areas and the allocation of cane to mills.	Review was completed in 1996 by a government/industry panel. It recommended: • retaining the domestic and export monopolies subject to export parity pricing of domestic sales; • permitting growers to negotiate individually with mills once collective agreements expire; and • removing the Commonwealth's sugar tariff.	In July 1997 the tariff was removed and export parity pricing was introduced. In November 1999 the *Sugar Industry Act 1999* was passed. This and subsequent amendments allow some scope for growers to negotiate individually with mills. New Act also brought several structural reforms of the corporation and bulk sugar terminals.	Meets CPA obligations (clauses 4 and 5).
	Egg Industry (Restructuring) Act 1993	Producer licensing. Production quotas. Vesting and marketing monopoly.	Not reviewed.	The Act sunsetted on 31 December 1998.	Meets CPA obligations (June 2002).

(*continued*)

Table 4.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Marketing of Eggs Act 1945*	Producer licensing. Production quotas. Vesting and marketing monopoly.	The Department of Agriculture released a discussion paper in June 2002.	None.	Council to finalise assessment in 2003.
	Marketing of Potatoes Act 1946	Producer licensing. Production quotas. Vesting and domestic marketing monopoly.	A review in 1999 by the Dept of Agriculture recommended retaining the domestic marketing monopoly. The review was restarted in 2002 and a discussion paper released in May.	None. Neither option for industry regulation proposed by the discussion paper is sufficient for CPA clause 5 compliance.	Does not comply with CPA obligations (June 2002).
Tasmania	*Egg Industry Act 1988*	Producer licensing. Production quotas. Vesting and marketing monopoly.	Review completed.	Marketing board withdrew from egg processing in 2001. A Bill to replace this Act considered by Parliament in 2002. Insufficient information on what if any restrictions will be retained.	Council to finalise assessment in 2003.

Agriculture-related products and services

This section considers governments' progress in fulfilling NCP obligations relating to legislation review and reform (CPA clause 5) and structural reform (CPA clause 4) in the agriculture-related activities of:

- agricultural and veterinary (agvet) chemicals;
- bulk grain handling and storage;
- food;
- quarantine and food exports; and
- veterinary services.

Agricultural and veterinary chemicals

Agricultural chemicals are chemicals used to protect crops against pests, to inhibit weeds and to modify plant development. Veterinary chemicals are applied to animals to prevent or treat disease or injury, or to modify physiological development.

Legislative restrictions on competition

Agvet chemicals are regulated under Commonwealth, State and Territory legislation. These laws establish the national registration scheme for these chemicals, which covers the evaluation, registration, handling and control of agvet chemicals up to the point of retail sale. The National Registration Authority administers the scheme. The Commonwealth Acts establishing these arrangements are the *Agricultural and Veterinary Chemicals (Administration) Act 1992* and the *Agricultural and Veterinary Chemicals Code Act 1994*.

Beyond the point of sale, these chemicals are regulated by 'control of use' legislation. This legislation typically covers matters such as the licensing of chemical spraying contractors, aerial spraying and permits allowing use for purposes other than those for which a product is registered (that is, off-label purposes).

Regulating in the public interest

Agvet chemicals pose a variety of serious risks if not supplied or used with due care, including risks to public health, worker health, the environment, animal welfare and international trade. Chemical suppliers generally have strong incentives to produce chemicals safely, to ensure they are fit-for-purpose and to make consumers aware of how to use the products safely. Users too generally have strong incentives to choose chemicals that are fit-for-purpose and to use them safely. Less than optimal care may result, however, where third parties bear some costs of chemical supply or use and encounter practical difficulties in forcing their compensation by the chemical supplier or user at fault. Governments therefore endeavour through regulation to deliver a level of chemical safety that is acceptable to the community.

Chemical safety regulation is not costless, however. It imposes costs on businesses by requiring, for example, specified premises design and equipment, staff training, and up-to-date knowledge of changes in regulation. These and other costs are ultimately passed on to consumers through higher prices and reduced choices. Chemical regulation should therefore:

- intervene only on the basis of sound science and risk assessment;
- hold chemical suppliers and users responsible for safety, by setting simple and clear performance standards and allowing suppliers/users the freedom to choose how to meet these standards; and
- unless necessary to protect health:
  - not impose significant barriers to entry by suppliers into chemical markets;
  - not impose different regulatory burdens on suppliers of competing chemical products; and
  - allow competition in the delivery of chemical safety services such as assessment and analysis.

Review and reform activity

National chemical registration scheme

In 1999, on behalf of all governments, Victoria coordinated a review of the national registration scheme for agvet chemicals. The independent reviewers recommended:

- retaining the National Registration Authority as the sole registration body;

- introducing a low cost registration process for low risk chemicals;
- making contestable the assessment services purchased by the National Registration Authority;
- limiting the National Registration Authority's efficacy assessments to determining that labelling is 'true' (removing the 'and appropriate' criterion);
- allowing the National Registration Authority to continue to operate on a cost-recovery basis, but simplifying the means of determining levies and fees;
- retaining the licensing of veterinary chemical manufacturers but removing the reserve powers for the licensing of agricultural chemical manufacturers until the case for such licensing is made; and
- modifying the compensation arrangements for third party access to chemical assessment data, consistent with the principles contained in part IIIA of the *Trade Practices Act 1974*.

In January 2000 agriculture and resource management Ministers agreed to an intergovernmental response to the review. The response accepted all recommendations except:

- removing the provision to license agricultural chemical manufacturers. This provision was retained, but with manufacturers exempted, pending further review by the Commonwealth; and
- limiting the efficacy review to whether labelling is true. This recommendation is believed to be inconsistent with minimising chemical use and the associated risks.

Working groups were established to progress the following issues:

- how best to regulate low risk chemicals. A Bill has now been prepared to amend the Agricultural and Veterinary Chemicals Code Act, and the Commonwealth expects to introduce it this year;
- how to monitor the quality of assessment services that the National Registration Authority purchases from alternative providers. A report is expected to be finalised in 2002 for consideration by the Primary Industries Ministerial Council; and
- whether licensing of agricultural chemical manufacturers is in the public interest. A report is expected to be finalised in 2002 for consideration by the Primary Industries Ministerial Council.

In addition, the Commonwealth undertook to include data protection issues in a wider review of data protection.

'Control of use' legislation

The national review coordinated by Victoria also examined 'control of use' legislation in Victoria, Queensland, Western Australia and Tasmania. The review recommended that these governments:

- establish a taskforce to examine 'control of use' arrangements and develop nationally consistent approach to 'off-label' use;
- retain the exemption of veterinarians from provisions relating to the supply and use of veterinary chemicals, but remove the exemption in relation to agricultural chemicals; and
- retain minimum necessary licensing (business and occupational) for agricultural chemical spraying.

Ministers in these jurisdictions established a Control of Use Taskforce as recommended. The taskforce agreed to remove the veterinarian exemption from provisions on agricultural chemicals and to reform licensing of agricultural chemical sprayers. Victoria amended its legislation accordingly; Queensland, Western Australia and Tasmania intend to do so in 2002. In relation to 'off-label' use, the taskforce agreed that more data are needed to adequately monitor the success of chemical risk management.

New South Wales completed in 1998 a single review of its *Fertilisers Act 1985*, *Stock Foods Act 1940, Stock Medicines Act 1989*, *Stock (Chemical Residues) Act 1975* and part 7 of the *Pesticides Act 1978*. The review recommended that the Government implement the following changes.

- Fertilisers Act;
  - remove brand name registration, various composition standards and the restriction on representations made in the sale of various organic fertilisers.
  - retain heavy metal content limits and content labelling requirements.
- Stock Foods Act;
  - retain content labelling and foreign ingredient content limits.
- Stock Medicines Act
  - retain restrictions on the possession and use of certain stock medicines, and mandatory disclosure upon the sale of treated stock and stock food; and
  - review advertising restrictions following completion of the national review of drugs, poisons and controlled substances legislation.
- Stock (Chemical Residues) Act;

  - retain all existing restrictions that relate to detecting and controlling chemical-affected stock, fodder and land.

- Part 7 of the Pesticides Act;

  - expand certain powers to provide for consistent controls on chemical-affected plants and animals.

The review also recommended that the Government remove some provisions that merely duplicate provisions in other legislation, and that it consider amalgamating some or all of the Acts to ensure greater regulatory consistency. In 1999 New South Wales responded by amending the Fertilisers Act as recommended and by replacing the Pesticides Act with the *Pesticides Act 1999* with provisions as recommended. Further, in April 2002 the Government agreed in principle to amalgamate the Fertilisers Act, the Stock Foods Act and the Stock (Chemical Residues) Act, to exclude certain restrictions from the new Act and to focus the new Act on addressing risks to human health, trade, the environment and animal welfare.

South Australia intends to replace its *Agricultural Chemicals Act 1955, Stock Foods Act 1941* and *Stock Medicines Act 1939* with new legislation. In 1998 it commissioned an independent review of the proposed legislation which found that all proposed restrictions were in the public interest. The South Australian Government introduced the Agricultural and Veterinary Products (Control of Use) Bill in 2001, but the Bill lapsed at the last State election. A virtually identical Bill has been introduced and proclamation is expected by the end of 2002.

The ACT replaced its *Pesticides Act 1989* with the *Environment Protection Act 1997*. The latter Act:

- prohibits 'off-label' use of registered chemicals and any use of unregistered chemicals, unless under a permit issued by the National Registration Authority; and

- prohibits the commercial use of registered chemicals unless authorised by Environment ACT.

The ACT reviewed the *Fertilizers Act 1904 (*NSW*)* which applies to the ACT. The Act prohibits the sale of fertilisers without the vendor providing a statement as to the fertilisers' constituents. The review recommended that the Government retain the Act without change.

The Northern Territory has not listed any 'control of use' legislation for review.

Assessment

National chemical registration scheme

The following issues from the review of the national registration scheme remain outstanding:

- licensing of agricultural chemical manufacturers;
- regulation of low risk chemicals;
- contestability of chemical assessment services; and
- compensation for third party access to chemical assessment data.

While governments are continuing to make progress in their review and reform activity, they are still to fulfil their related CPA clause 5 obligations. The Council will consider all jurisdictions' compliance in this area in 2003.

The Council has identified one key public interest question, which arises from the Ministers' decision to retain, as part of the registration process, an assessment of whether the efficacy claimed by a supplier is appropriate. This appropriateness assessment involves the National Registration Authority deciding, for example, what flea kill rate a flea collar should achieve within a certain period after application. Governments argue that this appropriateness assessment reduces health and environmental risks by avoiding the use of chemicals with inadequate efficacy. The Council understands, however, that other measures control the health and environmental risks arising from chemical use. It is also not clear to the Council why consumers are unable to judge the efficacy they prefer. Finally, the Council is concerned that the assessment may raise the cost of chemicals and reduce consumer choice. The Council therefore seeks from governments a more detailed explanation of the assessment's benefits, costs and alternatives in the context of the 2003 NCP assessment.

'Control of use' legislation

Queensland, Western Australia and Tasmania have yet to fulfil their CPA obligations arising from 'control of use' legislation because they are still to implement the recommended reforms.

Victoria has implemented the recommended reforms with one exception – it has retained a licence condition that aerial sprayers hold an approved insurance policy. Mandatory insurance restricts entry to the market and may raise the price of services. The Council seeks evidence from Victoria that this additional restriction is in the public interest. New South Wales has largely met its CPA clause 5 obligations arising from its 'control of use' legislation. The advertising restrictions in the Stock Medicines Act are the only significant outstanding matter.

South Australia is close to completing the reform of its 'control of use' legislation.

The ACT has implemented reform but the Council needs further information on the authorisation system before it can assess whether the Government has fulfilled its obligations. In particular, the Council wishes to understand how the system varies, if at all, from the licensing arrangements recommended by the review that Victoria coordinated.

The Council needs the Northern Territory to identify any 'control of use' legislation that significantly restricts competition and, if any exists, how the Government is fulfilling its CPA obligations.

Acknowledging that governments are continuing to progress their CPA clause 5 obligations in this area, the Council will consider the outstanding matters identified above in 2003.

Table 4.6: Review and reform of legislation regulating agvet chemicals

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Agricultural and Veterinary Chemicals Code Act 1994*	Prohibits chemicals from being supplied or held unless approved or exempt. Requires approval of chemicals solely by the National Registration Authority. Imposes same approval costs on low risk chemicals as on high risk chemicals. Provides for assessment services purchased from only certain authorities. Prohibits chemicals from being approved unless the National Registration Authority is satisfied of appropriate efficacy. Provides for licensing of chemical manufacturers. Provides for data protected from rivals unless compensation is paid.	Review was completed in 1999 by review team of economic and legal consultants. The review recommended: • retaining the monopoly on approval of chemicals; • lowering regulatory costs for low risk chemicals; • including principles in the Code to guide the inclusion/exclusion of chemicals in the national registration scheme; • accepting alternative suppliers of assessment services; • limiting the efficacy review to the truth of the claimed efficacy; • recovering National Registration Authority costs via a simple flat rate sales levy and cost-reflective application fees; • retaining licensing of veterinary chemical manufacturers; • removing licensing of agricultural chemical manufacturers until a case is made; and • applying TPA third party access pricing to data protection provisions.	Intergovernmental response to review was completed in 2000. It supported all recommendations except: • removing provision to licensing of agricultural chemical manufacturers; and • limiting the efficacy review. Amendments to establish a low cost regulatory system for low risk agvet chemicals are expected to be made in 2002. Further reviews of assessment services and licensing of agricultural chemical manufacturers are to be completed in 2002. Data protection is to be considered in a wider review.	Council to finalise assessment in 2003.

(*continued*)

Table 4.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth (continued)	*Agricultural and Veterinary Chemicals (Administration) Act 1992*	Prohibits chemicals from being imported unless approved or exempt. Requires minimum qualifications and experience for analysts. Sets fees and levies that impose an entry barrier and discriminate among firms.	See *Agricultural and Veterinary Chemicals Code Act 1994* above.	See *Agricultural and Veterinary Chemicals Code Act 1994* above.	Council to finalise assessment in 2003.
New South Wales	*Agriculture and Veterinary Chemicals (New South Wales) Act 1994*	Imports the Agricultural and Veterinary Chemicals Code into State jurisdiction.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	Council to finalise assessment in 2003.
	Fertilisers Act 1985	Provides for registration of brand names, composition standards and labelling requirements.	Review was completed in 1998 (with other State agvet legislation) by a government/industry panel. It recommended: • removing brand name registration and minimum content requirements; and • retaining heavy metal limits and labelling requirements.	Act was amended in November 1999 as recommended.	Meets CPA obligations (June 2002).

(*continued*)

Table 4.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales (continued)	*Pesticides Act 1978* (part 7)	Controls the sale, supply, use and possession of pesticides, the aerial application of pesticides and residue in foodstuffs.	1998 review recommended expanding certain powers to provide for consistent controls on chemical-affected plants and animals.	Act was repealed and replaced by the Pesticides Act 1999, in line with the recommendations.	Meets CPA obligations (June 2002).
	Stock (Chemical Residues) Act 1975	Imposes restrictions on chemically affected stock (for example, on its sale, movement or destruction).	1998 review recommended retaining all existing restrictions that relate to detecting and controlling chemical-affected stock and controlling affected stock fodder and land.	No NCP reform is required. This Act and the *Fertilisers Act 1985* and *Stock Foods Act 1940* are to be replaced by new legislation.	Meets CPA obligations (June 2002).
	Stock Foods Act 1940	Controls labelling. Limits foreign ingredients.	1998 review recommended retaining content labelling and foreign ingredient content limits.	See *Stock (Chemical Residues) Act 1975* above.	Meets CPA obligations (June 2002).
	Stock Medicines Act 1989	Prohibits unregistered chemicals from being held or used on food-producing stock unless prescribed by a veterinary surgeon. Requires minimum qualifications and experience for analysts. Restricts advertising.	1998 review recommended: • retaining restrictions on the possession and use of certain stock medicines and mandatory disclosure of sale of treated stock and stock food; and • reviewing advertising restrictions following completion of the national review of drugs, poisons and controlled substances legislation.	See *Stock (Chemical Residues) Act 1975* above.	Council to finalise assessment in 2003.

(*continued*)

Table 4.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Agriculture and Veterinary Chemicals (Victoria) Act 1994*	Imports the Agricultural and Veterinary Chemicals Code into State jurisdiction.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	Council to finalise assessment in 2003.
	Agriculture and Veterinary Chemicals (Control of Use) Act 1992	Allows 'off-label' use of chemicals subject to conditions. Conditions vary markedly among jurisdictions. Exempts Veterinary surgeons from various controls. Provides for licensing of spray contractors.	For national review, see *Agricultural and Veterinary Chemicals Code Act 1994* above. Review recommended: • developing a nationally consistent approach to 'off-label' use; • retaining the veterinarian exemption for veterinary chemicals but not agricultural chemicals; • licensing spraying businesses subject to maintenance of records, employment licensed persons and provision of necessary infrastructure; • licensing persons who spray for fee or reward, subject to accreditation of their competency and only if they work for a licensed business; • exempting from licensing those persons who spraying on their own land.	Intergovernmental response was completed in 2000. Ministers established a taskforce to develop a nationally consistent approach to 'control of use' regulation. The taskforce is still considering 'off-label' use. A working party is harmonising aerial sprayer licensing. Other reforms are being implemented by States and Territories. In 2001 Victoria: • removed the veterinarian exemption for agricultural chemicals; • amended its sprayer licensing regulation but retained mandatory insurance; and • recognised interstate licences.	Council to finalise assessment in 2003.

(*continued*)

Table 4.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Agricultural and Veterinary Chemicals (Queensland) Act 1994*	Imports the Agricultural and Veterinary Chemicals Code into State jurisdiction.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	Council to finalise assessment in 2003.
	Agricultural Chemicals Distribution Control Act 1966	Provides for licensing of spray contractors.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above. Results of national review were included in more general State review of legislation.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above. Queensland intends to amend legislation this year.	Council to finalise assessment in 2003.
	Chemical Usage (Agricultural and Veterinary) Control Act 1988	Allows off-label use of chemicals subject to conditions. Conditions vary markedly among jurisdictions. Exempts veterinary exempt from various controls.	See *Agricultural Chemicals Distribution Control Act 1966* above.	See *Agricultural Chemicals Distribution Control Act 1966* above. Queensland intends to amend legislation this year.	Council to finalise assessment in 2003.
Western Australia	*Agriculture and Veterinary Chemicals (Western Australia) Act 1995*	Imports the Agricultural and Veterinary Chemicals Code into State jurisdiction.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	Council to finalise assessment in 2003.

(*continued*)

Table 4.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Agricultural Produce (Chemical Residues) Act 1983*	Restricts sale, movement or destruction of chemically affected produce. Requires minimum qualifications for analysts.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above. Act is to be replaced by the Agricultural Management Bill being drafted.	Council to finalise assessment in 2003.
	Aerial Spraying Control Act 1966	Provides for licensing of aerial spray contractors.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above. Act is to be replaced by the Agricultural Management Bill being drafted.	Council to finalise assessment in 2003.
	Veterinary Preparations and Animal Feeding Stuffs Act 1976	Requires premises and products to be registered. Restricts packaging and labelling. Requires minimum qualifications for analysts. Contains advertising restrictions.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above.	Council to finalise assessment in 2003.

(*continued*)

Table 4.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Agricultural and Veterinary Chemicals (South Australia) Act 1994*	Imports the Agricultural and Veterinary Chemicals Code into State jurisdiction.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	Council to finalise assessment in 2003.
	Agricultural Chemicals Act 1955	Requires chemicals to be sold with registered label. Requires chemicals to be used as per label or Ministerial directions.	Act is to be replaced by new legislation. Review of legislative proposal found all proposed restrictions to be in the public interest.	Agricultural and Veterinary Products (Control of Use) Bill has been introduced and is expected to be proclaimed by the end of 2002.	Council to finalise assessment in 2003.
	Stock Foods Act 1941	Requires stock foods to be sold with label or certificate specifying chemical analysis. Prohibits seed grain from being fed to stock.	See *Agricultural Chemicals Act 1955* above.	See *Agricultural Chemicals Act 1955* above.	Council to finalise assessment in 2003.
	Stock Medicines Act 1939	Requires stock medicines to be registered.	See *Agricultural Chemicals Act 1955* above.	See *Agricultural Chemicals Act 1955* above.	Council to finalise assessment in 2003.
Tasmania	*Agricultural and Veterinary Chemicals (Tasmania) Act 1994*	Imports the Agricultural and Veterinary Chemicals Code into State jurisdiction.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	Council to finalise assessment in 2003.

(*continued*)

Table 4.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Agricultural and Veterinary Chemicals (Control of Use) Act 1995*	Prohibits chemicals from being used unless registered under the Code. Provides for licensing of spray contractors. Requires approval of indemnity insurance.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above. Act is to be amended in 2002.	Council to finalise assessment in 2003.
ACT	*Pesticides Act 1989*	Prohibits pesticides from being used unless registered.		The Act was repealed and replaced by the *Environmental Protection Act 1997*. This Act prohibits 'off-label' use unless with a permit and requires authorisation of chemical use.	Further information needed on terms of authorisations. Council to finalise assessment in 2003.
	Fertilisers Act 1904 (NSW) in its application in the Territory	Prohibits fertilisers from being sold unless with statement of composition.	Review was completed in 1999 by officials.	Act is to be retained.	Meets CPA obligations (June 2002).
Northern Territory	*Agricultural and Veterinary Chemicals (Northern Territory) Act*	Imports the Agricultural and Veterinary Chemicals Code into State jurisdiction.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above.	Council to finalise assessment in 2003.

Bulk grain handling and storage

Legislative restrictions on competition

South Australia and Western Australia[5] regulated the bulk grain handling and storage of grain via the *Bulk Handling of Grain Act 1955* (SA) and the *Bulk Handling Act 1967* (WA). Most importantly, these Acts:

- established a State monopoly on bulk grain handling and storage;
- obliged the monopoly bulk handler to:
  - charge uniform prices irrespective of cost; and
  - receive all grain tendered to it.

Regulating in the public interest

The main policy objective of legislative regulation in this area was to provide equal access to costly bulk grain handling and storage for all grain growers no matter where they were located. Competition was excluded so the handler could remain viable while charging a uniform price that was above cost for some growers but below cost for others.

Various efficiency costs must be weighed against this equity benefit. Where prices do not reflect costs, resources tend to be allocated away from uses that return the most value to society. From grain handling and storage regulation, for example, growers grow grain where other land uses would generate a better overall return, and vice versa. The monopoly grain handler tends to overinvest in some areas and underinvest in others. It also is less likely to respond as quickly to change in grower and buyer preferences.

The net benefit (or cost) of this form of regulation partly depends on how much society values equity among grain growers. This value can be difficult to ascertain, but evidence from other fields of agricultural policy reveals a limited appetite for support of some producers at the expense of others and/or the wider community. In any case, such special assistance can be made available in ways that do not restrict competition in the bulk grain handling and storage market — for example, via cash grants funded from either

[5] New South Wales repealed its regulation of bulk grain handling and storage in 1992. Victoria's *Grain Handling and Storage Act 1995* does not restrict competition but regulates pricing and third party access. Queensland does not directly regulate bulk handling.

compulsory levies or general taxation. Legislative restrictions on this market are unlikely, therefore, to serve the public interest.

A public interest case for regulation may exist where an essential facility may not be efficiently duplicated. Port facilities for grain loading may fall into this category in some circumstances. Owners of such a facility have substantial market power to raise prices above cost and to restrict competition in allied markets. Regulation generally gives third parties the right to access such facilities and provides a mechanism for negotiating or otherwise determining the price and conditions of their use. Victoria's *Grain Handling and Storage Act 1995* is an example of this regulation specific to grain handling and storage. Part IIIA of the TPA provides a generic third party access regulatory regime.

There has been a recent surge in competitive investment in port handling for grain infrastructure. This suggests that economies of scale in the industry may be less important than once thought and, therefore, that market power is dissipating.

Review and reform activity

Western Australia

Western Australia has restarted the Department of Agriculture's review of the Bulk Handling Act. The Government released a discussion paper on 15 May 2002 for comment on proposals to remove restrictions on how Cooperative Bulk Handling Limited prices its services. (The provisions giving the company sole right to receive and deliver grain expired on 31 December 2000.) The paper also proposes to retain requirements that Cooperative Bulk Handling Limited allow third party access to its port facilities and that it receive all grain tendered to it. The Government has not yet released a report of the review.

Western Australia is still to complete its CPA clause 5 obligation to review and, where appropriate, reform this Act. The delay in removing the pricing restriction on Cooperative Bulk Handling Limited means that some grain growers are effectively subsidising handling and storage services for others. In addition, infrastructure investment is unlikely to be allocated to where it provides the greatest benefit, which raises storage and handling costs for all growers. In the 2003 NCP assessment, the Council will examine the outcome of Western Australia's review and reform activity in this area.

South Australia

South Australia reviewed and repealed its Bulk Handling of Grain Act in 1998. South Australia has met its CPA clause 5 obligations by repealing the Bulk Handling of Grain Act.

Table 4.7: Review and reform of legislation regulating bulk grain handling and storage

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Bulk Handling of Grain Act 1955*	Sole right to receive and deliver grain. Obligation to charge uniform prices and to receive all grain tendered.	Review was completed in 1998, recommending repeal.	Act was repealed in 1998.	Meets CPA obligations (June 2002).
Western Australia	*Bulk Handling Act 1967*	Sole right to receive and deliver grain (now expired). Obligation to charge uniform prices and to receive all grain tendered.	Review by Department of Agriculture was restarted. Discussion paper was released in May 2002 proposing removal of uniform pricing obligation but retention of obligations in relation to grain receival and port facility third party access.		Council to finalise assessment in 2003.

Food

The food industry is a core activity in the Australian economy, involving primary producers and their suppliers, processing, transport, export, import and retailing. Food production from the farming and fisheries sector was an estimated $29 billion in 2000-01 (AFFA 2002). Total sales by the food processing industry were an estimated $55 billion. Food imports were $4.8 billion.

Legislative restrictions on competition

Commonwealth, State and Territory governments regulate the processing and sale of food in Australia. The Commonwealth's *Food Standards Australia New Zealand Act 1991* (formerly the *Australia New Zealand Food Authority Act 1991*) establishes Food Standards Australia New Zealand, or FSANZ (formerly the Australia New Zealand Food Authority, or ANZFA) which is responsible for developing, varying and reviewing the Food Standards Code. The code sets standards for the composition and labelling of food. In addition, FSANZ coordinates national food surveillance and recall systems, conducts research, assesses policies about imported food and develops codes of practice with industry.

The Commonwealth also controls the importation of foods under the *Imported Food Control Act 1992*, which does not restrict who may import foods into Australia, but requires imported food:

- to comply with Australian public health and food standards;
- to be subject to a risk assessment based program of inspecting and testing.

The Australian Quarantine Inspection Service administers the program with scientific support from FSANZ. Australian Government Analytical Laboratories is the sole provider of testing services.

States and Territories regulate food hygiene management via their Food Acts (the *Health Act 1911* in Western Australia) and often also via legislation that is specific to the dairy and meat industries. This legislation varies widely but generally provides for the approval of food premises, the authorisation of officers to inspect food and premises, and various food safety offences, including failure to comply with the Food Standards Code. Variation in regulation across jurisdictions hampers competition among suppliers in national food markets.

Regulating in the public interest

Food containing microbial, physical or chemical contamination can pose a serious threat to human health and safety. Some consumers also have particular dietary needs, such as those arising from food allergies. Food suppliers generally have strong incentives to produce safe food of the type that consumers want and for which they will pay. Incentives can be weak, however, where:

- contamination is often not evident to the consumer until after consumption; and
- suppliers of contaminated food cannot be forced to compensate consumers, given practical difficulties in verifying food quality and linking illness with a specific supplier.

In addition, food safety incidents can shake consumer confidence in broad classes of food and thus harm other suppliers. Governments therefore endeavour through regulation to deliver a level of food safety that is acceptable to the community.

Food safety regulation is not costless, however. It imposes costs on businesses by requiring, for example, specified premises design and equipment, staff training, and up-to-date knowledge of changes in regulation. These and other costs are ultimately passed on to consumers through higher prices and reduced choices. Food regulation should therefore:

- focus on protecting public health, by intervening only on the basis of sound science and risk assessment;
- hold food suppliers responsible for food safety, by setting simple and clear performance standards and by allowing suppliers the freedom to choose how to meet these standards; and
- unless necessary to protect public health:
  - not impose significant barriers to entry by suppliers into food markets;
  - not impose different regulatory burdens on suppliers of competing food products; and
  - allow competition in the delivery of food safety services such as auditing and testing.

Review and reform activity

The regulation of food production, processing and distribution has been subject to substantial review and reform activity since the mid-1990s. In 1994 the Australia New Zealand Food Standards Council (ANZFSC), comprising

health Ministers from the Commonwealth, States, Territories and New Zealand, commissioned ANZFA to review each standard of the Australian Food Standards Code and the New Zealand Food Regulations. These standards covered food composition and labelling. The aim was to produce a new joint Food Standards Code that was more focused, more coherent and less prescriptive.

The council adopted the new joint Food Standards Code in November 2000 —. including two new labelling standards (percentage labelling of key ingredients and nutritional panels) — and agreed to a two-year implementation period to allow businesses to minimise the associated costs. It also asked ANZFA to develop practical strategies to lower business implementation costs.

In 1995, the Australia New Zealand Food Standards Council commissioned ANZFA to develop nationally uniform food safety standards — the regulation of safe food practices, premises and equipment — to replace inconsistent and often out-of-date food hygiene regulations of the States and Territories, and New Zealand. In consultation with the States and Territories, and industry, ANZFA drafted four standards: Interpretation and Application; Food Safety Programs; Food Safety Practices and General Requirements; and Food Premises and Equipment. In July 2000, the council adopted three of the new food safety standards, which took force from February 2001. It deferred adoption of the Food Safety Programs standard pending further research on its effectiveness and efficiency.

In 1996, the Australia New Zealand Food Standards Council asked ANZFA to coordinate a review of State and Territory Food Acts and related legislation. This review resulted in a model food Bill. The Bill's accompanying regulation impact statement, including an NCP review, identified the following key restrictions on competition:[6]

- registration of food businesses;
- licensing of certain high risk food premises;
- licensing of laboratories and analysts to test food samples; and
- licensing of food safety auditors to audit food safety programs.

The regulation impact statement argued that these restrictions impose the minimum necessary cost to achieve the objectives of the Bill.

In March 1997, following consultation with the States and Territories, the Commonwealth commissioned the Blair review, which examined all aspects of food regulation (including competitive restrictions contained in the Australia New Zealand Food Authority Act) with the object of improving the efficiency

[6] The model food Bill uses 'notification' to mean registration and 'registration' or 'approval' to mean licensing.

of food regulation while protecting public health. The Blair report in August 1998 recommended that:

- the Commonwealth, States and Territories develop a national uniform food safety regulatory framework that meets identified principles of effective and efficient regulation;

- the Commonwealth amend the Australia New Zealand Food Authority Act to clarify its objectives; and require ANZFA, in carrying out its regulatory functions, to consider whether the benefits to the community outweigh the costs and whether alternatives to the regulation would be more cost-effective in achieving such benefits;

- all relevant government agencies make contestable such services as end-product inspection, auditing and laboratory analysis; and

- regulators and industry develop an integrated food safety auditor accreditation framework.

In 1999 the Commonwealth amended the Australia New Zealand Food Authority Act as recommended.

In November 2000, CoAG signed an Intergovernmental Food Regulation Agreement. Under the agreement, the States and Territories undertook to make their food legislation consistent with the core provisions of the model food Bill within 12 months. The core provisions relate mainly to food handling offences and to adoption of the Food Standards Code. Adoption of the noncore provisions (which include the registration and licensing schemes identified above) is voluntary. States and Territories may also retain other provisions in their legislation that are not in conflict with the enacted provisions of the model food Bill.

State and Territory governments are at various stages of amending or replacing their food legislation to adopt the model food Bill. Victoria, Queensland, South Australia, Tasmania and the ACT modified their food legislation in 2001. New South Wales and the Northern Territory intend to introduce the necessary legislation this year. Western Australia has not reported its timetable for adopting the model food Bill.

Most States and Territories have undertaken the review and, where appropriate, reform of their legislation relating to food safety in the dairy and meat industries (see table 4.8 for details). In several instances, some restrictions have been retained, and the Council will be seeking more information about these restrictions prior to finalising its assessment in 2003.

The Commonwealth Government reviewed the Imported Food Control Act in 1998. The review concluded that the existing regulatory arrangements overall deliver a net benefit to the community and, therefore, should be retained. It also found, however, that the efficiency and effectiveness of the arrangements could be improved, such as by encouraging importers to take co-regulatory

responsibility for food safety. The review recommended amending the Act to allow the Australian Quarantine Inspection Service to:

- enter into quality assurance-based compliance agreements with importers;
- expand the use of certification agreements with the food authorities of other countries; and
- tailor inspection strategies and rates to reflect importer performance and quality assurance agreements.

The review also recommended that the Commonwealth Government change its policy to permit suitably qualified laboratories to test imported food in all risk categories. On 29 June 2000 the Government announced that it accepted all of the recommendations. It has implemented eight of the 23 recommendations; other issues are substantially completed but awaiting legislative change.

Assessment

Commonwealth

The Commonwealth has met its CPA obligations to review and reform the Food Standards Australia New Zealand Act. The Blair review was properly constituted and its recommendations appear reasonable given the evidence available to it. Amendments passed in 1999 fully addressed the recommendations for changing the Act.

In relation to the new joint Food Standards Code, the Commonwealth did not meet its CPA clause 5(5) obligation to ensure the proposed new code was accompanied by evidence that it is in the public interest. The Commonwealth Office of Regulation Review found the cost–benefit analysis in the accompanying regulation impact statements to be inadequate and, therefore, not substantively in compliance with CoAG's principles and guidelines for national standard setting and regulatory action. This noncompliance has been addressed in part, however, by the above measures aimed at reducing implementation costs for business.

The Commonwealth is yet to meet its CPA clause 5 obligations arising from the Imported Food Control Act because the recommended reforms are still to be implemented. These reforms appear on a preliminary examination to be reasonable, and if implemented would satisfy the Commonwealth's obligations in this area. The Council will finalise its assessment of this matter in the 2003 NCP assessment.

States and Territories

The key competition restrictions imposed by the model food Bill are the provisions relating to the licensing of premises, laboratories, analysts and auditors. State and Territory adoption of these provisions is voluntary.

Where the provisions are adopted, however, their restrictive effect will depend on two features left open to State and Territory discretion:

- the criteria for granting or withholding licences; and
- the conditions that licences impose on licensees.

For State and Territories to meet their CPA clause 5 obligations arising from adopting these (or similar) provisions, they need to show that any licensing criteria and conditions are in the public interest. That is, they must show that no less restrictive alternative would meet the legislative objectives and that the benefits of the regulation exceed the costs. States and Territories also need to have reviewed any retained existing provisions that restrict competition, and reform these where this is in the public interest.

States and Territories are still to complete most of the review and reform of their food legislation, or to provide the Council with information that enables the assessment of whether they have met their CPA clause 5 obligations. Compliance will therefore also be a matter for the 2003 NCP assessment. Also in the 2003 assessment, the Council will examine review and reform of food safety legislation specific to the dairy and meat industries.

Table 4.8: Food regulation

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Food Standards Australia New Zealand Act 1991* (formerly the Australia New Zealand Food Authority Act)	Establishes FSANZ (formerly ANZFA), which develops food standards, coordinates food surveillance and recall systems, and develops codes of practice with industry.	Blair review of food regulation was completed in 1998. It recommended amending the Act to: • clarify regulatory objectives; • require ANZFA, in carrying out its regulatory functions, to apply an NCP test.	Act was amended by the *Australia New Zealand Food Authority Amendment Act 1999* to address the key recommendations.	Meets CPA obligations (June 2001).
	Food Standards Code	Sets standards for preparation, composition and labelling of food.	ANZFA developed a proposed new joint code including new standards on ingredient and nutritional labelling. It undertook regulatory impact analysis but the Office of Regulation Review found this analysis to be inadequate.	New joint code was adopted in November 2000 for implementation by November 2002.	Council to finalise assessment in 2003.
	Imported Food Control Act 1992	Requires imported food to meet Australian standards. Subjects imported food to risk-based inspection and testing. Provides for testing to be performed only by the Australian Government Analytical Laboratories.	Review was completed in 1998. It recommended: • recognising quality assurance processes of importers; • tailoring inspection rates and strategies to importer performance and agreements on certification and compliance; and • permitting qualified laboratories to test imported food.	Commonwealth accepted all recommendations in June 2000. Some have been implemented administratively while others await legislative change. Amendments have been drafted.	Council to finalise assessment in 2003.

(*continued*)

Table 4.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Food Act 1989*	Provides for various food safety offences. Provides for wide powers to make orders prohibiting or requiring conduct.	National review completed in 2000. It produced the model food Bill - a uniform regulatory framework for States and Territories. The Bill's core provisions adopt the Food Standards Code and set out various offences. Its noncore provisions include: • registration of all food businesses; • approval of food premises; and • contestable provision of audit and laboratory services subject to approval of providers.	All States and Territories agreed in November 2000 to adopt core provisions of the model food Bill by November 2001. New South Wales expects to introduce amendments in 2002.	Council to finalise assessment in 2003.
	Dairy Industry Act 1979	Provides for licensing of farmers and processors.	Review was completed in 1997.	Licensing and inspection provisions were replaced by the Food Production (Dairy Food Safety Scheme) Regulation 1999.	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.
	Meat Industry Act 1987	Provides for licensing of farmers and processors.	Review was completed in 1998.	Licensing and inspection provisions were replaced by the Food Production (Meat Food Safety Scheme) Regulation 2000.	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.

(*continued*)

Table 4.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Food Act 1984*	Various food safety offences. Food to meet prescribed food standards. Registration of food premises and vehicles. Food safety programs required for declared food premises/vehicles. Approval of auditors.	National review was completed in 2000 (see New South Wales *Food Act 1989*).	All Australian governments agreed in November 2000 to adopt core provisions of the model food Bill by November 2001. Act was amended by the *Food (Amendment) Act 2001* to adopt provisions of the model food Bill.	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.
	Dairy Industry Act 1992	Licensing of farmers, processors, distributors and carriers.	Review was completed in 1999 by independent consultant. It recommended retaining some food safety related restrictions but removing the public sector monopoly on the audit of food safety programs.	The Government accepted all review recommendations. Act was repealed by the *Dairy Act 2000*, which establishes Dairy Food Safety Victoria.	Meets CPA obligations (June 2002).
	Meat Industry Act 1993	Licensing of processing facilities and vehicles. Quality assurance programs required for certain premises. Minimum qualifications for inspectors. Minimum experience and qualifications for auditors.	Review by consultant was completed in March 2001. It recommended: • retaining licensing, minimum qualifications for inspectors, and minimum experience and qualifications for auditors; • improving the accountability of the Meat Industry Authority; and • prohibiting discriminatory exercise of Ministerial powers.	The Government accepted all but the recommendation to circumscribe the Minister's power to direct the Meat Industry Authority. Instead, the Government agreed to the disclosure of such directions. Act was amended accordingly in 2001.	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.

(*continued*)

Table 4.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Food Act 1981*	Provides for various food safety offences. Requires food to meet prescribed food standards. Requires registration of food premises (under associated regulations).	National review was completed in 2000 (see New South Wales *Food Act 1989*).	All Australian governments agreed in November 2000 to adopt core provisions of the model food Bill by November 2001. Queensland amended the Act accordingly in 2001. It is now consulting on adoption of the noncore provisions of the model food Bill.	Evidence needed on any restrictions to be retained. Council to finalise assessment in 2003.
	Dairy Industry Act 1993	Provides for licensing of farmers and processors.	Government/industry panel review was completed in 1998.	Licensing and inspection provisions replaced from 1 July 2002 by the Dairy Food Safety Scheme under the *Food Production (Safety) Act 2000.*	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.
	Meat Industry Act 1993	Provides for various food safety offences. Minimum qualifications for meat safety officers. Accreditation of processing facilities. Wide powers to make standards.	Review was completed in 1999, recommending the development of new food safety standards (especially for high risk foods).	Act was repealed and provisions for meat safety standards were included in the *Food Production (Safety) Act 2000*.	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.

(*continued*)

Table 4.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Health Act 1911*	Various food safety offences. Food to meet prescribed food standards.	National review was completed in 2000 (see New South Wales *Food Act 1989*).	All Australian governments agreed in November 2000 to adopt the core provisions of the model food Bill by November 2001. Western Australia expects to introduce new food Bill in the spring 2002 session of Parliament.	Council to finalise assessment in 2003.
	Health (Food Hygiene) Regulations 1993	Provides for licensing of food processors and registration of premises. Specifies safe food practices.	Regulations are under review.		Council to finalise assessment in 2003.
	Health (Game Meat) Regulations 1992	Requires minimum qualifications for slaughterers. Provides for registration of field depots and processing facilities.	Review completed.	Regulations were repealed and replaced by the Health (Meat Hygiene) Regulations 2001.	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.

(*continued*)

Table 4.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Food Act 1985*	Specifies offence to manufacture or sell food that does not meet prescribed standard.	National review was completed in 2000 (see New South Wales *Food Act 1989*).	All Australian governments agreed in November 2000 to adopt the core provisions of the model food Bill by November 2001. A new Food Act was passed in July 2001.	Further evidence needed on retained restrictions. Council to finalise the assessment in 2003.
	Dairy Industry Act 1992	Provides for licensing of farmers, processors and vendors.	Food safety provisions remain under review. Officials have developed a discussion paper for new primary industry 'food safety' legislation that would incorporate provisions for the dairy industry.		Council to finalise assessment in 2003.
	Meat Hygiene Act 1994	Provides for accreditation of meat processors. Requires meat inspectors and auditors to enter agreement with Minister.	Review was completed in 2000. It recommended extending the Act to cover rabbit meat and retail.		Further evidence needed on retained restrictions. Council to finalise assessment in 2003.

(*continued*)

Table 4.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Public Health Act 1962*	Provides for various food safety offences. Requires food to meet prescribed food standards. Requires registration of premises and vehicles. Provides for licensing of food manufacturers and sellers.	Proposed replacement legislation — Food Bill — was subject to CPA clause 5(5) review. National review was completed in 2000 (see New South Wales *Food Act 1989*).	Act was replaced by *Food Act 1998.* All Australian governments agreed in November 2000 to adopt the core provisions of the model food Bill by November 2001. Core provisions were adopted via the Food Regulations 2001.	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.
	Dairy Industry Act 1994	Provides for licensing of farmers, processors, manufacturers and vendors.	Review by a government/industry panel was completed in 1999.		Further evidence needed on retained restrictions. Council to finalise assessment in 2003.
	Meat Hygiene Act 1985	Provides for licensing of meat processing facilities.	Review was completed.	Reform legislation is to be introduced in 2002.	Council to finalise assessment in 2003.

(*continued*)

Table 4.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Food Act 1992*	Provides for various food safety offences. Provides for licensing of food businesses. Requires food to meet prescribed food standards.	National review was completed in 2000 (see New South Wales *Food Act 1989*).	All Australian governments agreed in November 2000 to adopt the core provisions of the model food Bill by November 2001. Act was amended accordingly in August 2001.	Further evidence needed on retained restrictions. Council to finalise assessment in 2003.
	Meat Act 1931	Requires Ministerial permission for certain meat processing activities.		Act was repealed by the *Food Act 2001*, subject to the passage of uniform food legislation.	Meets CPA obligations (June 2002).
Northern Territory	*Food Act 1986*	Provides for various food safety offences.	National review was completed in 2000 (see New South Wales *Food Act 1989*).	All Australian governments agreed in November 2000 to adopt the core provisions of the model food Bill by November 2001. Act is to be amended accordingly in 2002.	Council to finalise assessment in 2003.
	Meat Industries Act 1997	Provides for various food safety offences. Provides for licensing of processing facilities.	Review was completed by an independent reviewer in November 2000. It recommended no change. The Government accepted the recommendation in April 2001.		Meets CPA obligations (June 2002).

Quarantine and food exports

Quarantine

In 1999-2000 the Australian Quarantine Inspection Service supervised about 11 600 ship arrivals; processed 8.7 million passengers and aircrew, about one million cargo containers, 4.1 million airfreight consignments and more than 160 million mail articles; and managed the discharge of more than 150 million tonnes of ballast water (AQIS 2000).

Legislative restrictions on competition

The Commonwealth Government administers Australia's quarantine arrangements under the *Quarantine Act 1908*. The Act prohibits the import of certain goods, animals and plants unless with a permit. Other imports may require inspection or treatment before being allowed into the country. The entry of goods and passengers to Australia is also subject to screening by quarantine officers (appointed under the Act) who are empowered to search, seize and treat goods suspected of being a quarantine risk.

Regulating in the public interest

Exotic pests and diseases pose a serious threat to the Australian population, fauna and flora, and agriculture. Controlling this threat is a public good — given that it generally is neither feasible nor optimal to exclude persons who benefit from quarantine controls — so governments must intervene to supply the level of quarantine control desired by the community. Quarantine controls do, however, impose costs on international trade and travel, which are activities of considerable benefit to the public. To meet the public interest, governments should use the least costly quarantine controls available, and then only to the extent that the benefit of reduced pest and disease threat outweighs the cost.

Review and reform activity

The Quarantine Act was already under review when it was placed on the Commonwealth's legislation review schedule in 1996, but this review (the Nairn review) did not specifically consider whether the Act restricts competition. Consequently, the Commonwealth agreed in 1998 to review any elements of the Act that the Nairn review had not considered and that restrict competition.

In 1997-98 the Department of Health and Aged Care led an NCP review of those parts of the Act relating to human quarantine. This review concluded

that these provisions have minimal impact on competition and that the public health benefits outweigh this impact. It also found, however, scope to update the legislation to reflect current policy and practice. The Government released a final report in December 2000 following further research and consultation on possible changes. This report recommended amendments to the Act, along with further research and consultation on several remaining complex issues. Amending legislation is expected to be introduced later in 2002.

The Department of Agriculture, Fisheries and Forestry is giving consideration to whether any parts of the Act related to animal and plant quarantine significantly restrict competition and therefore justify review.

Assessment

The NCP review of the human quarantine provisions of the Quarantine Act appears to have reached an outcome consistent with the evidence before the review. As such, and because the further review and reform activity does not relate to material restrictions on competition, the Council considers that the Commonwealth has met its CPA clause 5 obligations relating to these provisions.

To meet its CPA clause 5 obligations relating to the animal and plant health provisions of the Act the Commonwealth needs to either:

- review and, where appropriate, reform these provisions; or
- show that these provisions do not significantly restrict competition.

The Council will assess the Commonwealth's CPA compliance in this area in 2003.

Food exports

Food exports make an important contribution to Australia's international trade, accounting for $24.3 billion in 2000-01 (AFFA 2002).

Legislative restrictions on competition

The Commonwealth's *Export Control Act 1982* provides for the inspection and control of exports prescribed by regulation (namely, the export of food and forest products). The 'Forestry' section of this chapter discusses review and reform activity relating to restrictions on competition in the export of forest products. The Export Control Act controls most food exports — fish, dairy produce, eggs, meat, dried fruits, fresh fruit and vegetables and some processed fruit and vegetables — and it restricts competition in this area by:

- requiring premises to be registered and to meet certain construction standards;

- imposing processing standards; and
- imposing compliance costs and regulatory charges.

These restrictions raise Australian food exporters' costs and may lead to forgone export sales, particularly where the requirements differ from those for domestic sales.

Regulating in the public interest

In exporting food, Australia must meet:

- market access requirements imposed by, or negotiated with, foreign governments, such as:
  - specified food safety standards or certification by a government agency;
  - trade and product descriptions, and volume limitations;
- obligations under various international agreements; and
- a moral obligation not to export dangerous or unhealthy food.

In addition to these obligations, all Australian food exporters may lose access to a market if one exporter causes a food safety incident. While exporters generally have strong incentives to avoid such incidents, the disruption of exports due to an isolated failure could have a significant impact on the performance of the Australian economy, particularly on the rural and food sectors, and individual producers. Regulating food exports is in the public interest, therefore, where Australian exporters would otherwise not maintain access to foreign markets and where least-cost controls are used. Such controls generally allow exporters flexibility as to how they meet market requirements (for example, via accredited quality assurance systems).

Review and reform activity

The Commonwealth completed a two-year review of the Act, as it relates to fish, grains, dairy and processed food, in February 2000. The review was led by a largely independent review committee which consulted extensively within and beyond Australia. The review found that the Act is fulfilling its purpose and delivering an overall economic benefit, having facilitated exports worth $13 billion in 1998-99. Against this finding, the review recommended improving the administration of the Act by:

- introducing a three-tiered system for administering Australian standards, access standards imposed by overseas governments and market-specific requirements;
- harmonising domestic and export standards, and making them consistent with relevant international standards;

- continuing to have a single government agency administer the certification of Australia exports;
- making monitoring and inspection arrangements fully contestable; and
- establishing development committees (with industry and Australian Quarantine Inspection Service representation) to determine and implement strategies and priorities for relevant industries.

The Commonwealth decided in April 2002 to accept all recommendations, and is consulting with industry on timeframes for implementation of the reforms.

Assessment

The review of the food-related provisions of the Export Control Act was properly constituted, and its findings and recommendations appear to be within a reasonable range of possible outcomes. As the Commonwealth is still to implement the review recommendations, it is yet to fully meet its CPA clause 5 obligation. The Council will finalise its assessment of the Commonwealth's compliance in 2003.

Table 4.9: Quarantine and export control regulation

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Quarantine Act 1908*	Screening of goods and passengers entering Australia. Prohibition of import of certain goods, animals and plants unless with a permit.	Provisions relating to human quarantine reviewed by the Department of Health and Aged Care in 1998. Review found minimal impact on competition, along with public health benefits in excess of costs. Department of Agriculture, Fisheries and Forestry is considering the need for review of provisions related to animal and plant quarantine.		Human quarantine — meets CPA obligations (June 2001). Plant and animal quarantine — Council to finalise assessment in 2003.
	Export Control Act 1982 (food provisions)	Registration of processing premises. Inspection of premises and goods. Product standards. Charges and penalties for noncompliance.	Review of provisions related to fish, grain, dairy and processed food was completed in February 2000. It recommended: • introducing a three-tier model for export standards; • harmonising domestic and international standards; • retaining a monopoly on certification of exports; and • making monitoring and inspection contestable. The Government has accepted all recommendations. An implementation timetable is being developed with industry.		Council to finalise assessment in 2003.

Veterinary services

About 7000 professional veterinarians are practising in Australia (DEST 2002). About 60 per cent are in private practice, caring for the companion animals of city people, the agricultural animals of farmers and racing greyhounds and horses. Others work for governments to control and prevent diseases that could affect animals throughout the country. Some veterinarians are field officers and some work in laboratories with diagnostic or research duties. Others are in higher education as well as research and development in the chemical and pharmaceutical industries.

Legislative restrictions on competition

All States and Territories regulate veterinarians via specific legislation. This legislation typically restricts competition among veterinarians through:

- registration and education requirements;
- the reservation of title and certain areas of practice to veterinarians;
- business conduct restrictions, such as controls on advertising and ownership; and
- disciplinary processes.

In addition, legislation relating to drugs and poisons, and animal health welfare may also affect veterinary practice. These restrictions constrain entry into the profession and innovation by veterinarians, thereby raising the cost of veterinarians' services and limiting choice for consumers, particularly for those in regional and remote areas. In May 2002 the Commonwealth announced a review into the shortage of veterinarians in country areas.

Regulating in the public interest

The principal objective of legislation regulating veterinary practice is to protect the public against professional incompetence, recognising that many consumers of veterinary services may have difficulty assessing the capability of veterinarians. Other objectives to which veterinary legislation contributes, but which generally are the subject of more specific and direct legislation, are:

- to limit the threat posed by inadequate diagnosis and treatment of animal diseases to public health and Australia's livestock and livestock product trade; and
- to protect the welfare of animals.

Professional regulation such as that of veterinary services is in the public interest where restrictions directly reduce identified and important harms and are the minimum effective response. In particular, regulation of veterinary practice in the public interest should:

- ensure professional interests do not dominate regulatory decisions on entry and conduct, by having regulatory bodies with strong community representation and only a minority representation from the profession;
- restrict entry only on the basis of clear and objective criteria, such as widely recognised and available qualifications and the absence of specific offences;
- reserve areas of practice only in specific terms, so that the reservation reduces harms than cannot be addressed in less costly ways, and allow less risky areas of practice to be performed by less qualified practitioners; and
- not restrict business conduct in ways that are only weakly linked to avoiding harm, such as reservation of practice ownership to veterinarians or advertising prohibitions beyond those in the TPA.

Review and reform activity

All States and Territories have largely completed the review of their legislation in this area. Victoria, Queensland and the Northern Territory have implemented reform. The other jurisdictions intend to introduce amendments to their legislation in 2000.

The main reforms implemented or foreshadowed have been to remove business conduct restrictions such as the reservation of practice ownership to veterinarians and advertising prohibitions (to the extent that advertising is restricted beyond general fair trading regulation). Less common has been the removal of general reservations of practice (although Victoria's legislation does not reserve practice and the ACT intends to remove its reservation). Table 4.10 summarises the key restrictions that remain in each jurisdiction.

Table 4.10: Veterinary surgery regulation post-reform

Jurisdiction and legislation	*Registration board membership*	*Registration criteria*	*Reservation of practice*	*Business conduct restrictions*
Victoria *Veterinary Practice Act 1997*	Six veterinarians One lawyer Two nonveterinarians	Recognised qualification or equivalent Good character including no prior offences	No general reservations in Act but several specific reservations in other legislation	Advertising restrictions equivalent to those in the TPA
Queensland *Veterinary Surgeons Act 1936*	Four veterinarians Chief animal health officer One other person	Recognised qualification, college membership or equivalent Good fame and character	General reservation subject to exclusion of practice not for fee or reward and certain minor acts	Prior approval of premises
Northern Territory *Veterinarians Act 1994*	Two veterinarians Chief stock inspector One nonveterinarian One other person (who may be a vet)	Recognised qualification, college membership or registration in another State or Territory No prior offences	General reservation subject to exclusion of practice by certain other health professionals and by other persons at the direction of a veterinarian, and of certain minor acts	Advertising restrictions equivalent to those in the TPA

Assessment

The Council's assessment of review and reform by Victoria, Queensland and the Northern Territory against CPA clause 5 obligations focused on several key restrictions on competition. The Council is concerned that veterinarians dominate registration boards in all three jurisdictions, although less so in the Northern Territory than in Victoria and Queensland. The composition of registration boards should avoid the possibility of professional interests predominating in registration, standard-setting and disciplinary decisions. The inclusion of a minority of veterinarians is sufficient to ensure access to relevant expertise. Regulatory bodies should involve consumer representation, given that consumer protection is the principal objective of regulating the profession. Other relevant expertise, particularly legal expertise where the board hears disciplinary matters, should be represented.

The Council is also concerned where registration criteria potentially allows the setting of a higher than necessary barrier to entry. Queensland's registration criteria requires that an applicant be of 'good fame and character' – a criterion which, on its own, leaves considerable doubt as to how it is applied. This doubt could be addressed by identifying specific character disqualifications, such as prior offences, either in the Act, in regulations or in guidelines made available to the public.

The reservation of practice to qualified professionals can be in the public interest. In accordance with the principle of minimum necessary regulation, however, the Council generally favours specific reservations over general ones such as in the Queensland and the Northern Territory legislation. Specific reservations allow competition from lesser qualified providers except where this would clearly be harmful and where there are no less restrictive means of addressing the harm. Such reservations may be best made in other legislation, such as that targeted at controlling animal disease or protecting animal welfare. This is the approach of the Victorian legislation and, the Council understands, the intended approach of upcoming reforms in the ACT.

Queensland's *Veterinary Surgeons Act 1936*, as recently amended, requires the approval and registration of premises from which veterinarians deliver services. Neither the Victorian nor the Northern Territory legislation includes this sort of provision. Western Australia intends to replace a similar provision with a code of practice. The Council is concerned that the Queensland provision, which could allow the arbitrary exclusion of new competing premises, is more restrictive than necessary to achieve the legislation's objective.

The Council will finalise its assessment of compliance with the CPA clause 5 in 2003. The Council will look for Victoria, Queensland and the Northern Territory to address the concerns identified above – either by reforming those restrictions or showing how they are in the public interest. It will also look for New South Wales, Western Australia, South Australia, Tasmania and the ACT to have completed their review and reform of their veterinary practice legislation, and to demonstrate that their legislation is consistent with CPA clause 5 principles.

Table 4.11: Veterinary surgery regulation

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Veterinary Surgeons Act 1986*	Licensing of veterinary surgeons and hospitals, reservation of practices, reservation of title, advertising restrictions, controls on business names.	Review was completed in 1998 by a panel of officials, veterinarians, consumers and animal welfare interests. The Government is developing its intended reforms with public consultation. The Government stated that it intends to make amendments in 2002.		Council to finalise assessment in 2003.
Victoria	*Veterinary Practice Act 1997*	Registration of veterinary practitioners, reservation of title, advertising restrictions.	Act followed a pre-NCP review of earlier legislation. Victoria considers remaining restrictions are in the public interest.		Council to finalise assessment in 2003.
Queensland	*Veterinary Surgeons Act 1936*	Registration of veterinary surgeons, general reservation of practice, advertising restrictions, ownership restrictions, controls on business names.	Review was completed in 1999. It recommended: • retaining registration, practice reservation and approval of premises; and • removing of restrictions on ownership, advertising and business names.	Act was amended accordingly in October 2001.	Council to finalise assessment in 2003.
Western Australia	*Veterinary Surgeons Act 1960*	Licensing of veterinary surgeons and hospitals, general reservation of practice, reservation of title, advertising restrictions, controls on business names.	Review was completed in 2001. It recommended: • introducing a new registration for lesser qualified practitioners; but • replacing restrictions on advertising, premises and ownership with voluntary codes. The Government has endorsed the review recommendations and intends to amend the Act this year.		Council to finalise assessment in 2003.

(*continued*)

Table 4.11 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Veterinary Surgeons Act 1985*	Licensing of veterinary surgeons and hospitals, reservation of practices, reservation of title, advertising restrictions, controls on business names.	Review was completed in 2000. The Government is preparing new legislation to replace the Act.		Council to finalise assessment in 2003.
Tasmania	*Veterinary Surgeons Act 1987*	Licensing of veterinary surgeons and hospitals, reservation of practices, reservation of title.	Minor review was completed and the Government intends to amend the Act in 2002.		Council to finalise assessment in 2003.
ACT	*Veterinary Surgeons Registration Act 1965*	Licensing of veterinary surgeons, reservation of practices, reservation of title, advertising restrictions.	Review was completed in March 2001. It recommended: • retaining registration, reservation of title and clear conduct standards; and • removing the general reservation of practice. The Government expects to amend the legislation in 2002.		Council to finalise assessment in 2003.
Northern Territory	*Veterinarians Act 1994*	Licensing of veterinary surgeons, reservation of practices, reservation of title, advertising restrictions.	Review was completed in 2000. It recommended: • retaining licensing, reservation of title and reservation of practices; • having additional consumer representation on the Veterinary Board; and • removing some advertising restrictions.	Act and Regulations were amended accordingly in March 2001.	Council to finalise assessment in 2003.

Mining

Coal mining and mining for metal ores generated turnover of $26.6 billion in 1999-2000 and added $15.2 billion to Australia's national income (ABS 2001a).

With few exceptions ownership of minerals is reserved in legislation to the Crown — being the government which has jurisdiction over the territory in which the minerals occur – principally State governments and the Northern Territory Government. The mining industry in Australia is privately owned. Governments intervene principally through regulation, some of which is specific to the industry,[7] and restricts competition in mineral and related markets. Governments' CPA obligations relating to mining are therefore to review and, where appropriate, reform this regulation.

Legislative restrictions on competition

Governments prohibit exploration for and extraction of minerals without a right such as a licence or permit.

Exploration rights are exclusive, generally nontradeable and defined by area boundaries and period — between 2 and 10 years. Governments usually allocate these on a 'first come, first served' basis, although there are some instances of competitive tenders. These rights often oblige holders to undertake a specified level of exploration work and to reveal the results of this work. Holders wishing to extract minerals must make a further application for an extraction right (or mining lease or licence).

Extraction rights are also exclusive and generally nontradeable. Their term is between 16 and 25 years. The rights require the holder to pay a resource royalty to the government, to pay fair compensation to the landowner, and to minimise environmental harms including through rehabilitation of former mine sites.

Some specific large mining projects are regulated by Agreement Acts. These Acts specify in advance the contributions and obligations of the developer and the government and, therefore, reduce uncertainty for miners and mine investors. As well as allocating ownership of resources, these Acts cover in some instances the provision of transport, water and energy infrastructure. The Agreement Acts are most common in Western Australia where there are

[7] Governments also provide assistance in relation to matters such as research and information.

some 64 resource development Agreement Acts. Few Agreement Acts in Australia have been listed for review.

Regulating in the public interest

The Industry Commission's 1991 report on mining and minerals processing contains an extensive and authoritative analysis of the regulation of mining (IC 1991). The commission evaluated the allocation of exploration and extraction rights and recommended either:

- its preferred approach — long-term (99 year) tradeable mineral rights, subject only to limited and well-defined conditions related to royalties and environmental safeguards, allocated by competitive cash bidding; or

- an incremental change approach — existing mineral rights, except that exploration rights should not be subject to work program conditions, allocated on the 'first come, first served' basis, or a competitive basis where there is the prospect of significant competition for a right.

Agreement Acts provide long term and well-defined rights and obligations and, therefore, are not inconsistent with the approach advocated by the commission. The issue of most concern for competition is how these rights are allocated. The allocation process tends to be ad hoc, rather than governed by legislation, so public interest issues arising from the making of these agreements are better addressed by means other than the CPA clause 5 obligations. Consequently, the Council does not consider Agreement Acts are a priority for NCP assessment.

Review and reform activity

Commonwealth

The Commonwealth commissioned an independent review of the *Aboriginal Land Rights (Northern Territory) Act 1976* and Regulations in 1998. This legislation gives traditional Aboriginal owners the right to consent to mineral exploration. The review, released in August 1999, recommended that this right be retained, and that various other restrictions on consent negotiations be removed. The Commonwealth is considering its response to this and other reviews of the legislation.

The Commonwealth reviewed its *Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act 1993* and Regulations in 1997. This legislation imposes on uranium producers a fee to recover costs of nuclear safeguards and protection activities related to uranium production. The review, by a committee of officials, recommended replacing the flat per-producer fee with

one based on uranium output and historical costs of these activities. It also recommended a cap of $500 000 per year per producer. In December 1997 the Government announced that it accepted all recommendations except the fee cap removal. The change to the fee was implemented by regulation.

Assessment

The Commonwealth is yet to meet its obligations relating to the Aboriginal Land Rights (Northern Territory) Act (and Regulations) because it has not responded to the review or made the recommended reforms. The Council will finalise its assessment of this matter in 2003.

The Council accepts that the Commonwealth has substantively met its CPA clause 5 obligations relating to the Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act and Regulations. The Council acknowledges that retaining the fee cap is unlikely to have a significant effect on competition.

New South Wales

New South Wales has progressed the NCP reviews of its *Coal Mines Regulation Act 1982* and *Mines Inspection Act 1901* as part of a general review of mine safety regulation. New South Wales expects a report shortly and to make consequential reforms in 2002-03.

New South Wales reviewed the licensing provisions of the *Mining Act 1992* as part of its licence reduction program. Other provisions are included in its mine safety regulation review.

New South Wales is yet to complete the NCP review of its mining legislation and therefore is yet to fulfil its related CPA obligations. The Council will finalise its assessment in 2003.

Victoria

Victoria completed an independent review of its *Mineral Resources Development Act 1990* in 1997. The review's most important recommendations called for removal of:

- various licensing criteria, including that the applicant is 'fit and proper';
- employment conditions of licences; and
- certification of mine managers.

The Government's response accepted most recommendations at least in part.

Victoria released in October 2001 the report of an independent review of its *Extractive Industries Development Act 1995*. Amongst other things this recommended removal of the requirement for quarry operators to obtain a work authority from the Minister. The Government is considering its response to the recommendations.

The Council found in its 2001 NCP assessment that Victoria had met its CPA obligations relating to the Mineral Resources Development Act. The review was open and independent, and the Government has implemented most recommendations at least in part.

Victoria has not met its CPA clause 5 obligations in relation to the Extractive Industries Development Act. It has not responded to the review recommendations and, in particular, the recommendation to remove the requirement for quarry operators to obtain a work authority. Given the recommended changes are minor, the Council acknowledges that the cost of the delay in the Government's response is not likely to be significant. The Council will finalise its assessment in 2003.

Queensland

Queensland listed its *Coal Industry (Control) Act 1948* for review. This was repealed in 1997.

The Government did not list for review two key mining Acts — the *Coal Mining Act 1925* and the *Mineral Resources Act 1989*. The Government repealed the Coal Mining Act and replaced it with the *Coal Mining Health and Safety Act 1999* which was examined under Queensland's gatekeeper process for legislative proposals that restrict competition. Queensland did not list for review the Mineral Resources Act, which regulates the allocation of exploration and extraction rights, on the basis that:

- reviews of similar legislation in other jurisdictions have recommended no more than minor changes;
- the Act is consistent with the outcome of the national review of Petroleum (Submerged Lands) Acts; and
- the Act includes an open appeals process.

The Council found in its 1999 NCP assessment that Queensland's repeal of the Coal Industry (Control) Act met its related CPA obligations. The Council assessed in 2001 that Queensland had met its CPA obligations relating to the Coal Mining Act and the Mineral Resources Act.

Western Australia

The principal mining legislation in Western Australia is the *Mining Act 1978*. Similarly to other general mining legislation, this Act prohibits mineral exploration and extraction activity without a licence or similar right issued by the Government. These licences are transferable subject to, in some circumstances, Ministerial consent. Exploration rights have a maximum term of five years. Extraction rights have a maximum term of 21 years and are renewable for further 21 year terms on application to the Minister. A review of the Act by the Department of Minerals and Energy recommended retaining all existing restrictions. The then Government endorsed this outcome in December 2000.

The 2001 NCP assessment reported that in June 1999 the Council had assessed Western Australia as having met its CPA clause 5 obligations relating to the Mining Act.[8] The Council reached this judgment because it understood that the Government had accepted the finding by the State's NCP review that the restrictions in the Act provide a net community benefit. The date at which the assessment of compliance was made was, however, June 2001.

South Australia

South Australia reported that its major mining legislation (namely the *Mining Act 1929*, the *Mines and Works Inspection Act 1920* and the *Opal Mining Act 1995*) remains under NCP review.

South Australia is yet to meet its CPA obligations in relation to legislation regulating mining because is still to complete its NCP review of legislation in this area. The Council will finalise its assessment in 2003.

Tasmania

Tasmania has completed the review of its *Mineral Resources Development Act 1995*. In 2000 the government/industry review panel consulted widely via the release of a discussion paper and regulatory impact statement. Following this it recommended retention of all existing restrictions on competition.

The Council considers that Tasmania has met its CPA clause 5 obligations in relation to the Mineral Resources Development Act. The review process was

[8] Other Western Australian legislation previously identified as priority assessment matters were the Coal Industry Superannuation Act 1989 and the Gold Corporation Act 1987. The Council's investigations indicate that these Acts are only tangentially related to mining activity.

open and the Act is similar to legislation which has been found to be in the public interest in other jurisdictions.

The Northern Territory

The Northern Territory's principal mining legislation is the *Mining Act 1980*. This prohibits exploration and extraction activity without a licence or similar authority. The Government has completed a review of this Act and is considering the recommendations.

Two other Acts, the *Mine Management Act 1990* and the *Uranium Mining (Environmental Control) Act 1979*, have been repealed without review. They have been replaced by the *Mining Management Act 2001*. This regulates the management of safety and environmental risks in the mining industry. The Government completed an NCP review of the legislation following its introduction to Parliament.

The Northern Territory Government is still to respond to the review of the Mining Act and so is yet to fulfil its CPA clause 5 obligations relating to this Act. The Council will finalise its assessment of the Territory's compliance in 2003.

The Northern Territory has met its CPA clause 5 obligations relating to the Mine Management Act 1990 by repealing it and subjecting the replacement legislation to its gatekeeper process.

Table 4.12: Review and reform of legislation regulating mining

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Aboriginal Land Rights (Northern Territory) Act 1976* and Regulations	Provides for the granting of land to traditional Aboriginal owners and gives certain rights over granted land, including a veto over mineral exploration.	Review completed, and report released publicly in August 1999.	The Government is considering a response to this and other reviews relating to the Act.	Council to finalise assessment in 2003.
	Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act 1993 and Regulations	Imposes a charge on uranium producers to recover cost of nuclear safeguards and protection activities.	Review by officials completed in 1997, recommending principally that the flat fee be replaced with an output-based fee. It also recommended removal of cap on fees paid by individual producers.	The Government announced its response in December 1997, accepting all recommendations but that to remove the fee cap.	Meets CPA obligations (June 2002).

(*continued*)

Table 4.12 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	(1) *Coal Ownership (Restitution) Act 1990* and (2) *Coal Acquisition Act 1981*	(1) Provides for the restitution of certain coal acquired by the Crown as a result of the *Coal Acquisition Act 1981*. (2) Vests all coal in the Crown.	Review unnecessary because the Acts considered not to restrict competition.	Acts superseded by the *Coal Acquisition Amendment Act 1997* and to be repealed when the Coal Compensation Board is abolished.	Meets CPA obligations (June 1997).
	(1) *Mines Inspection Act 1901* and (2) *Coal Mines Regulation Act 1982*	(1) Makes provision for the regulation and inspection of mines and regulates the treatment of the products of such mines. (2) Regulates coal mines (and oil shale and kerosene shale mines) and certain related places.	Review under way as part of a general review of mine safety regulation, expected to be completed shortly.		Council to finalise assessment in 2003.
	Mining Act 1992	Licensing of mineral exploration and extraction.	Licensing requirements dealt with under the Licence Reduction Program. Other restrictions considered in mine safety review above.		Council to finalise assessment in 2003.

(*continued*)

Table 4.12 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Extractive Industries Development Act 1995*	Searching for quarry stone prohibited without a permit. Quarrying prohibited without a work authority from the Minister.	Review completed and released in October 2001. It recommended removal of work authority. The Government is considering its responses.		Council to finalise assessment in 2003.
	Mineral Resources Development Act 1990	Licensees must be 'fit and proper' and intend to do work. Licence conditions including employment levels. Maximum term of licences and restrictions on renewal. Work prohibited without approved work plan. Certification of mine managers.	Review by independent consultant completed in 1997, recommending removal of subjective licence criteria, employment conditions and mine manager certification. Government accepted most recommendations at least in part.	Act amended in Spring 2000. Guidelines prepared on interpretation of licence criteria.	Meets CPA obligations (June 2001).

(*continued*)

Table 4.12 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Coal Industry (Control) Act 1948* and Orders	Compulsory acquisition of coal. Price regulation. Approval required for opening, closing and abandonment of coal mines.		Repealed.	Meets CPA obligations (June 1999).
	Coal Mining Act 1925	Regulates the operation of coal mines, particularly health and safety issues.	Not listed for review.	Repealed and replaced by the *Coal Mining Safety and Health Act 1999* and Regulations which were subject to a gatekeeper review.	Meets CPA obligations (June 2001).
	Mineral Resources Act 1989	Various permits, licences and leases.	Not listed for review as Act not considered unnecessarily restrictive.		Meets CPA obligations (June 2001).
Western Australia	*Mining Act 1978* and Regulations 1981	Prohibits mineral exploration or extraction without a licence. Term of exploration licences – 5 years. Term of extraction (mining) licences – 21 years (renewable). Minimum expenditure conditions.	Review by Department of Minerals and Energy recommended retention of all restrictions. Government endorsed recommendations in December 2000.	None required.	Meets CPA obligations (June 2001).[9]

(*continued*)

[9] The 2001 NCP assessment reported that the Council had assessed in June 1999 that Western Australia had met its CPA obligations relating to this Act. The assessment occurred in June 2001.

Table 4.12 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Mining Act 1971*	Mining prohibited without licence. Term of exploration licences – 5 years. Term of extraction (mining) licences – 21 years (renewable).	Review underway.		Council to finalise assessment in 2003.
	Mines and Works Inspection Act 1920	Mine inspector may order the cessation of mining.	Review underway.		Council to finalise assessment in 2003.
	Opal Mining Act 1995	Mining for precious stones without authority prohibited. Term of exploration permits – 1 year. Term of extraction permit – 3 months renewable for 12 months.	Review underway.		Council to finalise assessment in 2003.
Tasmania	*Mineral Resources Development Act 1995*	Exploring or extracting minerals prohibited without licence. Term of exploration licences – 5 years. Term of extraction (mining) leases – up to 21 years.	Review by government/industry panel completed, recommending no change.		Meets CPA obligations (June 2002).

(*continued*)

Table 4.12 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Mining Act 1980*	Prohibits mineral exploration or extraction without a licence. Term of exploration licence – 6 years renewable for 2 + 2 years. Term of extraction licence – 25 years renewable.	Review complete and awaiting Government consideration.		Council to finalise assessment in 2003.
	Mine Management Act 1990	Regulates occupational health and safety in mining.	Act not reviewed.	Repealed and replaced by the Mining Management Act 2001 which was assessed under the gatekeeper process.	Meets CPA obligations (June 2002).
	Uranium Mining (Environmental Control) Act 1979	Controls uranium mining in the Alligator Rivers Region.	Act not reviewed.	See Mine Management Act.	Meets CPA obligations (June 2001).

Fisheries

The commercial fishing industry is Australia's fourth most valuable food-based primary industry — after beef, wheat and milk. The landed value of the commercial wild catch increased from $1.1 billion in 1989-90 to nearly $2.4 billion in 1999-2000 (FRDC 2002). Australia's major commercially harvested species are prawns, rock lobster, abalone, tuna, other fin fish, scallops, and edible and pearl oysters. Aquaculture production is also growing rapidly, with the value of production rising from $188 million in 1989-90 to $602 million in 1998-99. Aquaculture is established in all States, with farmed species ranging from pearl oysters to trout. The majority of Australian production — some $1.5 billion in 1998-99 — is exported. The value of fish and fish products consumed domestically in 1998-99 was approximately $1.4 billion, including imports valued at $878 million.

Fishing is also an important recreational activity in Australia. Two main industries are involved. The Australian fishing tackle and bait industry has an annual turnover in excess of $170 million. The recreational boating industry (of which 60 per cent relates to fishing) accounts for a further $500 million in turnover. In addition to Australian fishers, international tourists spend over $200 million on recreational fishing in Australia each year.

This section discusses the issues facing governments; in particular, how best to develop and improve the efficiency of Australia's fishing industry while ensuring sustainable development of the resource. All governments, with the exception of the ACT, are addressing this question via reviews of their fisheries legislation under the NCP program. While most reviews have been completed, the Council has very little information on the processes and recommendations of most reviews and on governments' reform responses. Apart from Western Australia, governments have not released review reports. Further, their NCP annual reports have tended to provide little information on fisheries legislation. The Council therefore seeks more detailed information of review and reform activity in this area. It will finalise its assessment of governments' compliance with their CPA clause 5 obligations in the 2003 NCP assessment.

Legislative restrictions on competition

Commonwealth, State and Territory governments all regulate wild fisheries.[10] The Commonwealth is responsible for fisheries that are 3–200

[10] Approximately 60 per cent of wild fish production derives from State and Territory waters. The remaining 40 per cent is caught in Commonwealth waters.

nautical miles off the Australian coast. State and Territory governments are responsible for coastal fisheries out to 3 nautical miles, as well as estuaries and fresh water fisheries. There are also Commonwealth–State agreements (offshore constitutional settlement arrangements) aimed at improving the management of certain fisheries. States and Territories regulate fish farming (aquaculture) via either general planning and environment laws or specific-purpose legislation.

Most wild fisheries regulation restricts competition. The main restrictions (occurring in an array of legislative and nonlegislative instruments, including primary legislation, subordinate legislation, management plans and licence conditions) are:

- restrictions on access — entry and/or exit — via licensing of fishers and their boats;
- other restrictions on access; spatial restrictions (such as closure of fisheries and depth restrictions) and temporal restrictions (such as season or weekend closures of fisheries);
- restrictions on output via total allowable catches and fishing quotas;[11] and
- restrictions on inputs via limits on boat size and engine power or on fishing gear and methods.

Regulating in the public interest

The major objectives of fisheries legislation are sustainable development, equitable resource access and economic efficiency. These objectives require governments taking measures, at minimum cost to the community, to:

- sustain fish stocks to maximise their economic benefits in perpetuity;
- protect marine environments and marine biodiversity; and
- distribute the benefits of the resource appropriately among commercial, recreational and indigenous fishers.[12]

Governments regulate the use of wild fisheries principally because unfettered competition can lead to overfishing, overcapitalisation and, ultimately, lower economic, environmental and social returns from the fishery than otherwise

[11] There is increasing use of individual transferable quotas. These are in place in the south east trawl fishery, the south east non-trawl fishery, and the southern bluefin tuna fishery. Output controls are applied in the Bass Strait central scallop zone fishery and the southern shark fishery.

[12] Occasionally, fisheries regulation also seeks to exert export market power where the potential for such power exists.

may be obtainable. Economic theory suggests that these outcomes are the almost inevitable consequence of 'open access' fisheries (fisheries in which there are no limits on the catch of the fish resource). Even where there are restrictions on the number of fishers allowed access to the fishery or on fishing equipment and/or methods, fishers have an incentive to harvest as much as possible of the available resource before their competitors. There is a constant incentive for fishers to find new ways in which to circumvent access controls so as to increase fishing effort. Similarly there are incentives to fish at the start of a season because stocks may be later depleted. For these reasons, fisheries regulation is increasingly moving toward approaches based on quasi-property rights, which determine and allocate a 'total allowable catch'. The quasi-property rights approach can avoid, in theory, the above negative incentives, though substantial difficulties with its practical implementation can arise.

There is some evidence of overfishing in Australia. The Organisation for Economic Co-operation and Development's (OECD) reporting on Commonwealth-managed fisheries describes, for example, four fisheries as overfished, ten as fully fished, one as underfished and 15 as uncertain (OECD 2001). (The OECD did not report similar evidence about State-managed fisheries.) These observations about Australian fisheries are consistent with overseas experience. In the United States, for example, overcapitalisation and overfishing are empirically well established.

- Edwards and Murawski (1993) found that the economic benefits derived from the New England groundfish fishery could be increased by US$150 million annually, but that this would require a 70 per cent reduction in fishing effort.

- Ward and Sutinen (1994) estimated that only one third of the 1988 fleet operating the Gulf of Mexico shrimp fishery would be required to harvest the same quantity of fish — that is, two thirds of the capital employed could be re-deployed to other uses without reducing total product.

The likely existence of overfishing emphasises the need for management practices to ensure sustainability. Appropriate management practices may involve significant limits on entry to fisheries and on the allowable catch. A key conclusion of the OECD Committee for Fisheries, for example, is that management regimes in some overcapitalised fisheries need to impose significant reductions in the allowable catch in the medium term, with the likely result being fewer participants in the fishery (OECD 2000, p. 188).

Such management policies do not conflict with NCP principles. The CPA clause 5 guiding principle is that competition should be restricted only where necessary to maximise the net benefit to the community as a whole. Restrictions on fishing effort and policies that lead to fewer fishers are clearly consistent with this principle. In all fisheries, including those that are overexploited, the key NCP objective is to maximise competition within the framework of responsible long-term resource management.

Appropriate regulation of fisheries

Many countries have recognised over the past two decades the need to reform their mechanisms for regulating fisheries to ensure optimal use of the resource. There is now widespread international recognition of the nature of the questions and the challenges facing fisheries management. The OECD Committee for Fisheries, in commenting on the appropriate direction of reform, stated that:

> *… to alleviate fisheries problems it would be useful to introduce rights based management systems (e.g. transferable individual licences, individual quotas, and exclusive area user-rights). For example, individual quotas result in improved stock conservation, reduction in overcapacity and race-to-fish, and hence in overall better economic performance. However, rights based systems require governments to establish and maintain a legal framework for the rights and may increase administrative costs. Furthermore, the implementation of such systems may cause structural adjustment consequences, including lower employment opportunities, and distributional conflicts.* (OECD Committee for Fisheries 1996, p. 2)

The direction of change internationally is towards the adoption of output controls to either supplement or replace input controls. Input controls are measures such as licensing arrangements and restrictions on gear and fishing methods. Output controls involve determining a fishery's 'total economic catch' — that is, the level of catch at which profit (that is, revenue minus costs) is maximised when the most efficient fishing methods are used — and allocating this catch among fishers. The total economic catch is necessarily a long-term concept.

Some countries have moved quickly to adopt fisheries management practices based on output controls. The New Zealand Government introduced the Quota Management System in 1986. This system controls the total commercial catch from all the main fish stocks within New Zealand's 200 nautical mile Economic Exclusion Zone (Government of New Zealand 2002). More commonly, the movement toward output controls has occurred gradually, often fishery by fishery. This gradual approach usually reflects the need to respond to the circumstances of individual fisheries in designing or redesigning management approaches. Further, governments may be reluctant to disturb substantial entrenched interests.

The OECD has noted emerging evidence of the benefits of moving towards output-based regulation, indicating that the gains predicted by economic theory are achievable in practice. In the United States, where 'most fisheries can probably be characterised as overcapitalised, with too many vessels, too much gear and too much time spent at sea harvesting fish at a higher than optimal cost per unit of effort' (NMFS 1996, p. 12), the National Marine Fisheries Service found the following benefits from output regulation.

- The introduction of individual transferable quotas to the Atlantic surf clam fishery in 1990 led to a 54 per cent reduction in the fleet within two years, while total landings increased slightly. An annual resource rent of $11 million accrued to the industry following the reform. Previously this rent was dissipated.

- The introduction of individual transferable quotas to the south east wreckfish fishery in 1992 reduced the fleet from 91 vessels to 21 within three years. While total landings declined they also became more constant throughout the year (NMFS 1996, pp. 13–14).

The above evidence suggests there is substantial potential to capture significant community benefits by improving fisheries management and, in particular, by moving from input controls towards quasi-property rights approaches. The complexities of the industry, however, require reform to be based on a good understanding of the circumstances of individual fisheries.

One complexity is the multispecies fishery. In this type of fishery, different fishing methods may substantially change the proportions of the different species contained within the total catch. The most economic means of harvesting one species may yield suboptimal results for another species. A further consideration is the environmental impact of different fishing methods. Some methods may be environmentally detrimental, for example, because they increase the bycatch of noncommercial species, perhaps to levels that threaten the sustainability of those species. Other environmental problems may include disturbance of the marine environment more generally, with negative consequences for plant and fish habitats. A range of input controls may be required, often in conjunction with individual transferable quotas, to ensure that the exploitation of the fishery optimises all relevant social values.

Fisheries management also needs to recognise possible spillover effects of changing the management of individual fisheries. These effects may occur, for example, where boats and crews displaced from one fishery by regulatory change seek alternative uses and increase pressures on other fisheries, potentially offsetting the gains from improved management in the original fishery. It is thus important to ensure broad-based fisheries management decisions, rather than a piecemeal approach.

Tailoring controls to individual fisheries

Approaches to fisheries legislation, as well as legislative reform, must account for the considerable variability among individual fisheries. The main dimensions of this variability include the level of stocks, the seasonality of the fishery and the mobility of its fish population. The unit value of the fish species under consideration and the bycatch characteristics of the fishery are also important.

Keeping these factors in mind, it is possible to generalise about the fishing controls that are most appropriate for particular fisheries. Table 4.13 outlines how the different types of fishing controls may impede market competition. It suggests the types of fishery (including examples of specific species) for which each control may be most applicable. In principle, controls that define or closely resemble property rights impose fewer restrictions on market competition. Property rights controls are not always feasible, however, and may be too costly to apply in particular circumstances.

Table 4.13: Fishing controls and their impact on market competition

Class of control	*Impediment to market competition*	*Best suited for fisheries …*
Property rights — freehold title or tradeable leases	No necessary impediments to market competition	… where competitors can be excluded and fish do not migrate (or can be prevented from migrating) — oysters, pearl and abalone
Output controls — individual transferable quota or catch shares	Control on production levels High administration, enforcement or compliance costs	… that are single species, of high unit value and with stable and well known stock levels — rock lobster and tuna
Access controls — limited number of tradeable licences, spatial and temporal restrictions	Possible control on output levels Possible control on inputs Possible fishery closures or seasonal closures	… that are lower value, or multispecies, or where recruitment is variable, or species are not well understood, or stocks are depleted (meaning access controls are usually combined with input controls) — prawns and mixed trawl
Input controls — boat and/or gear controls	Restrictions on types of input Possible control on production levels Significant administration, enforcement and compliance costs	

Table 4.13 highlights a number of matters. First, while property rights (or quasi-property rights) approaches are theoretically superior, substantial practical difficulties arise where stock levels are relatively uncertain or highly variable. The setting of a total allowable catch as the basis for individual transferable quotas, for example, requires a sound knowledge of stock levels and characteristics if the total allowable catch is to be consistent with sustainability of the resource. Added difficulties arise in determining the appropriate total allowable catch where stock levels are highly variable.

Second, the total allowable catch approach can pose substantial difficulties in multispecies fisheries because an appropriate total allowable catch for one species may be associated with an unsustainable catch of another species in the same fishery.

Third, quasi-property rights approaches are likely to entail high levels of administration, enforcement and/or compliance costs. These costs undermine the usefulness of these approaches in managing fisheries of low value species, and possibly also small fisheries.

Conversely, input controls can also be associated with relatively high administration and enforcement costs. There must be an adequate level of enforcement activity to ensure satisfactory compliance. This enforcement may require substantial effort, because the potential private gain to fishers in departing from specific input controls can be extremely significant. In addition, regulators must maintain an adequate level of surveillance of actual fishing practices, because there is a constant incentive to seek more productive fishing methods that were not envisaged when input controls were designed. These unforeseen methods may undermine the effectiveness of the existing controls. The design and implementation of input controls must be dynamic, therefore, and involve vigilant monitoring and frequent adjustments of the control measures.

Recovering the cost of regulation

As noted above, some fisheries controls can have substantial implementation costs, in relation to administration, monitoring and enforcement costs. In some cases, significant research costs may also be incurred in obtaining the information needed to guide policy choices. Equity and efficiency considerations suggest these costs should be recovered from the regulated industry, particularly where the costs are significant.

Cost recovery is necessary to avoid allocative distortions, because the costs of the regulatory system are conceptually an element of the costs of production. Appropriate regulation is necessary for sustainable production in the long term and, therefore, the cost of regulation should be considered part of the cost of producing the fishery's output. Failure to reflect regulatory costs in the final price of the product would distort market competition among the products of the fishery and its competitors (whether the competitors are the products of other fisheries or are non-fish products). The design of the cost recovery mechanism must also be efficient and equitable, ensuring appropriate cost sharing among those who fish the fishery and taking steps to minimise the costs incurred.

Balancing the different uses of the fishery

Achieving an appropriate balance between different potential uses of the fishery is a further challenge. The two main uses of a fishery are generally commercial and recreational fishing. Each can be a significant commercial activity and each can exert substantial environmental pressure on a fishery. The extent to which these different uses translate into competing demands varies among fisheries, with some fisheries being primarily attractive to one or the other use. Deep sea fisheries, for example, may be less accessible to recreational fishers and thus less attractive. For most fisheries, however, the two types of demand will compete strongly.

Balancing competing uses is also complicated by differences between commercial and recreational fishing in the notion of 'output'. For the former, output is measured by the value of fish landed, while a substantial part of the total output of recreational fishing derives from the intrinsic (entertainment) value of participating in the fishing and associated activities. It is difficult to quantify the financial value of intrinsic outputs, complicating the task for governments of achieving an equitable balance between the sectors. For some fisheries, the protection of indigenous fishing rights is also an important element of the balance that governments must strike in managing competing interests.

While these issues are significant for the overall regulation of fisheries, they are unlikely to raise substantive NCP questions. The key competition questions revolve around ensuring the conditions for nondiscriminatory competition, within an access and sustainability framework that guides the long-term management of the fishery.

The need for careful analysis in regulation making

Making the right choice of restriction or combination of restrictions is crucial to sound fisheries management. The consequences of poor choice include:

- endangering the fishery, leading to a degraded environment, loss of livelihood for fishers and loss of a preferred choice fish product for consumers;
- inhibiting technological changes that may offer improved returns to fishers and better value fish products to consumers; or
- impeding the entry of new fishers and forgoing new investment in regional economies.

Fisheries differ substantially, which means careful analysis must underpin the choice of management policy or policies to meet the requirements of individual fisheries. The complexity of fisheries management and controls suggests that primary legislation should provide for management policies to be developed via NCP-like processes to ensure regulations meet the needs of individual fisheries while placing least restriction on the activities of fishers.

Review and reform activity

Governments are addressing their CPA clause 5 review and reform responsibilities within the context of their longer term efforts to reform fisheries management in recognition of both sustainability and efficiency issues. The overarching fisheries legislation being reviewed under the NCP reflects this longer term activity: the general fisheries Acts in all jurisdictions

but one were enacted in the 1990s and the remaining Act (in South Australia) was enacted in 1982.

Despite almost all jurisdictions having recently enacted new legislation, changes to the management of fisheries have been very gradual. Governments have been particularly concerned with minimising the disruption of remote and regional communities, many of which depend quite heavily on the fishing industry. Consideration of the impact of reform on affected regions and communities is clearly a legitimate aspect of governments' NCP work. The gradual nature of reform to date, however, has meant that NCP reviews are identifying a need for substantial further reform. The Queensland review, for example, recommended a separate examination of each fishery, applying resource management principles developed by the NCP review and considering relevant competition issues.

Despite most governments having completed their NCP reviews of fisheries legislation (and some reviews having been completed for a considerable time), the Council has little information on review recommendations and governments' reform responses. With the exceptions of Western Australia and the ACT, governments have neither released review reports nor provided detailed information about the review and reform of their fisheries legislation. With the exception of the ACT, which the Council considers has complied with CPA clause 5 in relation to its fisheries legislation, the Council will finalise the assessment of all governments' CPA clause 5 compliance in 2003.

Commonwealth

The Commonwealth Government began reviewing its principal fisheries legislation (the *Fisheries Management Act 1991*) and related legislation in October 1998. The review by a committee of Commonwealth officials was initially scheduled for completion in November 2000. The Commonwealth now expects to complete the review during 2002 and to consider review recommendations in 2002 or early 2003.

The Commonwealth completed a review in August 1999 of the *Torres Strait Fisheries Act 1984*, which regulates all fishing within the Australian jurisdiction of the Torres Strait Protected Zone (established under the Torres Strait Treaty between Australia and Papua New Guinea). The report was presented to the Torres Strait Protected Zone Joint Authority in March 2000. The authority referred the review findings and recommendations to the Torres Strait fisheries consultative and advisory committees for consideration. The Commonwealth is considering the review and expects to release its response in 2002.

New South Wales

New South Wales commissioned the Centre for International Economics to review its *Fisheries Management Act 1994* under the supervision of an

interagency committee. The review report was submitted to the Minister for Fisheries in May 2001. The review found the legislation provides a net public benefit. It recommended amending the objects of the Act to recognise socioeconomic benefits. New South Wales implemented this recommendation via the *Fisheries Management Amendment Act 2001*.

The Council has no information about other recommendations by the review or the New South Wales Government's response. The Government states that it expects to respond to all other recommendations by 30 June 2002 (Government of New South Wales 2002). The Council will therefore finalise its assessment of New South Wales's compliance with its CPA clause 5 obligations in 2003. In this context, the Government will need to provide information on the review recommendations, the evidence and analysis underlying the recommendations, and details of proposed or implemented reforms of the legislation.

Victoria

The Victorian *Fisheries Act 1995* and associated regulations, Orders in Council, Ministerial guidelines and other quasi-regulatory tools regulate commercial and recreational fishing and aquaculture. The Victorian review of the Fisheries Act in 1999 found that its regulatory regime provides a 'tool box' for fisheries management. It noted that the several restrictions in the Act, — which fall into the broad categories of resource definition, access controls, input controls, output controls and security of access rights — 'could reduce the efficiency of the industry but that generally the Victorian fishing industry is relatively efficient' (Department of Treasury and Finance [Victoria] 2002, p. 72).

The Government has responded to the review recommendations, accepting recommendations that apply generally to fisheries to:

- retain the conditions associated with access licences (for example, transferability);
- cease fisheries that do not have transferable licences (as licence holders exit or as the fishery converts to a transferable licence);
- consider the allocation of new licences and quota by mechanisms such as auctions, tender or ballot, to ensure efficient allocation of licences;
- review existing limits on the number of persons employed;
- introduce full cost recovery, subject to formal policy development; and
- consider imposing royalties or rent taxes, subject to Government policy.

The Government did not accept a review recommendation that annual access licences should be granted for longer periods (such as up to five years). The review argued that annual renewal involves additional transaction costs and,

despite being largely automatic, increases uncertainty. The Government considers, however, that the current issue of annual licences is an automatic renewal (subject to certain conditions) and that the fee structures are more efficiently managed under an annual regime.

In addition to the recommendations that apply to fisheries generally, the review made recommendations pertaining to specific fisheries. The Victorian Government has generally accepted these recommendations, as detailed in the following sections.

Rock lobster and abalone fisheries

The Government accepted the review recommendation to move from a system of input controls (pots) to output controls (quota) in the rock lobster industry and implemented an individual transferable quota system for rock lobster in November 2001. For abalone, the Government accepted that the individual transferable quota system should be retained, because there is no less restrictive alternative. The minimum quota holding is to be reduced (to one unit of quota) and the maximum limit of a quota holding is to be abolished, to enable licence holders to achieve scale and other economies.

Scallop fishery

The Government accepted the review recommendation that the current scallop fishery management arrangements be retained, because there is no feasible less restrictive alternative.

Bays and inlets and other fisheries

The Government accepted the recommendation that control mechanisms be retained for now, but that alternative output control mechanisms should be evaluated for some species. This may result in legislative reform, which would occur following consultation and negotiation with stakeholder groups.

The Council will seek additional information from the Victorian Government on the nature of the review and reform activity foreshadowed in these areas, and on the proposed timelines for any further reforms. It will consider these matters in the 2003 NCP assessment.

Queensland

Queensland completed a public review of the *Fisheries Act 1994* and its regulations in early 2000. The Cabinet endorsed the results of the review in October 2001. The Queensland Government stated that the review's general conclusion was that there is a 'need for some regulatory reform' and that its approach would include:

> *... examining each of the State's fisheries on an individual basis — recognising their diverse characteristics — and applying the resource management principles developed as part of the review process and the NCP requirements in determining and justifying the appropriate level of intervention for the fishery.* (Government of Queensland 2002, p. 10)

The Government's statement suggests that the review did not make specific recommendations for individual fisheries, providing instead a framework for a subsequent set of reviews of individual fisheries. Given the substantial differences between fisheries, such an approach may be appropriate. It leaves questions, however, about the nature of the resource management principles developed by the review, and about the processes and timelines for the individual fishery reviews. Given that CoAG set a target date of 30 June 2002 for completion of all NCP reviews and appropriate reforms, the Council expects Queensland to establish clear timelines for the fishery reviews and for implementing reform recommendations. In 2003 the Council will seek further information on these matters to finalise the assessment of Queensland's compliance with its CPA clause 5 obligations.

Western Australia

Western Australia completed reviews of the *Fish Resources Management Act 1994* and the *Pearling Act 1990*. It has publicly released the report of the former review, but not the latter. It is the only jurisdiction to have released a fisheries review report.

Fish Resources Management Act

The review of the Fish Resources Management Act recommended that the Government retain most of the existing restrictions, including quotas. The review also recommended clarification of the Act's objectives via legislative amendment, to focus on the Government's environmental and resource protection objectives. Finally, the review recommended integrating NCP principles into the ongoing fisheries management review cycle.

In terms of immediate reforms to existing restrictions, the review's major recommendations relate to the rock lobster fishery. The Western Australian Government has accepted a number of review recommendations and expects to have reforms in place by the start of the 2003 season. The main changes to be introduced are:

- removal of the cap of 150 lobster pots per boat, allowing economies to be reaped by using larger vessels;
- removal of the limit on the issue of domestic lobster processing licences; and

- permission for processing licence holders to establish at multiple locations.

The review also found that 'the potential net benefits from a possible restructuring of the Western Rock Lobster Managed Fishery into output-based management regime [sic] appear to be material' (Fisheries Western Australia 1999, p. 7). In this context, the review report recommended that the Government commission an independent update of earlier work on the net benefits of restructuring the management regime. The Council has no information on the Government's response to this recommendation. Given the review report found a potential 'material' net benefit to the fishery from the restructure of the management regime, the Council will look in 2003 for Western Australia to provide information on how it has progressed this recommendation.

Pearling Act

The review of the Pearling Act recommended substantial regulatory change. Specifically, it recommended:

- removing minimum quota units attached to licences;
- decoupling pearl farming licences from pearl fishing licences;
- auctioning wildstock quotas;
- removing hatchery quotas;
- codifying in regulation the criteria for fishery management decisions; and
- establishing an independent review tribunal.

The Western Australian Government advised that it has accepted most of the recommendations of the NCP review, but not those to remove limits on hatchery quotas and to auction wildstock quotas. The Government stated that it rejected these recommendations on the basis of an ACIL Consulting (ACIL) study, which was prepared for the Pearl Producers' Association and presented as a submission to the NCP review. Western Australia's review has not been made available to the Council and no information has been provided as to the reason for it reaching a different conclusion on these matters from that reached by ACIL.

In regard to hatchery quotas, the ACIL study argued that the existing restrictions have had the effect of slowing the rate of growth of supply, notwithstanding that 'supply has effectively been determined by non-regulatory factors' because '...maximum potential supply (estimated to be around 720 kan) is above the current levels of supply (around 530 kan in 1997) and quotas will not become binding for a number of years yet' (ACIL 1999, p. 7). The ACIL study argued that quota should generally be set above existing levels of supply, to allow for market expansion. On this view, the key purpose of the quota is that:

> *It further fosters the perception that the supply of Australian South Sea pearls to world markets is constrained to grow at a rate which can be absorbed by the market without eroding prices received to such an extent that aggregate revenues will begin to fall.* (ACIL 1999, p. 15)

Thus, the ACIL study argued that the existence of the quota assists in maintaining the scarcity premium element of current prices via its impact on expectations of future demand growth. ACIL cited a further study that concludes that wholesale pearl buyers believe that the quota system forms a major constraint on the supply of Australian pearls (ACIL 1999, p. 41). In addition, ACIL cited the experience of other countries (Japan, China, Tahiti) where major supply increases were associated with sharp declines in price, leading to falls in aggregate revenue (ACIL 1999, p. 55). It is not clear, however, why such an expectations effect would endure when, in ACIL's submission, the real constraints on the supply of Australian pearls are nonregulatory in nature.

The ACIL study argued that the supposed price supporting effect of the quotas provides a net benefit to Australia because the vast majority of pearls are sold overseas. ACIL analysed the likely size of this effect, estimating the annual benefit of the hatchery quotas at between $16–25 million with a most likely annual value of $21 million (ACIL 1999, p. 11 and p. 98). This analysis is based on the assumption that the current quota is a binding constraint on supply. It is not clear how this result relates to the ACIL contention that the current quota is not, in fact, the determining factor in constraining supply.

In relation to wildstock quota, the Government has agreed that the practice (allowed by the Act) of giving increases in quota to incumbents, rather than to auction them or put them out to tender, is in the public interest. The ACIL study stated that the wildstock quotas and the regulations governing entry into the industry 'can be justified in terms of achievement of the conservation objective'. The study argued that, when quotas were imposed on the industry, it was equitable that they were allocated to the existing operators who had developed the industry, and that any inefficiencies would be addressed because wildstock licences are transferable and quota units can be traded between licensees. The study noted also that new licences/quotas issued after enactment of the Pearling Act were allocated via a tender process based on assessment of the likely success of proposals and their contribution to the development of the region rather than a cash-bidding tender process (ACIL 1999, pp. 72-3). The ACIL study considered, nonetheless, that any future decision to increase the total allowable catch should involve consideration of options that result in the most efficient and equitable method of allocating shell including an open competitive tender process.

The Western Australian Government, while conceding that there is some dispute about aspects of the ACIL analysis, concluded there is a substantial risk in removing hatchery quotas, particularly in the current environment of declining pearl prices. The Government indicated that it would revisit this matter in 2005 when the current hatchery policy expires. The Government also stated that it accepted the public interest argument that auctions for wildstock pearl licences 'would not result in better utilisation of the resource

and could pose a threat to the conservation of the pearl beds' (Department of Treasury and Finance, Western Australia 2002b, p. 21).

The Council considers that Western Australia has made strong progress towards meeting its CPA clause 5 obligations on fisheries legislation. For the 2003 NCP assessment, however, the Council will need further information from the Western Australian Government in relation to the restructuring of the western rock lobster managed fishery and the implementation of the changes to the Pearling Act. The Council will also need information on the basis for the conclusions reached by the review of the Pearling Act in relation to hatchery quotas, and information on the Government's view on the medium term future of these arrangements.

South Australia

South Australia's principal fisheries legislation is the *Fisheries Act 1982* — the oldest major piece of fisheries legislation in Australia. The Act is under review by a group of officials, which released an issues paper for comment during 2001. The Council understands that a 'draft final report' has been produced but not yet considered by the Government. The Council has no information on the review process or recommendations. For the 2003 assessment, it will need information from the South Australian Government on these matters and the Government's response.

The South Australian Government has decided to repeal both the *Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act 1987* and the *Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act 1987* following reviews. A Bill is before Parliament to repeal the latter Act. Repeal of the former Act is pending settlement with licensees. Repeal of the legislation will address South Australia's CPA clause 5 obligations.

Tasmania

The major Tasmanian Acts governing fisheries are the *Living Marine Resources Management Act 1995,* the *Marine Farm Planning Act 1995* and the *Inland Fisheries Act 1995.* These Acts contain a range of restrictions on competition. The Tasmanian Government advised that reviews of all three Acts have been completed. The reviews of the first two Acts recommended retaining all restrictions. The review of the Inland Fisheries Act recommended retention of most restrictions, but proposed some simplifications, including abolishing some licence classes. The Government has indicated that it will implement these recommendations.

The Council has no information on the review processes, the detail of the review's recommendations or the public interest evidence supporting the restrictions in the legislation. For the 2003 NCP assessment, the Council will need the Tasmanian Government to provide information on these matters and on the public interest evidence supporting restrictions in the legislation.

The ACT

In 2000 the ACT passed the *Fisheries Act 2000,* which replaced the former *Fishing Act 1967*. The Government did not review the 1967 legislation. It stated that it considered competition issues in the 2000 Act via its legislation gatekeeper process.

The objects of the *Fisheries Act 2000* are to:

- conserve native fish species and their habitats;
- manage sustainably the fisheries of the ACT by applying the ecologically sustainable development principles mentioned in the *Environment Protection Act 1997*, s. 3(2);
- provide high quality and viable recreational fishing; and
- cooperate with other Australian jurisdictions in sustaining fisheries and protecting native fish species.

There is no commercial fishing from public waters in the ACT, although the Act provides for the possibility of commercial fishing in the Territory.

The legislation provides for the use of disallowable instruments as a form of regulatory control.[13] The ACT Government advised that its principal reason for using disallowable instruments is to enable greater flexibility in responding to changing environmental conditions. The ACT considered that the most likely changes will be the imposition of catch limits on fishing of a species that becomes threatened, or the relaxation of catch limits on a species if the population recovers sufficiently to allow further exploitation. It is also possible that there will be technological advances that result in new fishing gear being allowed for use in the ACT's rivers.

Current limits on fishing gear are directed at sustaining recreational fishing. In most places in the ACT, an angler may use two rods or hand lines, up to five hoop nets, and 10 baited lines for taking yabbies. In designated waters where trout spawn, fishers may use only one rod. These limits are based on an assessment of what is reasonable to prevent overfishing and to minimise unintentional damage to threatened species or spawning trout. In accordance with the conservation aims of the Act, limits for five species of threatened species (trout cod, Murray River crayfish, Macquarie perch, silver Perch and two-spined blackfish) are set at zero. Limits for the popular angling fish Murray cod, golden perch and rainbow/brown trout are set at two, five and five respectively.

[13] A disallowable instrument is a statutory instrument. It provides for administrative decision-making but with the condition of Parliamentary oversight, because instruments must be notified to the ACT Legislative Assembly.

The Council acknowledges that the ACT does not have a commercial fishing industry and that the Fisheries Act is aimed primarily at the conservation of fish and their habitats. The Council considers that the ACT has complied with its CPA clause 5 obligations in this area.

The Northern Territory

The Northern Territory has completed a review of the *Fisheries Act 1996*. The Northern Territory Government is expected to consider its response to the review in October 2002. The Council has no information on the review process or on the review recommendations. For the 2003 NCP assessment, it will need information from the Northern Territory Government on these matters and the Government's response.

The following table summarises NCP review and reform activity in each jurisdiction, as well as the Council's assessment of the current status of each jurisdiction in relation to CPA clause 5 obligations relating to fisheries legislation.

Table 4.14: Review and reform activity of legislation regulating fisheries

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Fisheries Management Act 1991*	Licensing of commercial fishers. Permits for fish receivers. Input controls on boats, gear and fishing methods. Output controls such as total allowable catches, individual transferable quota (transfer of which is subject to various restrictions), size limits, prohibitions on taking of certain species and restrictions on bycatch.	Review by officials commenced in October 1998. Review was to be completed in November 2000, but completion has been delayed until 2002.	The Government's response is expected to be completed before the end of 2002.	Council to finalise assessment in 2003.
	Torres Strait Fisheries Act 1984	Licensing of community and commercial fishers. Wide Ministerial powers to: • prohibit taking of certain species; • prohibit taking of fish under certain sizes; and • impose a variety of input controls.	Reviewed was completed in 1999 by Commonwealth and Queensland officials. It recommended: • setting a new statement of objectives for the Act; • maintaining the distinction between community and commercial fishing; • retaining licensing of fishing; and • retaining wide Ministerial powers to regulate fishing.	The report was presented to the Torres Strait Protected Zone Joint Authority in March 2000. The authority noted the findings and recommendations of the review and referred these to the Torres Strait fisheries consultative and advisory committees for consideration. The Government is considering its response (expected in 2002) to the review.	Council to finalise assessment in 2003.

(*continued*)

Table 4.14 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Fisheries Management Act 1994*	Licensing of fishers. Access (via share ownership) to share-managed fisheries. Input controls on boats, gear, crew levels and fishing methods. Output controls such as total allowable catches, bag limits, size limits and prohibitions on taking of certain species.	Review by independent economic advisers, supervised by interagency committee, was completed in May 2001.	Legislation to amend objects of Act passed. Annual report for 2002 states that the Government anticipates responding to remaining recommendations by 30 June 2002.	Council to finalise assessment in 2003.
Victoria	*Fisheries Act 1995*	Licensing of commercial and recreational fishers. Input controls on boat size, gear and fishing methods. Output controls such as total allowable catches, individual transferable quota and bag and size limits.	Review was completed by independent economic advisers in 1999. It recommended: • retaining access licences but for longer periods and with automatic renewal; • introducing full cost recovery; • considering royalty or rent taxes to limit fishing; • removing restrictions on quota transfers and holdings for abalone; and • replacing input controls with output controls for rock lobster.	The Government has accepted all general recommendations except longer term access licences with automatic renewal. The recommended replacement of input controls with output controls in lobster fishery was implemented 2001. The recommendation for evaluation of alternative output control mechanisms for some bay/inlet fisheries is to be implemented progressively on an Act by Act basis.	Council to finalise assessment in 2003.

(*continued*)

Table 4.14 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Fisheries Act 1994*	Licensing of fishers and crew. Input controls on boat and gear. Output controls such as total allowable catches, individual transferable quotas and bag and size limits.	Review completed. Review report endorsed by Cabinet in October 2001.	Recommendations appear to have been accepted, but implementation action not known.	Council to finalise assessment in 2003.
Western Australia	*Fish Resources Management Act 1994*	Licensing of fishers. Prohibitions on market outlets. Input controls on boat, gear and fishing methods. Output controls such as total allowable catches, quota and bag and size limits.	Review completed in 1999. It recommended retaining existing restrictions except for the Western Rock Lobster Managed Fishery, where it recommended an assessment of the net benefit of moving to an output controls-based regime. It also recommended steps to embed NCP principles in the ongoing cycle of fisheries management review.	Recommendations were accepted. Rock lobster fishery reforms are to be in place for the 2003 season. Objectives are to be clarified by legislative amendment. Reform of lobster processing provisions is also to be implemented.	Council to finalise assessment in 2003.
	Pearling Act 1990	Licensing of pearling and hatcheries. Minimum quota holding for pearling licences. Requirement that hatchery licensees must also hold pearling licence. Wildstock quota. Hatchery quota. Prohibition on hatchery sales to other than Australian industry.	Review completed in 1998. It recommended: • removing minimum quota holdings; • decoupling pearl farming licences from pearl fishing licences; • auctioning wildstock quotas; • removing hatchery quotas; • codifying in regulation the criteria for fishery management decisions; and • establishing an independent review tribunal.	Recommendations were accepted and are to be implemented, with the exception of the auctioning of wildstock quota and the removal of limits on hatchery quota. There has been no implementation action to date.	Council to finalise assessment in 2003.

(*continued*)

Table 4.14 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Fisheries Act 1982*	Licensing of fishers and fish farmers. Registration of boats and fisher processors. Input controls on gear and fishing methods. Output controls such as catch limits, size limits and prohibitions on taking of certain species.	Review by officials is nearing completion: a 'draft final report' has been produced.		Council to finalise assessment in 2003.
	Fisheries (Gulf St Vincent Prawn Fishery Rationalization) Act 1987	Imposition on remaining licence holders of the cost of compensating those who surrendered their licences.	Review by officials completed in 1999. Act has achieved the objective of reducing licence numbers.	Act is to be repealed once settlement with remaining licence holders is finalised.	Council to finalise assessment in 2003.
	Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act 1987	Prohibition on licensees from transferring their licences. Imposition on remaining licence holders of the cost of compensating those who surrendered their licences.	Review by officials completed. Act has achieved the objective of reducing licence numbers.	Act was repealed.	Meets CPA obligations (June 2002).
Tasmania	*Living Marine Resources Management Act 1995*	Licensing of fishers, handlers, processors and marine farmers. Input controls on gear, vessel operations and handling and storage standards. Output controls such as quotas, size limits and species.	Review completed. It recommended retaining all restrictions.		Council to finalise assessment in 2003.

(*continued*)

Table 4.14 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Marine Farming Planning Act 1995*	Prohibition on marine farming occurring outside marine farming zones. Requirement to have a lease to operate a marine farm.	Review completed. It recommended retaining all restrictions.		Council to finalise assessment in 2003.
	Inland Fisheries Act 1995	Licensing of commercial fishers and fish farms. Registration of private fisheries, fish processors and sellers.	Review completed.	Recommendations to be implemented.	Council to finalise assessment in 2003.
ACT	*Fisheries Act 2000*	Disallowable instruments. Limits on fishing gear.	Act was considered via legislation gatekeeping process.	New legislation.	Meets CPA obligations (June 2002).
Northern Territory	*Fisheries Act 1996*	Licensing of fishers. Input controls on vessels, gear, fishing methods and landings. Output controls such as total allowable catches, size and bag limits, and prohibitions on taking of certain species.	Review completed. Recommendations expected to be considered by the Government in October 2002.		Council to finalise assessment in 2003.

Forestry

Native forest covers 164 million hectares or 21 per cent of Australia's land area (ABS 2002). Of this, 76 per cent is on public land and 23 per cent on private land. Of publicly-owned forests, 16 per cent is held in conservation reserves, 14 per cent on other Crown land, 10 per cent managed for multiple uses including timber production, and 60 per cent on pastoral leases. Almost 70 per cent of Australia's native forest is therefore under some form of private management.

Plantations account for 1.5 million hectares. Two thirds of these are softwood (mainly pinus radiata) and the balance hardwood (eucalyptus). Ownership arrangements are diverse encompassing sole public or private ownership and joint ventures.

Table 4.15: Forest estate by State/Territory and type

Type ('000 ha)	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Public native forest	17 641	6532	39 990	33 207	9538	2233	18 182	121
- conservation reserve (%)	28	46	9	13	41	35	0	89
- other Crown land (%)	10	3	5	40	4	8	2	-
- pastoral lease (%)	52	1	76	42	55	-	98	9
- multiple use incl wood (%)	10	51	11	5	0	58	-	2
Private native forest	6938	1183	9182	1502	852	901	16 694	-
Other native forest	2117	1	54	90	399	-	3	-
Plantation	319	319	191	314	136	185	7	15

Note: Other Crown land includes land reserved for educational, scientific, defence or other institutional uses. Multiple use Crown land is land managed for wood and other values. Other native forest land is land where tenure is unresolved.

Source: National Forest Inventory 2001 via ABS.

Australia's native and plantation forests provide a range of benefits to the community.

Forests are a reservoir of biological diversity and functioning ecosystems. They provide protection for soils and water resources, and are increasingly being recognised for their potential as carbon sinks. They provide for a vast array of recreational and educational activities.

Forests and plantations are the basis for important wood-based industries which produce sawn timber, fibreboard, plywood and paper. In 1999-2000 the wood and paper product industries generated $13.7 billion of turnover, including exports of $1.6 billion, and employed 74 500 workers as at 30 June 2000. Other forest-related industries produce honey, wildflowers, natural oils, gums, resins, medicines, firewood, craft wood, grazing and minerals.

In Australia, there are around 1126 hardwood mills and 259 softwood mills. The hardwood mills are generally small scale and scattered, and the softwood mills large and integrated with other processing facilities. There are also 22 pulp and paper mills, and 30 veneer and panel board mills.

Australia produces about 83 per cent of its sawn timber needs. It obtains 36 per cent mostly from native forests and 64 per cent from softwood plantations (AFFA 2002).

Governments intervene in forestry through:

- regulating the use of native forests and the development and harvesting of plantations; and
- operating enterprises in the business of managing forests and plantations.

Hence the CPA clauses most relevant to forestry are clause 5 (legislation review) and clause 3 (competitive neutrality).

Forestry is a complex area of competition policy implementation. The Council first began to consider forestry as a priority assessment matter in 2001. Since then it has endeavoured to isolate the key issues and to draw some conclusions about how it will assess implementation activity and outcomes. It has not been possible, however, for the 2002 NCP assessment to reach conclusions on compliance by each jurisdiction. The Council therefore intends to finalise its assessment of governments' compliance with CPA clauses 3 and 5 in 2003. This will also allow the Council to consult further with governments and interested parties on NCP issues relating to forestry.

Legislation review

Legislative restrictions on competition

State governments regulate the commercial use of public native forests and plantations principally through their forests Acts or similar. This legislation generally provides for certain forested Crown lands to be designated as State forests, for management and control of State forests by a government agency, for the preparation of forest management plans and for the licensing of certain uses of State forests by private parties.

The principal restrictions on competition found in this legislation relate to licensing. These are:

- eligibility restrictions – such as requirements that licence holders own a processing mill or not be foreign owned;
- tradeability and divisibility restrictions – such as requiring official approval before licences may be transferred or split;

- security restrictions – short licence terms or powers to alter allocation volumes, grades and pricing; and

- conduct conditions – conditions mandating certain logging practices.

Forest Acts usually leave State forest agencies considerable discretion over how they allocate and price logging licences. This discretion could allow restrictive licence allocation and pricing practices – for example, favourable treatment of incumbent timber processors relative to potential entrants – although, strictly speaking, the Acts themselves do not restrict competition. Nevertheless, there are important reasons for governments to have in place regulatory and/or structural arrangements that, where possible, promote open competition – most notably to:

- obtain adequate returns to the community from the use of a valuable public resource;

- give more certainty to the timber processing industry and to other forest owners about the government's future behaviour as a timber supplier; and

- allow ready public scrutiny of State forest administration.

Similar issues are raised by forest agreement Acts, such as Victoria's *Forestry (Woodpulp Agreement) Act 1996*. Legislation of this type ratifies agreements to provide long term rights to timber supply – 35 years in the case of this particular Act – usually on a take-or-pay basis. The potential restriction on competition is not the term of these rights – long term property rights are often consistent with promoting competition – but how such rights are allocated between potential holders. Again, though, allocation decisions of this kind are typically not governed by legislation, and therefore not directly subject to review under CPA clause 5 (although, for the reasons above, allocation decisions should where possible be made in an open and competitive manner). There are also the agreement Acts themselves but these usually only ratify agreements already reached.

Private native and plantation forestry is principally regulated by general landuse planning and environmental protection laws. These laws impose restrictions on how forestry operations are conducted and, in the extreme, may prohibit conversion of land to plantation forestry from another land use. Chapter 13 assesses the review and reform of these laws where relevant.

New South Wales and Tasmania specifically regulate plantation forestry through requiring plantations to be approved and through setting conduct standards intended to minimise environmental harm. These laws are discussed here.

The Commonwealth regulates the export of unprocessed wood via regulations made under the *Export Control Act 1982*. These regulations prohibit exports without an export licence unless the wood comes from a forest or plantation subject to a regional forest agreement between the Commonwealth and the relevant State.

Regulating in the public interest

As noted earlier, native forests provide a wide range of benefits to the community, from the conservation of biological diversity to recreational experiences, timber production and stock grazing. Governments intervene in native forest use principally because some of these benefits are difficult for holders of forests or forest rights to trade – it is too costly to exclude those who have not paid for a particular benefit from enjoying it. In addition, those forest benefits that are readily tradeable are, above a certain of intensity of use, competitive with non-tradeable (ecological) benefits. Consequently, without government intervention, community welfare will tend to be reduced because forest rights holders have an incentive to produce too little of, for instance, biological diversity and aesthetic amenity, and too much of timber and grazing.

The key objective of native forest regulation is therefore to protect the adequate availability of non-tradeable forest values while maximising economic benefits to the community from the exploitation of tradeable forest values. Another important objective of governments is often to promote employment in forest-related industries in rural and regional areas.

Outside national parks and similar reserves, the least restrictive approach to meeting these objectives in public native forests is to define and allocate tradeable rights to delineated areas of forest. Such rights (or forest leases) would:

- oblige holders to:
  - protect specified non-tradeable forest values, including public access;
  - regularly obtain certification of fulfilment of these obligations by accredited independent certifiers;
- allow cancellation should holders persistently fail to meet these obligations;
- allow any use of the forest – not just timber production – subject to these obligations;
- be long term – possibly two cycles of harvesting and regeneration – to ensure right-holders have a stake in maintaining forest productivity; and
- be initially allocated either competitively, or to existing holders of timber licences, or a mix of both.

A return to the community could be recovered via resource rents set competitively or as a set proportion of attributable revenue.

Such forest leases would allow competition in all aspects of managing native forests. In particular, by allowing alternative uses to timber production, and

by being long term, such rights would foster more innovation in native forest management and utilisation.

There are, however, some potential problems in practically implementing such forest leases. First, skills and experience in productive management of native forests are likely to be in short supply outside the public sector, and hence there may be limited demand for such rights, at least in the short term. Second, in certain forest ecosystems there may be as yet insufficient understanding of ecological processes and hence the long term impact of certain forest uses, to decide whether reservation or production is the most appropriate long term use. Third, knowledge about the productive capacity of some forests may be poor, making it difficult for potential lease holders to select and value such rights. Fourth, given strong public concern about native forest management and use, potential holders may judge the risk of future policy change leading to the resumption of these leases to be too high.

These problems may all be overcome in time, at least for some public native forests, although at some cost.

In the meantime, and in situations not suited to such rights, governments must offer less complete rights to public native forest resources. In the case of timber these are licences to harvest specified areas or to take delivery of specified grades and volumes of logs. Such licences will generally be in the public interest where:

- there are few if any eligibility restrictions;
- they are initially allocated and priced competitively – preferably but not necessarily through public auctions or tenders;
- they are freely tradeable between eligible holders;
- of a sufficient term and security to justify downstream investment; and
- impose the minimum conditions on conduct necessary to protect other forest values.

These licences or rights need not be statutory instruments. Indeed, statutory instruments may present disadvantages, such as inflexibility, to State forest agencies constituted as corporatised public forest enterprises, and competing with other forest owners.

An important factor for governments in past timber allocations has been the objective of supporting employment in particular rural areas. The Council understands that governments have pursued this objective by excluding potential competitors from rights to certain forest resources and by concessionary pricing of such rights. It is likely that this has led to lower returns to the community from public forests and less efficient production in some parts of the timber processing industry than would otherwise be the case. These costs may in some circumstances be exceeded by the regional employment benefits, but generally there are alternative means of seeking

such outcomes that do not involve restricting competition for rights to forest resources. These alternatives, such as conventional employment programs and structural adjustment assistance offered by the Commonwealth and the States as part of the regional forest agreement process, also have the advantages of avoiding the rewarding of inefficient production practices and of being more open to public scrutiny.

With plantation forestry the main concern is that establishment and harvesting of plantations may impose costs outside the boundary of the plantation, for example, harm to water quality and local roads. The aim of regulation here should be to require the plantation owner to take steps to minimise the harm (for example, to protect water quality through using settling ponds) or to compensate for harm done (for example, to contribute towards the maintenance of local roads). A sound regulatory regime will:

- impose minimum restrictions to effectively mitigate or remedy clearly identified harms; and
- be stable and predictable so that potential plantation investors can be certain what costs they face before investing.

Review and reform activity

Commonwealth

The Commonwealth has completed the review of various regulations under the Export Control Act affecting wood.[14] The review, principally by AFFA officials, was unable to find any significant benefit from the regulations – either in encouraging domestic processing or sustainable management of forests. It recommended that the Government remove export controls on:

- sandalwood;
- plantation-sourced wood, if plantation codes of practice in Queensland and the Northern Territory are found to meet National Plantation Principles; and
- hardwood chips, or allow the export of hardwood chips from non-regional forest agreement regions under licence.

The Government expects to respond to these recommendations during 2002.

14 Export Control (Unprocessed Wood) Regulations, Export Control (Hardwood Wood Chips) Regulations 1996 and Export Control (Regional Forests Agreements) Regulations.

New South Wales

New South Wales's *Forestry Act 1916* was not scheduled for review under the NCP. The Government has however completed a parallel review and reform program intended to improve the efficiency and sustainability of the forestry sector in New South Wales. This program resulted in the *Forestry and National Park Estate Act 1998* and *Plantations and Reafforestation Act 1999*. The Government considers this new legislation and the Forestry Act to be consistent with CPA principles.

Victoria

Victoria completed an independent review of its *Forests Act 1958* in April 1998.[15] The review found the Act and its regulations themselves contain few restrictions, but that administration of the Act and regulations could give rise to restrictions. It recommended (among other things) that the Victorian Government:

- amend the Act to:
  - allow a purchaser-provider separation in State forest management; and
  - remove any requirement under the sustainable yield provisions for a minimum level of logging regardless of timber demand;
- enhance competitive neutrality by:
  - clearly separating the department's policy, regulatory and commercial forestry functions; and
  - assessing the costs and benefits of corporatisation of the commercial function;
- develop more transparent and market-based processes by:
  - reviewing the present system of administered log allocation and pricing; and
  - reforming minor forest product licence and permit practices.

In August 2000 the Government established its commercial native forestry business as Forestry Victoria. This is a distinct commercially-focused unit within the Department of Natural Resources and Environment.

15 Other Victorian forestry legislation includes the Forests (Wood Pulpwood Agreement) Act 1996, which ratifies a 34 year long agreement to supply pulpwood to AMCOR Limited, and the Forestry Rights Act 1996, which provides a voluntary framework for agreements between landowners and forest developers. These Acts do not in themselves restrict competition.

In early 2001 the Government commissioned independent consultants to review timber pricing. This review released a discussion paper in June 2001 evaluating a variety of approaches to pricing public native forest produce. A report is expected soon.

In February 2002 the Government announced that, following research on sustainable yields from public native forests, sawlog supply volumes would fall substantially. It also released a major policy statement, 'Our Forests, Our Future', which set out directions for further native forest management reform. These include:

- establishing a separate commercial enterprise, VicForests, to operate public native production forests and funded to provide identified community services;
- phase-in of market-based pricing and allocation of timber via a mix of short and long term supply arrangements.

A taskforce of industry and departmental members is advising the Government on implementation of these reform directions, including the preparation of a revised response to the NCP review, and the development of new forests legislation and new licensing processes.

Queensland

Queensland completed a departmental review of its principal forestry legislation, the *Forestry Act 1959*, in April 1999. The review recommended retention of the 'non-competitive' native forest sawlog allocation system (Queensland Government 2001). It found that the efficiency gains of reform to the system would be outweighed by significant social costs for several small rural communities. The Government accepted the recommendation and passed the Forestry Amendment Act 1999. This Act exempts the allocation system from the Commonwealth *Trade Practices Act 1974* until 2009. In January 2000 the Government removed a stumpage levy that funded the Timber Research and Development Advisory Council.

The Government expects to repeal the *Sawmills Licensing Act 1936* in September 2002 following the implementation of a new Forest Practices Management System.

Western Australia

Western Australia's principal forestry legislation is the *Conservation and Land Management Act 1984*. A review by an independent economic adviser recommended the repeal of various limits on beekeeping in State forests and the exemption of tree values from local body rating. The Government is implementing these changes in 2002 via an omnibus Bill.

The review also examined the then Conservation and Land Management Amendment Bill and the Forest Products Bill, both now enacted, and found the identified restrictions to be in the public interest. These Acts vested State forests and other lands in the Conservation Commission and established the Forest Products Commission to undertake commercial forestry functions on State forests and private land.

The *Sandalwood Act 1929*, which controls the harvesting of sandalwood on private and public land, has been reviewed. The review recommended removal of the cap on the amount of sandalwood which can be harvested from private land. The Government has decided to retain restrictions on harvesting sandalwood on public land in the public interest, however. The Act is to be amended accordingly this year via an omnibus Bill.

South Australia

South Australia considers that its principal forestry legislation, the *Forestry Act 1950*, does not restrict competition.

The Government reviewed the *Sandalwood Act 1930* in 1999. The review recommended repeal of the Act and the South Australian Parliament is currently considering the Sandalwood Repeal Bill 2001.

Two new Acts passed in 2000 were the *South Australian Forestry Corporatisation Act 2000* and the *Forest Property Act 2000*. The former established ForestrySA as a public corporation. The latter provides a voluntary framework for separating ownership of land and trees. South Australia considers neither Act restricts competition.

Tasmania

Tasmania reviewed its *Forestry Act 1920* in 1998. The Government is to remove all but one of the Act's restrictions on competition. The remaining restriction, relating to minimum supply requirements for eucalypt veneer logs and sawlogs to the veneer industry and sawmilling industries, was found to be in the public benefit during the regional forestry agreement process.

Tasmania also completed a review of the *Forest Practices Act 1985* in 1998. The review found all restrictions on competition contained therein to be in the public interest.

Table 4.16: Review and reform activity of legislation regulating forestry

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	Regulations under the Export Control Act related to wood	Licensing of unprocessed wood exporters Licensing of hardwood chip exporters Maximum aggregate mass limits for woodchip exports	Review principally by AFFA officials completed July 2001. It recommended removing controls over export of sandalwood and over the export of plantation-sourced wood and hardwood chips subject to certain conditions.	The Government expects to respond in 2002.	Council to finalise assessment in 2003.
New South Wales	*Forestry Act 1916*	Licensing of timber harvesting Licensing of sawmills Permits for grazing, hunting or occupying State forest	Not scheduled for NCP review but included in program of forest regulatory review.	Review led to new *Forestry and National Park Estate Act 1998* and *Plantations and Reafforestation Act 1999.*	Council to finalise assessment in 2003.
	Threatened Species Conservation Act 1995	Licensing of conduct that harms threatened species, populations or ecological communities	See Forestry Act (NSW).	See Forestry Act (NSW).	Council to finalise assessment in 2003.
Victoria	*Forests Act 1958*	15 year non-transferable timber harvesting licences Permits and leases for grazing and other uses of State forest Administrative discretion over how licences and produce are allocated and priced Logs harvested to equal sustainable yield	Reviewed by independent economic advisers in 1998. The review recommended: • allowing purchaser/provider structure for management of State forests; • removing requirement for minimum level of logging; • developing market-based processes for log allocation and pricing; and • separating policy, regulatory and commercial forestry functions of the department.	In February 2002 Victoria released a major policy statement. The Government intends to establish a new commercial entity VicForests and to make pricing and allocation of forest produce more competitive and transparent. An industry/department task force is advising on implementation.	Council to finalise assessment in 2003.

(*continued*)

Table 4.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Forestry Act 1959*	Licensing of timber collection and of taking of other resources Administrative discretion over how licences and produce are allocated and priced Logs harvested not to exceed sustainable yield Levy to fund timber research	Reviewed by officials in 1999. The review recommended: • retaining the native forest sawlog allocation system as, while pro-competitive reform would bring economic gains, it avoided imposing significant social costs on several rural communities; and. • retaining the timber research levy. A subsequent review of agricultural levies recommended removal of the timber research levy.	Act amended in November 1998 to extend exemption from the Trade Practices Act for the native forest sawlog allocation system until 2009. Timber research levy removed in 2000.	Council to finalise assessment in 2003.
	Sawmills Licencing Act 1936	Licensing of sawmills at absolute discretion of corporation Licences specify maximum productive capacity of mill	Reviewed in 2000.	Act to be repealed (without replacement legislation) in September 2002.	Council to finalise assessment in 2003.

(*continued*)

Table 4.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Conservation and Land Management Act 1984*	Licensing of timber collection and of taking of other resources Administrative discretion over how licences and produce are allocated and priced Permits to occupy and use State forest Registration of timber workers	A review by an independent economic adviser recommended the repeal of: • various limits on beekeeping in State forests; and • the exemption of State forest tree values from local body rating. Separately the Act was amended by: • *Conservation and Land Management Amendment Act 2000*; and • *Forest Products Act 2000*. These Acts vested State forests and other lands in the Conservation Commission and established the Forest Products Commission to undertake commercial forestry functions on State forests and private land. A review of this amending legislation found all identified restrictions to be in the public interest.	The recommendations of the review of the unamended Act will be implemented in 2002 via an omnibus Bill.	Council to finalise assessment in 2003.
	Sandalwood Act 1929	Caps the quantity of naturally-occurring sandalwood harvested from Crown and private land Licensing the harvesting of sandalwood Individual licences capped at 10 per cent of the total limit	Review completed. It recommended retaining the overall cap on the quantity sandalwood harvested while removing the restriction on the proportion of the annual sandalwood harvest that may be taken from private land.	Recommendations to be implemented in 2002 via an omnibus Bill.	Council to finalise assessment in 2003.

(*continued*)

Table 4.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Forestry Act 1950*	Exclusive control and management of State forests by Forestry SA Licensing of timber collection and taking of other resources Administrative discretion over how licences and produce are allocated and priced	Not scheduled for review as Act is not considered to restrict competition.		Council to finalise assessment in 2003.
	Sandalwood Act 1930	Caps the quantity of naturally-occurring sandalwood harvested from Crown and private land Licensing the harvesting of sandalwood	Reviewed in 1999. The review recommended repeal of the Act.	A Bill repealing the Act has been introduced into the South Australian Parliament.	Council to finalise assessment in 2003.

(*continued*)

Table 4.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Forestry Act 1920*	Exclusive control and management of State forests by the Forestry Corporation Licensing of timber collection and of taking of other resources Administrative discretion over how licences and produce are allocated and priced Minimum supply of logs for veneer and sawmilling industries Wood supply agreements to contain certain conditions Permits to occupy and use State forest Registration of timber workers	Reviewed by an external consultant in 1998. It noted that minimum supply restrictions are anti-competitive and recommended: • simplifying the Act; and • removing certain conditions of wood supply agreements. The minimum supply restrictions were found to be of public benefit during the process to establish a Regional Forest Agreement.		Council to finalise assessment in 2003.
	Forest Practices Act 1985	Requires preparation and certification of forest practices plan before timber harvesting can start Declaration of private timber forests Prescribes forest practices under Forest Practices Code Operators harvesting more than 100 000 tonnes per annum must submit a 3 year plan for approval by Forest Practices Board	Reviewed in 1998 by Forest Practices Advisory Council. The review recommended no changes to the Act.		Council to finalise assessment in 2003.

Competitive neutrality

All States and the ACT have publicly owned agencies which are recognised as undertaking significant forest-related business activities, most importantly the sale of logging rights and/or logs, in competition (current or potential) with private forest owners. State governments are therefore obliged under CPA clause 3, to the extent that the benefits outweigh the costs, to either corporatise their forestry business activities or to adopt cost-reflective pricing of forestry goods and services.

The key elements in corporatising a significant business activity (drawn from CPA clause 3 and the corporatisation model prepared by the Taskforce on Other Issues in the Reform of Government Trading Enterprises in April 1991) are:

- setting a clear value-maximisation objective for the enterprise and directly funding any non-commercial community services;
- separating policy advisory and regulatory functions from commercial functions;
- setting the enterprise's core business, valuation, target rate of return, capital structure and dividend policy;
- imposing on the enterprise:
  - Commonwealth and State/Territory taxes or tax equivalent systems;
  - debt guarantee fees; and
  - those regulations to which private enterprises are normally subject;
- delegating to the enterprise's board and management full authority over pricing, operational, employment, investment and financing decisions; and
- regular reporting and monitoring of the commercial performance of the enterprise.

Cost-reflective pricing involves pricing goods and services to cover their full costs of production including, where appropriate, taxes or tax equivalents, the opportunity cost of capital employed in producing the goods and services, and costs arising from complying with regulations that similar private businesses are subject to. Full cost attribution can accommodate a range of costing methodologies, including fully distributed cost, marginal cost, avoidable cost, as appropriate to particular cases. See chapter 2 for further discussion of the general principles and application of competitive neutrality.

Whichever approach governments adopt, forest agencies must charge prices for timber that, over the longer term, generate revenues that at least cover

the costs of managing their forests for timber supply and provide a commercial return on the assets employed in timber production.

There have been longstanding concerns that timber supplied by forest agencies is sometimes underpriced. Underpricing timber imposes various costs on the community, including:

- supporting exploitation of native forests at higher than economic levels;
- slowing productivity growth in the timber processing industry; and
- hampering the development of private plantations (and hence related benefits such as the contribution that private plantations make to controlling salinity in certain dryland farming areas and to sequestering carbon).

In May 2001 the Commonwealth Competitive Neutrality Complaints Office (CCNCO) released the research paper 'Competitive Neutrality in Forestry' which extensively discussed the implications of competitive neutrality for state forest agencies. The CCNCO noted some difficulties in monitoring the financial performance of forest agencies and the adequacy of timber prices.

> *Over the 'life' of a forest, the rate of return provides a useful measure of an agency's financial performance. However, annual rates of return need to be interpreted with care. For example:*
>
> - *revenues, and hence rates of return, will fluctuate from year to year because the quantity of wood available for harvest will vary, unless the forest age profile is consistent through time;*
> - *with a pronounced cyclical demand for many processed wood products, log prices (and hence forestry returns) can also be quite volatile; and*
> - *the use of expected future returns to determine the value of forestry assets introduces an element of circularity into an agency's reported rate of return. More specifically, it means that poor performance by an agency will lower the value of its forestry assets. As a result, the reported decline in returns, relative to the new asset base, is dampened, or perhaps even eliminated.*
>
> *This 'circularity', coupled with the sensitivity of rate of return measures to factors unrelated to the performance of the forestry agency (eg changes in market conditions), suggests that, for performance monitoring purposes, annual rates of return need to be assessed in the context of longer term trends and other relevant information. This should include details of, and reasons for, changes in asset values and longer term projections of the pattern of future log sales.*
>
> *The CN requirement that forestry agencies recover all costs and generate commercially acceptable returns should help address past*

> *concerns about underpricing of logs by forestry agencies. However, in view of the difficulties in assessing and interpreting rates of return and related information, it may often be difficult to judge whether logs are being sold at their 'full' market value. In these circumstances, a useful way of assessing the market value of logs is to compare log prices with their residual value — a value derived by subtracting harvesting, transport and processing costs from the prevailing international prices of processed wood products.*
>
> *Underpricing by forestry agencies of logs from native forests has hampered the development of private wood growing enterprises. However, with the reforms of the last decade or so, and with harvesting controls limiting the output of most forestry agencies, other factors — such as the future competitiveness of Australia's wood processing sector — may be more important for the future development of private wood supplies.* (CCNCO 2001, p. x)

The key conclusion of the research paper is that monitoring of public forest enterprise financial performance — and thus the assessment of competitive neutrality compliance — may be assisted by determining the market value of logs (for use in valuing the timber asset) using the residual value method.

This does not mean that the 'residual value' method is most appropriate for setting actual timber prices. A report recently prepared for the Australian Conservation Foundation (Marsden Jacob Associates 2001) argued that forest agencies that set timber prices in this way effectively subsidise the processing industry by making 'ability to pay' the main pricing criterion. According to the report, this results in the exploitation of native forest that is uneconomic to log, and in inefficiency in the processing industry. The report recommended that forest agencies sell timber via auctions or tenders subject to a cost-based reserve price.

The sale of timber via auction or tender was also discussed in a paper recently released by the Victorian Government's Timber Pricing Review (Jaakko Poyry Consulting 2001). The discussion paper also noted, however, that in areas where insufficient competition exists between processors, other approaches (such as the residual value method) may give a better indication of overall market values.

An obvious further difficulty with the residual value method is that, like price regulation generally, it relies on the revelation of cost information to governments by government agencies and private processors which have strong incentives to bias the information in their favour.

For this and other reasons noted by the CCNCO, reported rates of return are likely to be insufficient to effectively monitor State forest enterprises and hold directors and management to account for the enterprise's performance. Governments are likely to find it necessary to also monitor the pricing policies and practices of these enterprises.

This though presents another difficulty. Under the corporatisation model boards and management have autonomy from shareholding Ministers and departmental officials in making pricing decisions. Moving the focus of ownership monitoring to product pricing may invite undue influence by Ministers and officials in enterprise pricing decisions. Such influence was arguably a significant factor in past instances of underpricing.

The best solution to this dilemma may be for governments to negotiate with State forest enterprise boards a performance monitoring regime that includes pricing transparency mechanisms. Possible such mechanisms include:

- posted prices and pricing formulas for all sales – so that processors, competing timber suppliers and the community at large are able to scrutinise the enterprise's pricing performance and detect any instances of 'weak selling' or discrimination;

- periodic reviews of the enterprise's pricing policies and practices by an independent expert and reporting of review results in the enterprises' annual report; and

- gazettal or similar reporting of any directions from shareholding Ministers to the enterprise's board related to pricing.

The design of suitable transparency mechanisms would need to address confidentiality concerns – particularly where existing contracts or licences carry (legitimate) confidentiality obligations.

The CCNCO noted that currently there is very little published information on prices realised by forest agencies (CCNCO 2001 p. 43).

Forest agencies may argue that these types of transparency mechanisms are not imposed on their privately-owned counterparts and may disadvantage the public enterprises competitively. The appropriate response to this argument is that it makes up for the deficiency in management accountability that is unavoidable where ownership rights are not publicly traded, as is the case for public forest enterprises.

In assessing in 2003 the application by governments of CPA clause 3 to their forest enterprises the Council will focus on the effectiveness their performance monitoring arrangements – particularly the extent to which the problems noted above have been acknowledged and addressed – and related elements of competitive neutrality such as the identification, costing and funding of community service obligations.

5 Transport

The National Competition Policy (NCP) is relevant for all modes of transport. The major elements of the NCP that apply to transport are:

- clause 5 of the Competition Principles Agreement (CPA), which obliges governments to review and, where appropriate, reform legislation that regulates transport, particularly legislated licensing requirements that limit the number of taxis and hire cars;

- clause 3 (competitive neutrality) of the CPA, which obliges governments to ensure government-owned rail and port businesses apply competitive neutrality principles;

- clause 4 (structural reform) of the CPA, which obliges governments to review the structure of public monopolies (including any prices regulation arrangements) before privatising monopolies or introducing competition to the former monopoly market. This clause is relevant where rail, port and airport businesses are privatised and/or third party access regimes are introduced in these areas; and

- Council of Australian Governments (CoAG) reform of the regulation of the road transport sector, which is aimed at improving the consistency of regulation nationally in areas such as vehicle registration and operations, and driver licensing. (This is one of the four sector-specific reforms).

This chapter considers governments' compliance with obligations under the CPA. Chapter 3 discusses governments' compliance with the CoAG reform obligations for road transport.

Taxis and hire cars

All States and Territories regulate the taxi and chauffeured hire car sectors. Regulation of taxis is broadly similar across all jurisdictions, and has two broad aims: limiting entry to the industry via licensing and setting the service quality standards required of vehicles and drivers.

- Limits on taxi licence numbers have over the past two decades reduced the number of taxis relative to population and encouraged increases in the real (adjusted for inflation) value of taxi licence plates. (Fares have also been regulated as a corollary to the restrictions on licence numbers.) The limit on licence numbers (taxi plates) is the major regulatory issue for the NCP.

- Regulation of standards covers matters such as the age and roadworthiness of vehicles and the entry requirements for drivers. These regulations relate to service quality and emphasise passenger safety. Standards regulation in the taxi sector does not have substantial impacts on competition.

The hire car sector also faces significant regulation, including restrictions on licence numbers and minimum fare requirements in most jurisdictions, and driver and vehicle quality regulations. Entry restrictions for hire cars are not endemic, as with taxis, but are nevertheless widespread. Only Western Australia and South Australia currently have effective free entry to the hire car industry.[1] There are also other constraints on hire cars that exceed those on taxis. Passengers must book in advance, some jurisdictions set a minimum fare for hire cars (up to twice the standard taxi detention rate) and some impose a minimum hire period of one hour. Most jurisdictions also require the vehicle providing the hire car service to be of a higher standard than taxis.

International experience

Most Western governments impose entry restrictions in the taxi and hire car services, although there is a recent trend to removing or loosening those restrictions. New Zealand, Sweden and, most recently, Ireland have removed supply restrictions since 1989. Taxi licensing in many cities in the United States was deregulated during the 1970s and 1980s. Almost all governments impose service quality regulation.

Victoria's NCP review investigated the experiences of other countries in some detail. The Victorian review noted the United Kingdom's regulatory approach, which has no explicit supply restrictions on either cabs or 'mini-cabs' (that is, hire cars) in the London area, but has some (recently relaxed) restrictions in other parts of the country. The review concluded that 'the combination of hire cars and taxi-cabs appears to work reasonably well'. It noted in the context of the United Kingdom's new taxi industry legislation that 'there has been no attempt … to limit the number of these vehicles; it [the legislation] addresses problems resulting from a lack of quality controls, not too many vehicles' (KPMG Consulting 1999, pp. 121–2).

The Victorian review also cited a 1994 analysis of Sweden's experience following its deregulation in 1991. The 1994 analysis found there was an increase in the number of cabs and consequent reduction in waiting times and that, while there was some increase in fares, it was likely that user gains due to reduced waiting times more than offset costs to consumers. High licence

1 A number of other jurisdictions notionally have free entry but constrain entry in practice by levying licence fees. The Northern Territory imposes an annual licence fee and a one-off entry fee of $10 000. Tasmania allows entry subject to a $5000 fee. Current Victorian reforms establish a $60 000 fee for a perpetual hire car licence.

values were not a significant feature of pre-deregulation Sweden (KPMG Consulting 1999, p. 126).

Several Australian NCP reviews of taxi and hire car legislation considered the experience of New Zealand, which deregulated in 1989, concluding that deregulation has been successful. The number of taxis in New Zealand increased substantially, from 2567 in 1989 to 6903 in 1998. Fares were lower overall in real terms in 1998 than in 1989, although there was more variation in fares. In addition, a range of different services developed following deregulation, including public transport services, different vehicle types (including different sized vehicles and different quality levels) and the provision of mail deliveries and other services under contract (KPMG Consulting 1999, pp. 124–5).

Ireland deregulated its taxi supply arrangements recently, and it is too early to draw firm conclusions. There has been, however, a rapid and substantial increase in the number of taxi licences, indicating a major supply response to the removal of restrictions.

Some studies consider the experience of the United States, where many cities deregulated the taxi industry during the 1970s and 1980s, as being negative. Teal and Berglund (1987) and Price Waterhouse (1993) (cited in KPMG Consulting 1999) report a range of adverse outcomes. These include increased fares (particularly in the short run), higher rates of trip refusals and no-shows, older vehicle fleets and lower vehicle standards, lower productivity (that is, trips per cab) and limited service improvements despite increasing taxi numbers because cabs tended to congregate in well-serviced areas such as airports. Many of these problems relate, however, to failures of quality regulation, rather than to supply deregulation. Moreover, pre-deregulation licence values in the United States were generally much lower than those currently in Australia, suggesting that there was less scope for deregulation to lead to major market realignments in favour of the consumer than is the case in Australia. Tellingly, 15 of the 21 cities considered by Price Waterhouse maintained their open access policies, indicating that around three quarters of cities found, on the basis of direct experience, that removing supply restrictions provided a net benefit.

Overall, there is an apparent trend toward the removal of supply restrictions on taxis in many countries, although the pace of reform is relatively slow, probably reflecting the power of taxi plate owners. Overseas experience of removing supply restrictions appears to be positive, although achieving beneficial outcomes depends on sophisticated regulatory design that ensures appropriate quality controls and other market support mechanisms are in place.

Competition in taxi services

The impact of restrictions in the provision of taxi and equivalent services depends on the importance of these services to the community and the likely market power of taxi service providers with and without those restrictions. These factors in turn depend on:

- the nature of the taxi services;
- the potential for competition between taxi services and other modes of transport providing relevantly equivalent services, that is, the market for taxi services;
- the extent and nature of regulatory constraints on the supply of taxi services;
- regulatory constraints on the supply of alternative services and on competition between taxi services and services provided by other modes of transport; and
- economic reasons why the market for taxi services may not work effectively.

The nature of taxi services

Taxis provide on-demand, point-to-point personal transport services within a region such as a large metropolis. The dominant characteristic of taxis is the ready consumer identification of the vehicles providing taxi services, which promotes consumer awareness of, and confidence in, the service offered.

Taxi services are provided at short notice and also with some forward notice (often in response to phone bookings). Taxis can be seen as providing at least five distinct services, each with particular characteristics. These distinct services are:

- where a telephone booking is made for some future time ('pre-booked' travel);
- where a telephone booking is taken for immediate despatch of a vehicle ('telephone despatches');
- where customers queue at a designated point for pick-up ('rank' hires);
- where customers hail taxis from the street (the 'cruising' segment); and
- Wheelchair Accessible Taxi services.

On-demand, point-to-point personal transport services can be provided by other transport modes. Hire cars provide closely equivalent services, especially for booked services, short-notice phone bookings and where the hire

car has access to cab ranks. The lower profile of hire cars is a disadvantage in the cruising sector — consumers are more likely to identify and hail taxis. Specialised bus services that provide on-demand, point-to-point transport to more than one customer concurrently are also closely equivalent to taxis in some circumstances, such as transport on popular routes, for example between airports and city centres. Other public transport modes, such as bus and train services, might be considered alternatives to taxis, albeit with some significant loss of convenience. On many occasions, travellers would also regard use of their own car as an alternative to taxis.

It is possible to distinguish among these possible alternative transport modes. One distinction is between public and private transport. Taxis and hire cars constitute a part of the public transport system. Private cars (as well as rental cars) constitute a 'self-drive' option, but may be poor alternatives in some contexts, whether because of concern about drink-driving, the need to find parking, or because one way transport is required. Another distinction is between scheduled fixed route and on-demand, point-to-point services. Many public transport options (trains, buses, trams) follow fixed routes and have fixed departure times. Further, public transport options may be unavailable for late night custom.

Importantly, the extent to which different modes of transport might provide viable alternatives for travellers is often limited by regulation. Regulation can restrict alternatives to taxis directly. Hire cars for example are commonly prevented by regulation from servicing the rank and cruising segments. Regulation can also have an indirect impact on alternatives to taxis. Vehicle standards for hire cars for example can make it impractical for hire cars to provide services in particular market segments.

The market for taxi services

A market is the minimum field of rivalry between suppliers of products where a hypothetical monopoly could exercise substantial market power, that is exercise the ability to price its products significantly and sustainably above the cost of producing those products. Market analysis is critical to judgments about the extent of competition, or the extent of restrictions on competition, in the supply of particular products, such as taxi services. A market delineates the bounds of competition in relation to a particular product.

The Trade Practices Tribunal has defined 'market' in the following way:

> *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. So 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.* (Re Queensland Co-operative Milling Association Ltd (1976) 25 FLR 169 at 190)

This definition of a market has been accepted by the High Court in Queensland Wire Industries Pty Ltd v The Broken Hill Pty Ltd (1989 167 CLR 177) and was adopted by the Australian Competition Tribunal in the context of Part IIIA of the *Trade Practices Act 1974* in the Sydney Airport case (Sydney International Airport [2000], ACompT 1, paragraph 91).

Where competing services from other transport modes, such as hire cars, are provided in the same market as taxi services, any problems associated with regulatory restrictions in the provision of taxi services will be reduced. This is because the availability of competing modes of transport will constrain, at least to some extent, any market power that might otherwise be available to taxis as a consequence of regulatory restrictions. Thus, if taxis do not have the ability to price their services substantially above costs because they would lose too much business to, say, hire cars, then a theoretical monopoly supplier of taxi services would not have substantial market power. Any definition of the market for taxis would have to include hire cars. Market analysis for taxi services is important, therefore, to understanding the costs of restrictions on taxi services, as well as understanding which approaches to reducing those costs are likely to be effective.

Whether hire cars or other transport modes are capable of providing viable substitute services for taxis depends largely on consumer preferences for point-to-point personal transport services; that is, the demand for taxi services. Demand for taxi services can be segmented by the purpose of the travel undertaken, such as business, private/social and tourism. Each is likely to have different demand characteristics. Demand for business travel is generally characterised by relatively low levels of price elasticity[2] but particular sensitivity to reliability and timeliness. Private or social demand is likely to be more price sensitive and, in many contexts, less time sensitive than business travel. Tourism demand is likely to be the least time sensitive, but may exhibit a high level of sensitivity to quality issues such as safety and reliability (for example, the perception that a taxi will take the most appropriate route).

The relative importance of these demand segments varies across jurisdictions. The Victorian NCP review estimated that around 31 per cent of demand in that State was business derived, 16 per cent was tourist derived and 53 per cent was from the household sector. A widely observed trend is strong growth in tourist demand, in line with generally increasing levels of international and domestic tourism in Australia.

2 Price elasticity of demand is a measure of the sensitivity of demand to changes in the price of a good or service. Low price elasticity of demand means that demand is unlikely to increase (decrease) significantly if price falls (rises).

Wheelchair Accessible Taxis are a growing sector, because all governments have sought to improve the access of disabled persons to transport services. This involves issuing specific taxi licences for vehicles equipped to carry wheelchair-bound occupants, as well as providing subsidies to users so they have access to the taxi service. The Victorian NCP review reported that the Victorian Government's 'Multi-Purpose Taxi Program' had a budget of $36.8 million in 1997-98, which was equal to more than 10 per cent of total taxi industry revenue (KPMG Consulting 1999, p. 25).

The ACT NCP review report emphasised that potential taxi users include a broad section of the community including:

- school children to retirees;
- business executives to unemployed youth;
- sophisticated patrons of the arts to economically/socially disadvantaged persons;
- fit and healthy sport participants to frail aged residents of health care facilities; and
- people with meticulously planned travel schedules, to spontaneously required travel imperatives resulting from vehicle breakdown, urgent medical needs or non-arrival of a bus, friend, hire car etc (Freehills Regulatory Group 2000, pp. 140-1).

Demand characteristics and substitution opportunities vary widely among such groups. The ACT review report stated:

> *Depending on the type of consumer, substitutes for taxi and hire car services vary. For instance, for the one-car modest income family, taxis compete with subsidised transport such as buses, Health and Community Care vehicles and the motor vehicles of friends and relatives. On the other hand, for the patronage of interstate visitors, including politicians, taxis, hire cars, rental vehicles and Comcar providers are in direct competition.* (Freehills Regulatory Group, 2000, pp. 140–1)

There is substantial evidence on the extent of substitution away from taxi services over the past five to ten years. Taxi industry submissions to the various NCP reviews have expressed concerns about competition from hire cars. Some NCP review reports have documented declining levels of activity in the taxi industry. The Western Australian NCP review reported that the use of taxis for business trips almost halved between 1990 and 1996 and that a further 30 per cent fall occurred between 1996 and 1999 (BSD 1999, p. 16 and p. 18). These figures suggest there has been a loss of market share in the business traveller segment by taxis of almost two thirds within less than a decade, and that business travellers are substituting to other transport modes. The Western Australian review report stated that:

> *There is … evidence that the industry is losing market share and failing to meet consumer expectations … The industry is static, profitability is declining and owners and drivers face significant competition from other transport sources.* (BSD 1999, p. 16)

The Victorian NCP review reported a decline in taxi hirings over a longer timeframe, finding that the number of passenger trips declined by 8.5 per cent between 1983 and 1998. It noted that, by contrast, the number of train trips in the State rose by over 30 per cent during the equivalent period, suggesting a significant loss of market share by the taxi sector over time (KPMG Consulting 1999, p. 27).[3] The ACT NCP review reported that 'taxi hirings in the ACT has [sic] fallen by about 7.5 per cent over the last three years' [that is 1996 to 1998] (Freehills Regulatory Group 2000, p. 147). The subsequent report by the Independent Competition and Regulatory Commission (ICRC) found that the decline in taxi usage observed between 1996 and 1998 continued between 1999 and 2001. Total telephone bookings fell by a further 8.4 per cent during this period, while rank and cruising bookings fell by 14.8 per cent; total bookings therefore fell by 10.9 per cent between 1999 and 2001 (ICRC 2002b, p. 61). Taking the data from the two ACT review reports, the total decline in trips over the five years from 1996 to 2001 was 14.4 per cent. That is, the ACT taxi industry lost one seventh of its total custom within five years, at a time of strong economic growth. Hire car usage data for 1995-1998 presented in the ACT review show no increase in the average number of journeys completed by hire cars, suggesting either that any diversion of custom to hire cars was delayed or that other transport options, such as private vehicle use or self-drive rental cars, diverted demand from taxis.

The New South Wales NCP review report suggested that demand for taxis is increasing in Sydney, although its conclusion is based on evidence that does not consider the rank and cruising segments (IPART 1999b, pp. 34–5). Given that Sydney has by far the lowest number of hire cars relative to population, this observation is consistent with the view that substitution between taxis and hire cars is important. That is, taxi hirings may be growing in Sydney, by contrast with Victoria, Western Australia and the ACT, partly because the very small number of hire car licences in New South Wales substantially reduces the possibility of substitution towards hire cars. Surprisingly, the remaining NCP reviews did not investigate trends in demand, despite their obvious importance for assessing the public benefits and costs of current restrictions on competition. Consequently, there is a restricted factual basis on which to make judgments in this area.

The evidence of declining patronage of taxis in some jurisdictions suggests that continuation of tight taxi supply restrictions may be leading to substantial substitution away from taxis towards other modes of transport. At least some of this substitution appears to have been to hire cars, although

[3] Average taxi trip lengths increased substantially despite the reduction in hires, meaning that total passenger kilometres grew by 57 per cent.

this picture is clouded by the lack of available data and differing restrictions on hire cars across the States and Territories. Some of this substitution is probably to less preferred modes of transport, as suggested by Victoria's review evidence (cellophane fallacy substitution).[4] While the evidence is by no means clear, it appears likely that, in most contexts, public transport options based on fixed routes and times are relatively poor substitutes for taxis. That is, changes in the price or availability of taxis are likely to result in only limited substitution to public transport. Mini-bus services combining some elements of both bus and taxi services (such as operate in the Northern Territory) are likely to constitute a closer substitute.

Taxis and hire cars are the closest substitutes for a large proportion of the above demand segments. This substitutability is recognised in most NCP reviews, many of which note that the hire car industry provides the only close substitute for taxi services in the sense that a passenger hires a chauffeured vehicle to complete a specific journey. This point is implicitly recognised in that the same legislation regulates both taxis and hire cars in most jurisdictions. Consideration of the effects of taxi regulation must therefore also take account of the hire car sector. In this regard, the Council concurs with the findings of ACT review report, which states that:

> *Though the different purposes for which an SCPV [Small Chauffeured Passenger Vehicles] service is sought can limit substitutability between different types of SCPV vehicles, it is our view that evidence of sufficient competition between different types of vehicles reduces the importance of this distinction. Accordingly, it is our view that the relevant SCPV markets are segmented according to pre-booked SCPV services and cruising (rank or hail) SCPV services.*
>
> *We take the view that the market for pre-booked services would include all SCPVs including those vehicles currently licensed as taxis, hire cars RHVs [restricted hire vehicle transport services] and smaller MOs [motoromnibus transport services], as well as any unlicensed RHV-type vehicles currently being utilised for SCPV services.*
>
> *It is our view that the market segment for cruising SCPV services would include SCPV vehicles that, as a minimum, have an appropriate level of external identification to make them sufficiently recognisable as SCPVs for hire.* (Freehills Regulatory Group, 2000, p. 24)

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4 US v E I Du Pont de Nemours and Co (1953) F Supp 41. This case involved questions of substitution between cellophane (the supply of which was monopolised) and wrapping paper. The case gave rise to the notion of cellophane fallacy substitution; that is, an artificial form of substitution toward a less valuable product driven by a very high price for the product in question. Artificial substitution such as this is not the result of effectively competitive markets and reduces community welfare because consumers are 'making do' with a less valuable product.

This suggests that hire cars and other forms of on-demand point-to-point transport services have the potential to impose, at least, substantial competitive pressure on taxis across the full range of taxi services. The extent of this competitive pressure across all taxi services may depend on the freedom granted to taxi alternatives to operate in the ways that taxis operate; that is, to the extent that there are regulatory constraints on hire cars they will be a less than perfect substitute. Because of the physical and market needs of particular taxi users, notably in the cruising segment, taxis may nonetheless be able to exercise some market power, even in the absence of regulatory constraints on all modes of personal transport, because of their higher visibility and likely greater availability.

Regulatory constraints on taxis

As noted above, the major regulatory constraint on taxis is the control on entry and the associated controls on fares. This section discusses the inter-relationship between these controls and evaluates evidence from consumer surveys to rebut claims made by some governments that consumers do not suffer as a consequence of regulatory constraints on taxi services.

Supply restrictions

State and Territory legislation generally provides for new licences to be issued only at the discretion of a regulator or a Minister. The outcome has been a long term decline in the number of taxis, relative to population, because lobbying has meant that new licences are rarely issued. In Brisbane, for example, the number of taxis per 10 000 population fell from 19.8 in 1960 to 13.3 in 1990 and to 9.8 by 1999 (Gaunt and Black 1996, p. 57 and IPART 1999a, p. 75). Similar declines in taxi supply are observed in other capitals. In Melbourne, for example, the number of taxis per 10 000 population fell from 12.3 in 1951 to 9.6 in 1995 (KPMG Consulting 1999, p. 55). The supply shortfall in Australian capitals is emphasised by a comparison with cities in New Zealand, where markets are deregulated. The New South Wales review estimated in 1999 that the number of taxis in Australian cities was about one quarter to one third that in New Zealand cities; the number of taxis per 10 000 population in Australian capital cities was estimated to range between 7.7 and 11.4, compared with 29.3 in Auckland and 36.6 in Wellington (IPART 1999a, p. 75).

The real value of taxi licences in all States and Territories has increased as the supply of taxis relative to population has declined. The Productivity Commission noted substantial real increases in taxi licence values in all Australian capitals during the 1990s (PC 1999d, p. 15). The Victorian NCP review of the taxi industry found that the real value of a Melbourne taxi licence increased almost fourfold between 1975 and 1998 (KPMG Consulting 1999, p. 55). Victorian Government estimates show there has been a further

increase in the last three years, with licences now valued at $330 000 in Melbourne.[5] Indeed, the value of a taxi licence is now higher in Australia than in almost all other countries. Melbourne's current licence value of $330 000 is approximately equal to that of licences in New York City, where no new licence has been issued since 1937.[6]

The reductions in the number of taxis relative to population have occurred in an environment of likely increasing demand for on-demand passenger transport services as a result of factors such as expansion in tourism and growth in real per capita incomes. The NCP reviews, which have largely focused on demand for taxi services per se, rather than on total demand for on-demand passenger transport services, provide little direct quantitative evidence of increasing demand, beyond their confirmation of the rapid increases in taxi plate values that occurred in most major cities over the 1980s and 1990s. The increased plate values provide fundamental evidence, however, that demand has increased strongly in the context of near static supply. Since licence plate prices represent the capitalised value of expected future returns to the asset, and regulated fares have remained historically constant in real terms, only increasing demand for taxi services can explain the often massive increases in plate values observed.

Moreover, as noted above, the review present several indications that taxis are losing market share to substitute services where these are available. Thus the increases in demand reflected in plate prices is occurring in a context in which the taxi share of the overall market for on-demand passenger services is declining, in some case substantially. The evidence that demand for taxi type services is not being fully captured by taxis suggests that restrictions on supply, by reducing the availability of taxis and maintaining fares at a level above which they might otherwise settle (to service the capital cost of purchasing licence plates), may adversely affect the longer term health of the taxi industry.

Estimated cost to the community

NCP review reports indicate that the net cost of restricting licence numbers is considerable. The Victorian review report concluded that:

> *The greatest influences on the size of the losses are the licence values and the elasticity of demand. As the licence value grows (assuming other things equal) the size of the losses increases at an increasing*

5 The Victorian Government estimates the current licence value at $330 000 (see Department of Infrastructure 2002). This compares with an estimated value of $259 100 in 1997 (KPMG Consulting 1999, p. 53).

6 Malanga (2002) reports the current New York City price as being US$200 000, or approximately A$350 000. In 1999, the Productivity Commission reported a licence value for New York City of US$60 000 (PC 1999d).

> *rate…The efficiency losses grow exponentially as price-cost margins and licence values increase.* (KPMG Consulting 1999, pp. 92–93)

This link between licence values and the costs of supply restrictions derives from the fact that, where licence values are high, a substantial proportion of fare revenue is used to service the capital costs of those licences. The New South Wales review concluded that around one fifth of taxi revenue in Sydney is accounted for by this cost (IPART 1999b, p. 61). Similarly, the Victorian review found that fares in Melbourne are around 30 per cent above competitive levels as a result of the need to service the capital costs of taxi licences (see below). In some jurisdictions, the size of this effect is substantially larger still: Malanga (2002) states that over 50 per cent of taxi industry revenue in New York City now accrues to taxi licence owners. NCP reviews gave the following estimates of the aggregate cost of restrictions on the supply of taxi licences.

- Victoria's 1999 NCP review estimated that the annual cost to the community (based on then taxi plate values of $250 000) of taxi supply restrictions was $72.1 million, comprising transfers from passengers to plate owners of $66.1 million and deadweight losses of $6 million.[7] The review estimated that the average price of a taxi journey was $2.96 higher than it would have been if the market were unrestricted. The estimated total cost of $72.1 million can be compared to annual revenue accruing to the taxi sector of $320 million. At current Melbourne plate values ($330 000), the annual deadweight loss from supply restrictions would be $13 million (KPMG Consulting 1999, p. 93).

- The 2000 ACT review estimated the annual transfer from ACT passengers to plate owners to be $5.6 million per year, and the deadweight loss at approximately $408 000. The ACT review based its estimates on an average licence value of $260 000, 217 unrestricted licences and an average fare of $11.74 (Freehills Regulatory Group 2000, pp. 149–151).

The analysis by the Victorian and ACT reviews suggests that, with rising licence plate values in most Australian capitals, the cost to the community from restricting the supply of taxis is significantly increasing. Based on the estimates from the Victorian review and assuming an average plate value across Australia of $200 000, total transfers from consumers to plate owners could be as much as $200–250 million a year, while annual deadweight losses may be as much as $20–25 million.[8]

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7 The deadweight loss arises because fewer taxi journeys are taken than would be the case in a market with unregulated supply, because of higher prices in the restricted market.

8 The analysis assumes that taxi supply in a deregulated market is perfectly elastic. If, however, elasticity of supply is positive, there will also be a loss in producer surplus, thereby increasing the total loss. The Victorian review argued that the loss of producer surplus is likely to arise, but ignored it because of measurement difficulty (KPMG Consulting 1999, p. 92).

Price regulation

All Australian jurisdictions regulate maximum taxi fares. Where governments' NCP reviews have reported on fares, they show that fares have risen approximately in line with the consumer price index, notwithstanding some year-to-year variation. The Victorian review indicated for example that the real (1998 dollars) average fare varied between approximately $10.80 and $13.00 in the period 1975–1998, but that the 1981 figure was almost identical to those for 1994–1998. The Victorian review also indicated that taxi fares grew overall at the same rate as private motoring costs over the period 1981–1998 (KPMG Consulting 1999, pp. 60-61). These outcomes are consistent with a pricing policy that appears to seek stability and predictability in taxi fares.

Over the same period, there have been substantial increases in licence plate values. On one view, licence plate values are equal to the expected (capitalised) value of the future stream of revenues that can be earned from the licence. Any reduction in fares will reduce those revenues and, therefore, the price of the licence. Another way of explaining the relationship between fares and licence plate values is that fare revenues must cover the costs of taxi services. These costs include operating costs, administrative fees, booking and despatch membership fees, driver income and a return to the taxi owner to cover capital costs, including the cost of the licence plate. The higher the licence plate value, the higher the costs of taxi services. Supporting this view is the fact that the long-run value of licence assignments[9] has remained quite constant at approximately 8 per cent of the market price of the plate licence.

Lower taxi fares may mean lower licence plate values. There is a strong likelihood that fare reductions would be reflected in the short term in reduced assignment values. Because licence assignments can be relatively short term in nature, an assignee would be likely to exit the industry or search for a less expensive licence assignment if a fare reduction rendered the operation of the existing licence unprofitable. The price of the assignment may fall relatively quickly. In turn, lower assignment revenues to licence plate owners may drive the value of licence plates down.

Alternatively, lower fares may put pressure on the other costs of providing taxi services. Virtually all reviews have indicated that the current, very high, values of taxi licences co-exist with extremely poor levels of driver remuneration. In fact, one explanation of experience to date is that with relatively stable fares, declining driver incomes are funding rising licence plate values. Several reviews have suggested that average driver incomes are currently around $7.50–$8.00 per hour. Anecdotal evidence suggests that, currently, some driver incomes may be even lower. Anecdotal evidence also

[9] The assignment cost of a taxi is the charge paid by drivers to taxi owners for the use of the taxi. The charge represents the owners' return on the capital costs of the taxi (including the plate values).

suggests, not surprisingly, that lower driver incomes are associated with falling driver standards.

Lower fares would mean some benefits to licence plate owners and (particularly) drivers. Reductions in real fare levels would be expected to substantially increase taxi demand. Several reviews have used an estimate of likely demand elasticity of –0.8. This implies that a 10 per cent reduction in fares (for example) would give rise to an 8 per cent increase in demand. The resulting increase in taxi usage, especially outside peak times, would have some offsetting effect on revenue and profitability and, thereby, on driver incomes and licence values.

This analysis suggests that there is a rather fluid relationship between taxi fare levels, licence plate values and driver incomes. Changes in fare levels are likely to result in some mix of corresponding changes to plate values and/or driver incomes, but it is difficult to predict these changes precisely. Changes in fare levels will also have an inverse impact on demand for taxi services, which in turn will have a countervailing impact on plate values and/or driver incomes.

Consumer satisfaction

Some governments have argued that survey data indicate a high level of consumer satisfaction with taxi services and that this high level of satisfaction indicates that there is no need for substantial reform. Perceived consumer satisfaction is not directly relevant, however, to the CPA clause 5 guiding principle. In any case, scrutiny of some of the material cited does not support the conclusion that consumers are satisfied. Moreover, consumer satisfaction is being measured in a context in which consumers have no experience of an unrestricted market on which to base comparisons.

The Queensland NCP review reports subjective rankings for various criteria, based on a five point scale in which a rating of 3 is 'fair' and 4 is 'good'. In relation to the criteria of 'availability in your area' and 'waiting time after telephone hire', the average scores reported were 3.9 and 3.8. respectively (Queensland Government 2000, p. 79). The New South Wales NCP review found a substantially lesser degree of consumer satisfaction in relation to waiting time. Slightly more than half of respondents rated waiting time after telephone booking as 'good' or 'very good'. This figure fell to around 43 per cent for waiting time at ranks and little more than 30 per cent for street hails (IPART 1999b, p. 27).

The Western Australian NCP review cited a survey showing 93 per cent of respondents were 'very' or 'quite' satisfied with the service received on their most recent taxi journey. The same review also cited data indicating that 42 per cent of peak time calls to taxi despatch services were not even answered, with company management blaming an inadequate supply of vehicles (BSD 1999, p. 10). The review made no attempt to reconcile these apparently contradictory observations.

Overall, the data on consumer satisfaction appear to be somewhat ambiguous and the reported survey methods make interpretation of the data difficult. More fundamentally, there is a question about the interpretations drawn from the survey data because consumers generally have little or no experience of a deregulated market with which to compare their experiences in the current regulated market. This emphasises contrasts between the claims of consumer satisfaction (based on these data) and evidence of declining patronage.[10] Given that patronage is an indicator of effective demand, it provides a more reliable guide to consumer satisfaction.

Declining patronage appears to be particularly acute in the generally less price sensitive business market. This is to be expected given that regulatory restrictions require hire cars – the closest substitute for taxis – to charge substantially higher prices in many jurisdictions. These restrictions have in some cases been justified as protecting taxis from competition from hire cars. Their success in this regard seems partial and perhaps declining. More generally, consumer satisfaction, as measured via the market share of taxis, may fall further if more price-competitive substitutes are made available, for example by removing price restrictions on hire cars and increasing the number of hire cars so they are better able to compete in the market segments served by taxis.

Regulatory constraints on taxi alternatives

The main taxi alternative, the hire car sector, seems initially to have focused on special purpose hires, such as for weddings and other formal events. Arguably, for some consumers, the hire car continues to be seen largely as providers of special event services, perhaps limiting consumers' tendencies to use hire cars as a substitute for taxis. Over time, however, the range of transport services provided by hire cars has broadened substantially (as recognised in regulation by the distinctions among different types of hire cars). Hire cars now compete strongly with taxis in several areas. The historical regulation of the supply of taxis and the increasing supply constraints on taxis have, over time, probably improved hire cars' opportunities to compete with taxis.

The most obvious remaining regulatory restriction on the ability of hire cars to compete with taxis is the strict limit on the number of hire cars that most governments impose. The number of hire car licences is considerably less than the number of taxi licences, although hire car numbers have grown substantially in recent years in some jurisdictions. Some jurisdictions appear to have allowed greater entry to the hire car sector partly as an indirect

[10] As noted above, several reviews have reported declines in the number of hirings. While the Victorian review also reported an increase in passenger-kilometres travelled, this was nonetheless associated with apparently declining market share.

means of addressing the shortfall in taxi numbers. This strategy has not always resulted in greater entry, because there are other regulatory restrictions on the operation of hire cars.

Entry restrictions for hire cars are not endemic, as they are with taxis, but are nevertheless widespread. Only Western Australia and South Australia have effective free entry to the hire car industry.[11] While New South Wales, Victoria, Queensland, Tasmania and the ACT limit hire car numbers,[12] the effect of these limitations in practice — in terms of the ability of the hire car sector to compete with the taxi sector — varies. Victoria for example has 508 hire car licences[13] and 3898 taxi licences. By contrast, New South Wales has 321 standard hire car licences (plus 175 short term licences) compared with 5428 standard taxi licences. In terms of capacity to compete with taxis, the hire car sector in Victoria is therefore better positioned than it is in New South Wales.

The second broad regulatory restriction on the ability of hire cars to compete with taxis is the prohibition, in virtually all jurisdictions, on hire cars providing rank and hail services. Except for limited opportunities to 'rank' at airports or other major pick-up points, hire cars can compete with taxis only in the provision of pre-booked and telephone despatch services.

The importance of this restriction varies according to the relative size of the demand for rank and hail services versus pre-booked and telephone despatch services. In the ACT, demand for rank and hail services is 37 per cent of total demand, while telephone bookings account for the remaining 63 per cent (ICRC 2002b, p. 61). Similarly, approximately 50–60 per cent of trips in Western Australia are the result of telephone bookings (BSD 1999, p. 8). In contrast, the evidence from Victoria is that 50–55 per cent of demand is for rank and hail services within metropolitan Melbourne (KPMG Consulting 1999). This is also the case in New South Wales, where approximately 55–60 per cent of taxi hires derive from the rank and hail markets within Sydney (IPART 1999b, p. 26). Overall, the rank and hail services, which regulation prevents hire cars from providing, appear to constitute about 40–60 per cent of total taxi services (although less in less densely populated areas). Regulatory restrictions therefore allow hire cars to compete with taxis in only 40–60 per cent of total taxi services.

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11 The Northern Territory has free entry to both taxi and hire car industries, although entry is substantially constrained in practice by the annual fee of $10 000. Victoria's reform proposals would create a similar situation, with a proposed $60 000 fee for a perpetual licence. Tasmanian legislation allows entry subject to a $5000 fee.

12 New South Wales limits the number of permanent licences, but not the number of short term licences.

13 This is the number of standard hire car licences (see KPMG Consulting 1999, p. 19). Victorian legislation also provides for two restricted categories of hire car licence: Special Purpose Vehicles and Restricted Hire Vehicles. Neither of these categories is able to compete substantially with taxis.

There are other regulatory restrictions that are also likely to constrain hire cars' ability to compete with taxis in providing pre-booked and telephone despatch services. Some jurisdictions regulate minimum fares for hire cars (contrasting with the regulated maximum fares that generally apply to taxis). In Tasmania, hire cars have a regulated minimum fare of twice the standard taxi detention rate (approximately $40 per hour) and a minimum hire period of one hour. In Western Australia, there is no limit on the number of hire car licences and no substantial entry cost, but there is a requirement that hire car charges are at least 30 per cent higher than the taxi detention charge.

There is no fare regulation for hire cars in Victoria or the ACT. Evidence presented in the NCP reviews in these jurisdictions suggests that hire car rates are at some premium to taxi fares, but that the premium is generally small. The proportion of hire cars in the total small chauffeured passenger vehicle fleet in Victoria and the ACT (about 12 per cent and 9 per cent respectively) is substantially higher than in jurisdictions where fares are regulated. In New South Wales, for example, permanent unrestricted hire car licences represent only 5.6 per cent of the total small chauffeured passenger vehicle fleet.[14] The regulated fare restrictions appear therefore to have a direct, substantive impact on the ability of hire cars to compete with taxis; they reduce the ability of hire cars to compete in the more price-sensitive segments of the market.

Most jurisdictions also require hire cars to be of higher quality than taxis. This requirement limits the ability of hire cars to compete with taxis, by potentially ruling them out of the more price-sensitive segments, such as pre-booked and telephone despatch services. The impact of these restrictions is likely to be most significant where other entry costs, such as the hire car licence fee, are low.

In the absence of restrictions on the type of service provided, fares and vehicle quality, hire cars may be able to provide a lower cost service than taxis in some contexts. The substantially lower value of hire car licences (approaching zero in some jurisdictions), compared with taxi plate values, would provide a significant cost advantage for hire car operators. Some reviews have for example estimated that the cost of servicing the capital expenditure needed to purchase a taxi licence accounts for one quarter or more of taxi costs.

[14] That is, permanent unrestricted hire car licences as a proportion of the total number of permanent unrestricted hire car licences plus standard taxi licences.

Economic factors in taxi and hire car markets

In some markets, the absence of regulatory restrictions on competition may not mean effective competition because of market failures or externalities.[15] Market failures or externalities may arise in the supply of taxi and hire car services because of the importance of network effects. Network effects arise because providing an effective and reliable taxi or hire car service can depend on the coordination of a minimum number of vehicles to ensure adequate response to requests across the geographic spread of the market.

Network effects are probably significant in all taxi and hire car services, but are likely to be especially important in telephone despatch services. Unless available cars are relatively close to the requested pick-up location, there will be delays in providing 'on demand' services. Such delays substantially limit the ability of the network to compete in those areas of demand, such as the business sector, in which timeliness is a critical element of service quality.

The member vehicles of a despatch network that falls below a critical size will also experience a substantially increased proportion of unproductive time and distance. The result will be a higher cost structure (that is, a higher effective cost per hire), due to lower income to defray fixed costs and higher variable costs per dollar revenue. Inevitably, the ability of the network to compete on price will diminish. This effect will be felt in both the telephone despatch and pre-booked markets.

Network effects and taxi services

The structure of taxi networks in major metropolitan areas suggests that the 'critical size' for a network may be substantial; that is, declining costs may be experienced over a wide range of network capacity levels, relative to market size.

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[15] Market failures are said to arise where all of the requirements of an effectively functioning market are not present. Examples of market failures include where consumption of a good or service is nonrivalrous and nonexclusionary (that is, one person's consumption in no way impedes another person's consumption and it is not possible to exclude a person from consuming a good or service – known as a public good); where a good or service can only be efficiently provided by one supplier (a natural monopoly); and where there is inadequate information available to support sound decisions about the supply and consumption of products (information failures). Externalities occur where a producer or consumer of a product does not realise all the costs and/or benefits associated with that production or consumption. A network externality is said to be present where linking an additional consumer to a network increases the value of that network to all consumers. For example, a telephone network is more valuable to all users when it can be used to access all other phone users. The presence of network externalities tends to increase the viable scale of production, reduce the number of producers and thus reduce the scope for competition in the market. In extreme cases, network externalities can create natural monopolies because the minimum viable scale of production exceeds the size of the particular market.

The New South Wales NCP review report notes that there are three networks in Sydney; Taxis Combined Services (with a 71 per cent market share), Premier Cabs (17 per cent) and Legion Cabs (12 per cent). Taxis Combined Services is a bureau service, where member companies retain their own management, calls are answered in the name of the cab company whose number was dialled and jobs are despatched in the first instance to that company's network. If these jobs are not taken up within a given time, they are made available to cabs from the other member companies of the network (IPART 1999b, p. 70).

The Victorian NCP review report also provided evidence on the influence of network effects. It concluded that 'economies of scale in network operation appear to have led to a rationalisation of service mainly to two major Metropolitan networks, which provide bureau services to other depots' (KPMG Consulting 1999, p. 33). Reviews in other jurisdictions indicate similar impacts on market structure.

As a consequence of network effects, the provision of taxi services throughout Australia is oligopolistic or monopolised, even in the largest metropolitan markets. In smaller markets, taxi services are probably natural monopolies. These natural characteristics in the provision of taxi services are unlikely to change with reduced regulation and are therefore likely to continue to constrain competition to some extent. Reduced entry barriers through removal of supply restrictions are likely, however, to increase contestability because new booking and despatch service providers will be more able to attract vehicles to their networks. Alternatively, increased availability of hire cars may enable new booking and despatch service providers to compete by coordinating a mix of taxis and hire cars.

Network effects and hire car services

Evidence suggests that most hire cars operate as small businesses with very limited networking. In Victoria, where there are 508 hire car licences (excluding Special Purpose Vehicles), there are 361 hire car businesses of which 315 are in Melbourne. These are mostly small businesses, each operating on average one or two cars (KPMG Consulting 1999, p. 68). This market configuration is likely to constrain substantially the ability of hire cars to compete with taxis.

Many jurisdictions limit the number of hire car licences that can be owned by one person. This restriction may substantially impede the ability of hire car operators to form networks that reach a critical size. NCP review reports indicate, however, that individuals frequently lease substantial numbers of licences. There are few regulatory impediments to this. Canberra's entire hire car fleet is essentially organised into two groups, despite the restrictions on the number of licences that an individual may hold. This restriction is unlikely, therefore, to prevent hire car networks attaining critical size to allow effective competition with taxis.

In most jurisdictions, a more fundamental regulatory restraint that may explain the failure of hire cars to form substantial networks is the limit on the overall numbers of hire cars. Sydney has only 496 unrestricted hire car licences, of which only 321 are permanent. Given the geographic spread of Sydney and traffic conditions, even if all were organised into a single network, it might still fail to reach critical size. Limits on licence numbers may also exercise an indirect restrictive effect. The historical basis of the hire car industry is in serving pre-booked 'special occasion' services, which still comprise an important part of the demand for hire cars. Given the limited capacity for hire cars to serve new, network-dependent markets, the incentives to form the necessary network structures are likely to be significantly attenuated.

Increasing competition in the taxi and hire car markets

Given the equivalence of the services provided by taxis and hire cars and similar vehicles (chauffeured, on demand, point to point transport), the diversion of demand to providers other than taxis arising from tight supply restrictions on taxis would appear unlikely to have substantial negative effects on the welfare of the community. By contrast, diversion of demand towards other, less effective substitutes (such as scheduled bus and train services, private cars, self-drive rental cars) is likely to reduce welfare substantially.

The analysis in the preceding sections suggests that taxi demand is being diverted to hire cars as well as to other modes of transport as a result of current supply restrictions. To the extent that this diversion of demand is toward substitutes other than hire cars, welfare losses may be substantial. Changes to the regulation of the hire car sector may improve its ability to compete with taxis and thus reduce these welfare losses. To this extent, moves foreshadowed by some governments to reduce regulatory restraints on hire cars have the potential to reduce the net costs of taxi supply restrictions, even without significant reform of taxi licensing regulation.

All jurisdictions have identified the capital value of the stock of existing taxi licences (and, to a lesser extent, of hire car licences) as a substantial impediment to reform. This suggests that to be successful, reform programs must take account of outcomes for plate owners. Increasing the scope for competition by reducing the constraints on hire cars would reduce adjustment costs for the taxi sector. Notwithstanding the approach taken by the Northern Territory, the significance of the plate value issue, particularly in the larger jurisdictions, provides some public interest support for a multi-stage approach to the reform of taxi and hire car regulation.

A multi-stage approach raises a number of issues for CPA clause 5 compliance. The most pressing is ensuring that governments implement their reform commitments over the medium term. The history of taxi licensing reform, suggests a substantial risk that continued lobbying from industry

incumbents will mean that reform initiatives are abandoned or compromised before implementation. Strategies to 'lock in' reform are therefore important to ensure the credibility of multi-stage programs. Such strategies include announcing at the outset the longer-term reform program, making transparent the underlying objectives of the program, setting clear, verifiable performance indicators, and providing scope for monitoring the effectiveness of changes and further development of the program where necessary.

One approach is to incorporate future reforms in legislation at the outset. While many reforms (for example the issue of new licences) can be implemented without the need for legislative change in many or most jurisdictions, enactment of legislation that sets out specific reform commitments provides additional confidence that the reforms will be implemented. Another approach is to identify and implement an overarching policy for the regulation of taxis and hire cars. While most review reports have argued for free entry, governments are unlikely to achieve this in the short run. It may be useful, therefore, for governments to set an alternative, transitional objective to ensure reform processes lead to continuing improvements in community welfare over time.

Elements of these approaches are present in the 2002 Victorian reform package. First, the Government publicly announced the number of licences to be issued annually over the next twelve years. Second, it announced a long term approach to determining entry to the hire car market. Third, it explained that the conditions surrounding the issue of new licences are aimed at breaking the nexus between plate values as a tradable asset and the provision of taxi services to the public. This aim includes a commitment to improving drivers' opportunities to obtain a taxi plate.

The weakness of the Victorian approach is that it does not explicitly account for the likely evolution of demand in the industry. As noted below (in the assessment of review and reform activity by Victoria), demand growth in Victoria is likely to mean that the effect of the new licence issues will largely be to prevent existing supply restrictions becoming more severe. This means that the reforms will not necessarily meet their stated objectives of reducing the imbalance between the demand for and supply of small passenger vehicle chauffeured services. This deficiency could be addressed by framing an overarching reform policy that takes a dynamic approach to improving taxi and hire car availability and services.

One possible model is provided in the Tasmanian NCP review report. The review report noted that under the current legislation the regulator (the Transport Commission) can issue unlimited numbers of new licences wherever market values exceed the 'capped value' established pursuant to the legislation. The commission has however issued no licences to date. The NCP review report recommended removing the discretion, replacing it with a simple formula governing new licence issue. Under the formula, licences equivalent to 5 per cent of existing licences would be issued annually, with a reserve price equal to the market value assessed by the Valuer-General from

time to time. If the average tender price exceeded the reserve by more than 10 per cent, an additional tender would be called.

The formula would be likely to have the effect of capping licence values at the level determined by the Valuer-General. It would therefore prevent further increases in the relative scarcity of taxi licences and thus yield better outcomes than those generally experienced in Australia in recent decades. Moreover, because it would be automatically applied, it would render the licence issue process immune to lobbying by vested interests, while adding considerable predictability to the taxi market. These are important advantages over the ad hoc approach to licence issue in all other jurisdictions.

The 5 per cent figure for new licence issues means that the process is unlikely, however, to do more than prevent greater scarcity problems developing over time. The Tasmanian approach is vulnerable therefore to the criticism that it fails to address the existing problem, although the formula could be modified to deal with this. An amended formula could require new licences to be issued until the average tender price is, say, 5 per cent or 10 per cent lower than the Valuer-General's assessed market value price. This would have the effect of creating a 'sinking cap' on licence values and deliver gradual improvements.

Another way to help ensure sustained reform progress and to reduce the possibility of future lobbying is to confer responsibility for key regulatory decisions on a multisectoral regulator with broad regulatory expertise, at arms length from government. Existing regulatory systems tend not to do this. They generally include substantial areas of Ministerial discretion, together with a regulatory body dedicated to the taxi sector, and as a result vulnerable to 'capture' by the sector. The 2002 Victorian reform program, which gives the Essential Services Commission responsibility for determining the price at which hire car licences should be sold (updating the figure every two years) is an example of using an independent body to implement regulatory objectives and reduce the costs of lobbying by vested interests. Victoria's approach provides a clear basis for the future regulation of hire car entry, and could be usefully extended to encompass the taxi industry.

A more rapid alternative to staged reform is the immediate deregulation of supply restrictions implemented through some form of (possibly partial) buy-back of existing taxi and/or hire car licences. This was the approach taken by the Northern Territory in 1999. The Territory removed restrictions on taxi licence numbers via a buy-back of existing taxi licences at full market prices.[16] The ACT Government is considering options for licence deregulation and buy-back of taxi licences proposed by the ICRC.

Four NCP reviews recommended open entry to the taxi industry achieved via buy-back of existing plates at full market prices. Governments which have

[16] Buy-back prices were determined by taking the price of the last licence sale in a given taxi area and adjusting this amount by the Consumer Price Index.

considered this recommendation have mostly argued that the cost of a licence buy-back at full market prices is prohibitive. Consequently, in the preparation for the 2001 NCP assessment, the Council outlined various scenarios for dealing with reform implementation issues deriving from the high capital values of licences, to show that it is possible to remove supply restrictions at a cost to taxpayers and/or consumers that is within reason, while avoiding hardship and inequity for taxi plate owners (Deighton-Smith 2000).

The Council considers that there are strong equity based reasons for governments to question the presumption that all taxi plate owners have a right to financial assistance equivalent to the full market value of plates where restrictions on licence numbers are removed. Some licences for example were purchased at low cost many years ago and have acquired considerable paper value only because inappropriate supply regulation has contributed to scarcity. People purchasing licences since 1995 (who are likely to have paid the highest prices) did so in the knowledge that governments' reviews of taxi licensing regulation under the NCP might reasonably be expected to lead to removal of supply restrictions. It is notable in this context that none of the four NCP reviews that recommended a licence buy-back at full market price offered a detailed supporting case.

In the 2003 NCP assessment, the Council will look for governments to have adopted credible reform programs. Where governments adopt a staged approach to licensing reform rather than immediate deregulation, the Council will look for a high degree of certainty that all stages of the reform will be implemented within a reasonable period. Reforms need to address, in particular, the dynamics of supply and demand, and involve mechanisms that avoid the problems of regulatory capture, inconsistent outcomes for different types of service providers and unpredictability that have historically characterised regulation.

NCP review and reform activity

All robust NCP reviews of the taxi and hire car industry have found that the extent of current supply restrictions is too great, while a majority argued for the complete removal of supply restrictions other than those restrictions based on quality considerations. Many reviews attributed substantial net costs to the existing supply restrictions.

At the 2001 NCP assessment, only the Northern Territory had implemented significant reform. The Territory removed all restrictions on taxi supply in January 1999. Despite all jurisdictions but one having completed their reviews for at least two years (and some for almost three years), there has been little change since the 2001 NCP assessment. The major developments are the announcement of a package of reforms in Victoria and the conduct of a supplementary review in the ACT. The Northern Territory backtracked by

imposing a temporary (12 month) moratorium on the issue of new licences in November 2001 to assist the taxi industry to adjust to deregulation. It has also released a discussion paper (May 2002) foreshadowing a possible partial re-regulation.

Some governments argued they have implemented 'most' review recommendations, apparently suggesting they have achieved a degree of compliance. These changes have not, however, encompassed the predominant NCP question of supply restrictions. Some governments have emphasised surveys of 'performance standards' and/or 'consumer satisfaction', apparently to demonstrate that taxi supply is sufficient to meet consumer demand. These arguments fail to recognise that high levels of performance can co-exist with substantially above-equilibrium prices, due to supply constraints. Moreover, consumer satisfaction is being measured in a context in which consumers have no experience of an unrestricted market. The central question that governments need to address to satisfy CPA clause 5, therefore, is whether there are net public benefits from the current supply restrictions.

New South Wales

New South Wales's NCP review, undertaken by the IPART, was completed in November 1999. The review report concluded there is 'little benefit in terms of passenger service in restricting the number of taxi licences'. It recommended that the Government adopt a transitional approach to reform involving the immediate deregulation of the hire car sector, a 5 per cent annual increase in the number of taxi licences each year from 2000 to 2005 and a further review in 2003 (IPART 1999b).

The Government has taken a number of steps toward implementing the measures recommended by the IPART. By mid-2001, it had released 60 new limited term (six year) licences and 120 new Wheelchair Accessible Taxi licences (New South Wales Government 2001). The Government has provided no information however about any subsequent releases of licences. It is currently negotiating with the industry about a process for the staged release of new general and special licences and the introduction of a public interest test to expedite the licence approval process (New South Wales Government 2002, p. 6). New South Wales has also taken steps to ease the constraints on operators of hire cars. While it has not implemented the review recommendation to remove quantitative restrictions on licences, it has reduced the fee for annual licences by almost 50 per cent, from $16 100 to $8235, and committed to review the fee in September 2003.

Assessment

The IPART review report concludes that supply restrictions are not in the public interest, and that the goal for New South Wales should therefore be to remove them. In this regard, the recommended transitional approach represents only a first step. Given that the review estimated that demand for

taxi services would grow at an average rate of 5 per cent per year, annual increases in the number of taxi licences of 5 per cent will do little to alleviate the existing imbalance between the demand for and the supply of taxi services.

New South Wales has indicated it supports the approach recommended by the IPART. It has taken only limited steps towards implementation, however; the available information suggesting it has issued only 180 new licences since 2000 (less than half the number that would have been issued if the IPART transition were being implemented in full). The Government has reported limited take up of new licences and that some licences have been handed back to the Department of Transport. It has attributed this to a decline in travel generally since 11 September 2001 and the collapse of Ansett Airlines. The Council considers that a more likely explanation for the limited take up is the restricted nature of the licences offered and the terms for the sale of the licences, including imposing a reserve price. The reported lack of interest does not appear to be observed in relation to unrestricted plates, for example, which continue to trade at more than $250 000.

The Council is also concerned that the negotiations with the industry in relation to the staged release of new licences may be a cause of further delay. The Government has not explained the purpose of these negotiations, or why they are yet to produce a more substantial outcome some three years after the NCP review, or even indicated when the negotiations will be finalised. The purpose of introducing a 'public interest test' to expedite the licence approval process is also not apparent, given that the clear finding by the IPART that licence restrictions are not in the public interest.

New South Wales is also still to implement the IPART recommendation to remove quantitative restrictions on hire car licences. It has reduced the annual licence fee, which is likely to lead to substantial new entry, although the extent of entry may be less than the size of the fee reduction would suggest because the previous fee was well above the market rate for leasing an existing 'permanent' licence.[17] New South Wales currently has the smallest number of hire cars relative to population of all jurisdictions, and a substantial increase in their number could help alleviate current shortages in the supply of taxi services. The Government's review of the fee in September 2003 provides a further opportunity to ensure that the hire car annual fee is set at a level that facilitates entry.

The Council considers that New South Wales is yet to comply with its CPA clause 5 obligations in relation to taxi supply restrictions. While the Council acknowledges that New South Wales has expressed its commitment to the IPART transitional model (which the Council sees as a first step toward the

[17] The Council understands the market rate for leasing a permanent licence to have been approximately $12 000–13 000 per year prior to the change to the Government's annual fee.

objective of removing supply restrictions), New South Wales is yet to implement it in full. The Council will therefore review New South Wales's compliance with CPA clause 5 obligations in relation to taxis and hire cars again in the 2003 NCP assessment. While the Council does not expect any government to remove all restrictions on taxi supply immediately, it will look for significant progress by New South Wales toward this objective by 2003, given the IPART finding that supply restrictions offer no net benefit in the longer term. The Council notes that the New South Wales Government has committed to work with it to progress the implementation of reforms before the 2003 NCP assessment.

Victoria

Victoria completed its NCP review of restrictions on taxi licensing in July 1999. The Victorian NCP review, by KPMG Consulting, calculated that existing taxi supply restrictions cost consumers $66.1 million per year and lead to $6 million per year in deadweight losses to the economy. It recommended the removal of all restrictions on the number of taxi and hire car licences and a buy-back of existing licences at full market value (KPMG Consulting 1999, p. 152).

The Victorian Government released its taxi and hire car industry reform package in May 2002. This is the only substantial reform package — involving the release of significant numbers of new taxi licences — announced by any jurisdiction other than the Northern Territory. The key points of Victoria's reform program are:

- the release of 100 new 'peak period' taxi licences, of six year duration, annually for the next twelve years;
- the conversion of 50 'peak period' licences annually into full licences, from years 7 to 12 of the reform program;
- the removal of the 'public interest test' and the need for a 'business case' for applications for hire car licences;
- making new hire car licences available at a price of $60 000 (about 10 per cent greater than the market price in 2001) reviewed two-yearly by the Essential Services Commission;
- a 20 per cent surcharge on taxi fares between 1 a.m. and 6 a.m. (with 100 per cent of the surcharge retained by taxi drivers); and
- the introduction of accreditation for licence-holders, taxi depots and networks.

The reforms should increase the total number of taxi licences in Victoria by almost 46 per cent over 12 years, from 3272 in 2002 to 4773 in 2014. The surcharge, and particularly the requirement that drivers retain the full amount, is intended to encourage drivers to make themselves available at

times when the imbalance between the demand for and supply of taxis is greatest, although the Victorian NCP review cast doubt on whether the lack of cabs at these times is related to driver availability (KPMG Consulting 1999, p. 66). There may also be increases in the number of hire cars, although Victoria has not estimated the likely increase in this area. The reform package, by providing for regular performance monitoring and public reporting of the results of this monitoring, is likely to provide continued pressure for change in the event that imbalances between the supply of and demand for taxi services continue.

As its announcement of reforms to licensing restrictions indicates, the Victorian Government accepts that increases in the supply of taxi licences are necessary to meet the demand for taxi services.[18] The Government is adopting a gradualist approach to increasing supply, in preference to an immediate buy-back of licences and removal of supply restrictions (as recommended by its NCP review). It considers a gradual approach to be preferable for two reasons; first because it removes the need to buy back taxi plates (which would otherwise constitute a substantial budgetary cost) and, second, because it will minimise the cost of the industry adjusting to less restricted licensing arrangements.

Impact of the reform package

The effectiveness of Victoria's reform package in addressing imbalances between the demand for and the supply of taxi services depends critically on the future growth in demand for taxi services. Although the Government does not appear to have estimated future demand, it is possible to make some projections from the evidence in Victoria's NCP review report, which contains data on taxi use between 1983 and 1998 (KPMG Consulting 1999, p. 27). While the number of trips declined over this period, there was a substantial increase in the length of trips. Demand for taxi services over the period, measured in passenger kilometres travelled, increased by almost 57 per cent,[19] equivalent to an average annual growth rate of 3 per cent. Applying this estimated historic growth rate to future demand suggests that passenger kilometres travelled by taxi in 2014 will be some 43 per cent higher than in

[18] The current price of taxi licences suggests that there is a significant imbalance between the demand for and the supply of taxi services. The price of a taxi licence in Melbourne has been increasing in recent years and is currently about $330 000, higher than in any other jurisdiction.

[19] Victoria's NCP review used data from Public Transport Corporation annual reports, the 1987 Foletta Report on the taxi industry, the Victorian Taxi Association submission to the NCP review and from KPMG to derive passenger kilometres travelled by taxi between 1983 and 1998. These data are presented in table 2.1. (Table 2.1 reports that passenger kilometres travelled by taxi were 95.8 per cent higher in 1998 than in 1983, which may be an error.)

2002.[20] Given that the Victorian reform package will see the number of taxi licences increase by about 46 per cent over the same period, the relative balance between the demand for and the supply of taxi services may remain relatively unchanged.

The overall impact of the reform package will also be influenced by changes to the regulation of hire cars, and their capacity to satisfy part of the future demand for taxi services. The two substantial changes that will affect hire car numbers are the removal of the public interest requirements that must be met by licence applicants and the change in the way in which the prices of hire car licences are set, from the current administrative cost basis to a market price basis.

Victoria's NCP review indicates that, currently, almost two thirds of licence applications are rejected because applicants cannot satisfy the public interest test. Some 90 applications for hire car licences were rejected in the three years from 1995, with the result that there were at most only 15 per cent more hire car licences in 1998 than there were in 1995 (KPMG Consulting 1999, pp. 20 and 43).[21] This suggests that removing the public interest test should increase the rate of new entry. Conversely, the change in the price of a hire car licence — effectively an increase from a nominal 'administrative cost' based fee to $60 000 (about 10 per cent greater than the 2001 market price) — will reduce entry. Indeed, in a comparative static sense, the equilibrium amount of entry at $60 000 will be zero. In practice, it can be expected that there will be some entry, perhaps by unsophisticated investors. This will lead to a period of sub-normal returns and some decrease, over the medium term, in the average market price of a licence.

Victoria's success in inducing new entry by hire car operators will depend on the approach the Essential Services Commission takes in its two-yearly adjustments to the price of new licences purchased from the Government. If it adopts a 'market price' based approach, as the Victorian Government's current policy suggests it should, entry levels are likely to be relatively low. If, however, it takes the view that the Government's policy is intended to favour new entry and increased competition in the medium term, it may consider a lower price to attract more rapid entry. If it adopts this approach, it could enhance the prospect of substantial hire car entry in the medium term.

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[20] The estimated 3 per cent average annual increase in the demand for taxi services is likely to be conservative. Annual real growth in gross domestic product in Australia over the last decade was 4 per cent, substantially higher than the rate of growth in the 1980s and early 1990s.

[21] The number of hire cars in 1998 may have been no more than 8 per cent more than in 1995. The review report cites differing data on hire car numbers.

Assessment

The Council acknowledges that the Victorian Government's reform package represents the only substantial set of reforms to be announced in any jurisdiction other than the Northern Territory. The reforms should, at a minimum, prevent the net costs to the public of current taxi regulation increasing significantly in future. Moreover, the package takes a long term view and considers both taxi and hire car reforms simultaneously. In these aspects, the Victorian Government is well ahead of most other governments.

There is nonetheless a substantial risk that the proposed reforms may not materially improve the current supply/demand imbalance with regard to taxi services in Victoria. Improvement will occur only if the annual growth in demand for taxi services is substantially lower than 3 per cent and/or if there is substantial new entry by hire car operators. Unless these conditions hold, the current supply/demand imbalance could worsen, despite the reforms. Thus, the Council cannot be confident that Victoria's reforms, as they are currently formulated, will satisfactorily address future demand.

The Council proposes to continue dialogue with the Victorian Government in the period to the 2003 NCP assessment. In this context, Victoria has undertaken to provide more detailed information on how its reform package will operate. The Council will look to Victoria to closely monitor the effectiveness of its reforms in encouraging new entry. Monitoring might suggest, for example, that changes in the rate and terms of taxi licence releases and to the regulation of hire cars are warranted. In the 2003 NCP assessment, the Council will look for indications that Victoria is taking into account dynamic changes in the supply and demand conditions of the industry and is focusing its regulatory arrangements accordingly. The Council will also consider whether the strategy of relying on fixed (6 year) duration licences, as opposed to permanent licences, risks reversal of the reforms (in whole or in part) by some future government and how such risk if any can be minimised.

The Council considers therefore that Victoria is yet to fully meet its CPA clause 5 obligations relating to taxi and hire car licensing. In the 2003 NCP assessment, it will seek to confirm that the longer term objective Victoria is seeking via its 2002 reforms is the removal of supply restrictions within a time period that will deliver measurable community benefits. Further development of the reform model in line with this objective, particularly to respond to any evidence of continuing undersupply of taxis revealed by performance monitoring, could lead to a positive assessment of Victoria's compliance with CPA clause 5 obligations in the future.

Queensland

Queensland publicly released the report of its NCP review of the *Transport Operations (Passenger Transport) Act 1994* in September 2000. This Act

governs the operation of taxis, limousines and regulated bus and air services. Regarding taxi licence restrictions, the report rejected full deregulation of supply, arguing that it would increase the costs of many trips, particularly to outlying areas and airports and that it would also substantially reduce the supply of Wheelchair Accessible Taxis (Queensland Government 2000).

The drafting of the review report is unclear, and it is difficult to determine the precise nature of the report's recommendations. The general view appears to be, however, that taxi service companies should have at least partial control over licence numbers, including preferential access to new licences issued. The review report itself acknowledges such an approach would be anticompetitive. For hire cars, the review report recommended that licences be issued on demand at a price (either one-off or as an annual fee) that 'reflects the value of licences'.

Queensland has not announced a substantive response to the review report. The Cabinet has directed the Department of Transport to prepare specific policy proposals for the Government's consideration after completing consultation on the review report. The main focus of the consultation and policy development is on measures to enable booking companies more flexibility and responsibility in controlling the resources they need to provide taxi services, while at the same time ensuring minimum standards are maintained (Queensland Government 2002, p. 7).

Assessment

While there is necessarily a degree of uncertainty due to the Queensland review report's lack of clarity, there is considerable doubt as to whether the report's analysis is adequate to justify its recommendations. The assumptions underlying the report's recommendations, and the methodology on which the report has based its conclusion that there are likely to be benefits from retaining supply restrictions, are not clear. It is also difficult to determine from the report precisely what regulatory model is proposed. The review report, therefore, does not provide a strong public interest case for restricting taxi supply, nor does it offer an approach to regulating taxis and hire cars that satisfactorily addresses competition principles.

The Government's request to the Department of Transport to prepare specific policy proposals on the basis that taxi companies be permitted more flexibility and responsibility in controlling the resources they need to provide taxi services suggests the Government accepts the general recommendation to retain supply restrictions. Queensland has not however presented a strong public interest justification for such as approach, nor has it demonstrated that allowing incumbent taxi companies control over future licence releases is in the public interest. Its case for retaining restrictions comprises a list of problems, which it claims have been experienced 'elsewhere' when fares and entry have been fully deregulated (Queensland Government 2002, p. 8). These claims are unsupported by any citation of specific data or cases.

The Council considers that Queensland has not complied with its CPA clause 5 obligations regarding legislative restrictions in taxi and hire car legislation. The Queensland Government is, however, still developing its policy approach and has indicated to the Council that it is prepared to implement a less restrictive approach based on successful reform models implemented in other large jurisdictions in Australia. The Council will progress this work with the Queensland Government over the period to the 2003 NCP assessment.

Western Australia

Western Australia has completed a review of its *Taxi Act 1994*. The review was conducted by a steering committee of officials. The steering committee let two consultancies, whose reports formed the substantive basis of the steering committee report and recommendations to Government. These consultancies were:

- a review of the Taxi Act by BSD Consulting, Economics Consulting Services and Estill and Associates Pty Ltd (BSD); and
- a survey of public opinion on the industry, and what aspects of it need improvement, by the Boshe Group.

The BSD review report provided a detailed analysis of the net costs of licence restrictions and the likely benefits of reform. It found restrictions on the supply of licences should be removed, with existing licences bought back by the Government at full market value. The Boshe Group opinion survey indicated a high level of consumer satisfaction with current taxi services. The survey reported that 93 per cent of consumers rated the service at the time of their most recent taxi ride as good or very good, although 18 per cent were able to identify something 'particularly bad' about their last trip. By contrast, the BSD report presented evidence that use of taxis for business purposes has fallen by almost two thirds in less than a decade, suggesting a substantial level of dissatisfaction at least within this part of the market.

The steering committee did not endorse the BSD report recommendation that the Government remove restrictions on plate numbers and buy back licences. Rather, the committee took what it described as a 'conservative' view on supply restrictions. It recommended that 50 new wheelchair accessible taxi licences and 100 new peak period taxi licences should be put to tender, and that an advisory group should monitor the effect of the additional licences and the other reforms, focused on performance standards, implemented following the review. The steering committee's recommendation provides, therefore, for the merits of removing supply restrictions to be reconsidered (via the advisory group) following the implementation of the initial reforms.

Western Australia has only partially implemented the steering committee's recommendation. In early 2000, the then Government released via tender 25 wheelchair accessible taxi licences and 100 perpetual peak period licences.

There were significant restrictions placed on the peak period licences; they can be used only between 5 p.m. and 6 a.m. on Friday and Saturday nights, and are not transferable. Despite the minimum tender price being $1000, only 35 licences were taken up. The limited take-up presumably reflects the significant restrictions placed on the licences. In addition, the Council understands that there was diminished confidence in the industry at the time of the tender. The Government has not conducted a further tender.

The current Government, while not supporting 'wholesale deregulation', stated that it recognises a public interest case for a buy-back of taxi plates. It saw a plate buy-back as offering 'the opportunity to reduce the high cost structures in the industry and reduce driver lease fees'. In 2001, the Government undertook to establish a Ministerial Task Force to 'look in detail at the feasibility of a plate buy-back and develop an approach that is fair to taxi plate owners and provides benefits to taxi drivers and taxi customers' (Department of Treasury and Finance, Western Australia 2001, p. 10). The task force proposal did not proceed. Instead, Western Australia is to convene an 'industry forum' to discuss plate buy-back. No timeframe for the forum has been announced. The advisory group recommended by the steering committee has not been established.

Western Australia is one of only two jurisdictions that allows free entry to the hire car industry, with licence fees limited to $4.75 per year per seat. There are, however, a number of regulatory restrictions that constrain the ability of hire cars to compete with taxis. Chief among these are the requirement (found in all jurisdictions) that hire cars accept only passengers who book in advance by telephone, the requirement that bookings be of a minimum one hour duration, and that the fee be at least 30 per cent higher than the taxi detention charge. The review did not propose any changes to these arrangements.

Assessment

The steering committee report endorsed many of the findings of the BSD review report. It recognised that restricting supply adds significantly to average fares, which constitutes a 'powerful argument' for removal of the restriction on supply. It also agreed with the consultants that 'the current restrictions on plates result in a sub-optimal number of taxis.' Moreover, it accepted that 'the consultants have developed a good public interest argument in support of removing the restrictions on plates'. Despite these comments, the steering committee did not support deregulation of licensing restrictions, opting instead for the release of a limited number of new licences. The committee's major concern — which is supported by the Western Australian Government — is that the cost of buying back existing plates means that immediate deregulation is not feasible.

Western Australia released 60 new licences some two years ago, equivalent to approximately 6 per cent of the existing number of licences in the Perth area, whereas the steering committee had recommended the release of 150 new licences (or 15 per cent) and a subsequent review of whether the release of

more licences is warranted. Western Australia appears to have made no attempt to address the limited take-up of licences in 2000, for example by relaxing the restrictions attached to the peak period licences to make them more attractive and conducting a further tender. The failure to address the constraints on hire car operations, noted above, also prevents hire cars providing increased competition with taxis, notwithstanding the open entry regime in place.

Western Australia has also not adopted the recommendation by the steering committee for further expert and independent advice on supply restrictions following the initial reforms. In this regard, the Council considers that the Government's proposal for an industry forum may not be the best way to evaluate the community benefit from further relaxation of supply restrictions. There is a considerable risk that such a mechanism would see the overall community interest subsumed by the interests of the industry.

Given the above, the Council considers Western Australia has not yet complied with its CPA clause 5 obligations relating to the Taxi Act. The Council acknowledges, nonetheless, that Western Australia has made a start to improving the supply of taxi services, albeit limited, by releasing 60 new licences. The advisory group proposal, were it to be implemented, would enable objective consideration of the merits of further reform. Further, in meetings with the Council, the Western Australian Government has indicated a desire to introduce some changes, particularly aimed at improving driver remuneration and career opportunities. The Council expects to continue dialogue with the Western Australian Government on these issues in the period to the 2003 NCP assessment.

South Australia

The South Australian review by Bronwyn Halliday and Associates reported in November 1999. The review report concluded that there is no need to change the *Passenger Transport Act 1994*, which governs the issue of taxi licences, because the Act allows the Minister a discretionary power to issue up to 50 new licences annually. The review report noted that this is equivalent to about 5 per cent of current licences. It considered that an annual rate of growth in licence numbers of 5 per cent would be sufficient to improve the availability of taxis over time, given the relatively low growth in demand for taxi services in the State. The review report was publicly released on 8 November 2000, and is being considered by the Minister for Transport and Urban Services (Government of South Australia 2002, p. 35).

South Australia deregulated its hire car licensing arrangements in 1991, allowing free entry subject to the payment of fees which are currently set at $248 for operator accreditation and $1110 per vehicle. These are the fees applying to the category of hire car which most closely competes with taxis. Called 'SPV Metropolitan', these cars travel more than 40 000 kilometres a

year and accept fares of less than $20. Other categories of hire car also exist, but these compete far less directly with taxis.

Hire cars, particularly of the SPV Metropolitan category, can therefore compete with taxis to provide chauffeured passenger services where the hire car is booked in advance over the telephone. There is some evidence, however, that other obligations placed on South Australian hire car operators reduce their capacity to compete with taxis. Victoria's NCP review considered that:

> …*the* [South Australian] *Passenger Transport Board, which was established in 1994, has used its regulatory powers to dampen competition, for example requiring applicants for accreditation to produce 'business plans'. It is widely believed that business plans that present the service as competing with taxi-cabs will be frowned upon.* (KPMG Consulting 1999, p. 138).

Assessment

Despite the discretion available to the Minister, there have been no general taxi licences issued since 1 January 1999. South Australia removed hire car licence restrictions in 1991; despite this the value of taxi licences continued to increase until 1998, when they peaked at approximately $160 000.[22] The most likely explanation for the Minister's failure to use the discretionary power in the Act is, as the NCP review report recognises, that 'rent seeking behaviour on behalf of the existing licence holders tends to pressure the system into a status quo situation' (Bronwyn Halliday and Associates 1999, p. 71). This suggests it is likely that the discretionary process will continue to fail to ensure an adequate supply of taxi services.

Despite recognising that existing licence holders inevitably seek to protect their own position (suggesting this is the likely reason for no new issue of taxi licences) the NCP review did not recommend changing the discretionary arrangement. It raised an argument that removing supply restrictions may reduce the supply of taxis, because new entry would drive down profitability for all players, which 'could result in operators leaving the industry' (Bronwyn Halliday and Associates 1999, p. 58). The review made no attempt to reconcile this suggestion with the experience of substantial supply increases in markets such as New Zealand and Ireland following the removal of supply restrictions in those countries. In addition, the review report's acknowledgement of the need for additional taxi licences if current demand/supply imbalances are to be addressed (despite pointing to low demand growth), together with its recognition of the industry and regulatory dynamics that tend to prevent new release, appears to contradict the conclusion that no change to the legislation is necessary.

[22] While there was a substantial decline over the next two years, the most recent data available – for May 2002 – indicate that the licence value is now around $150 000.

The South Australian Government's argument that the deregulated hire car sector provides a substantial level of competition to the taxi sector in South Australia (reducing the need to increase the number of taxis) is not supported by the available data. South Australia's removal of entry restrictions saw an initial increase in the number of hire cars but numbers have now stabilised; approximately 100 vehicles serve the metropolitan market (Passenger Transport Board 2000, Attachment 3). There are 991 taxis in Adelaide, meaning that the 100 SPV Metropolitan category hire cars, which compete directly with taxis, constitute about 9 per cent of the total supply of small chauffeured passenger vehicles. In Victoria, where there are 508 hire cars and 3898 taxis, hire cars constitute almost 12 per cent of total supply. Further reform to remove remaining regulatory impediments to hire cars would appear to be required in South Australia if its policy of free entry to the industry is to have the effect desired by the Government.

South Australia's failure to use the discretion in the Passenger Transport Act to allow new entry (and thus to ensure a balance between supply and demand) means that the mere existence of the legislative discretion is not sufficient for compliance with CPA clause 5 obligations. In this context, a guarantee that the discretion will be exercised whenever certain supply-based criteria are met, or replacement of the discretion with a mandatory release arrangement as Tasmania's review has proposed (see below), would be a valuable step forward. In discussions with the Council, the South Australian Government has undertaken to look at possible mechanisms for addressing restrictions on the availability of taxis. The Council will pursue arrangements for improving the supply of taxis with South Australia over the period to the 2003 NCP assessment.

Tasmania

An independent review group reviewed *Tasmania's Taxi and Luxury Hire Car Industries Act 1995* during 1999, providing a final report in April 2000. (The Act was previously known as the *Taxi Industry Act 1995*, but was amended late in 1999 to include the licensing of luxury hire cars.) The review group made recommendations for changes to the licensing arrangements for both taxis and hire cars.

Tasmania's Act allows the Transport Commission to issue unlimited new licences whenever the value of a licence in a given area exceeds the 'capped value' set by regulation. The Tasmanian review proposed modifying this arrangement to eliminate the discretion over the issue of new licences. Noting that the Transport Commission had issued no new licences since 1995, when the current Act came into effect, the review recommended that the Act require the issue of new licences annually via tender (5 per cent of existing licences), subject to a reserve price set by the Valuer-General. If average tender prices exceed this valuation by 10 per cent or more, an additional tender would be called. In relation to hire cars, the review recommended that these be issued by the government for a one-off fee of $5000.

Tasmania's review coincided with the proclamation of the Taxi and Luxury Hire Car Industries Act. The Act removed a number of pre-existing restrictions on the operation of hire cars, notably a regulated minimum fare of $40. At the same time, it imposed a one-off fee of $5000 for a hire car licence, whereas these had previously been available at a price that represented administrative cost recovery. Under the 1999 Act (proclaimed in 2000), hire car licences are issued as of right, subject to payment of the $5000 fee. The legislation contains no fare controls. Hire cars remain formally limited to pre-booked work, although it is understood that they compete strongly with taxis at airport terminals, due to the 'pre-booking' occurring inside the taxi terminal, while hire cars wait outside.

Little quantitative information is available on the impact of these changes to the hire car industry. Tasmanian officials stated that new entry has been extremely limited (numbers are estimated to have increased from 40 to 44 in the two years since the Act came into force). It is believed, however, that the quantity of work being undertaken by each hire car has, on average, increased substantially. Thus, it appears possible that changes to hire car regulation have increased competition within the taxi and hire car industry.

The recommendations of the Tasmanian NCP review essentially endorsed the approach taken to hire cars in the 1999 Act. In relation to taxis, the Tasmanian Government was expecting to have considered the review's recommendations by mid-2002 (Government of Tasmania 2002, p. 7), but had not done so by the time of this assessment.

Assessment

The model for the issue of new licences proposed by the review would be a considerable improvement on the current arrangement because it would remove the current regulatory discretion over new licence issues. At a minimum, the reform would prevent any further increase in the relative scarcity of taxis. In addition, the adoption of a formula-based approach would offer scope in the future for further improving the supply of taxis via adjustments to the formula over time.

The regulatory arrangements for hire cars appear to have improved the ability of hire cars to compete with taxis, although the extent to which this has occurred is difficult to determine. The review group regarded the $5000 licence fee as being able to 'assist in preventing the undermining of the taxi industry that may occur from unrestricted entry.' This would suggest that the low rate of entry apparently experienced was an intended result of the changes made. However, to the extent that the turnover of each hire car has increased due to diminished restrictions on their operation, it is plausible that the change has had a substantive impact.

Although Tasmania's legislation contains a discretion providing for the release of additional taxi licences, there has been no new issue of licences since 1995. The Government is still to respond to the recommendation of the State's taxi review group that the discretion be replaced with a provision

requiring the annual auction of new licences. Moreover, the formula that Tasmania is currently proposing for governing the release of taxi licences is unlikely to reduce the existing scarcity of taxi licences. Given these circumstances, Tasmania cannot be considered to have met CPA clause 5 obligations relating to taxis and hire cars. Tasmania has however undertaken to work with the Council during 2002-03 to progress taxi licensing reform, and the Council will look for progress in these areas over the period to the 2003 NCP assessment.

The ACT

The ACT review, completed in March 2000, recommended that supply restrictions be removed and that there should be a buy-back of existing licences at market value (Freehills Regulatory Group 2000). It also recommended the removal of all restrictions on hire car licence numbers.

The ACT Government announced a response to the review in December 2000, outlining its preference for a transitional approach to licensing to provide 'certainty and benefit to the industry and consumers' (Smyth 2000). The first stage of the transition involved the issue of 10 new Wheelchair Accessible Taxi licences and moves to promote a second taxi despatch network. The Government has also reached an agreement with New South Wales to allow 16 New South Wales taxis to operate in the ACT. The Government stated that it would consider further transitional steps after a second review to be completed in June 2002 (ACT Government 2001, p. 35).

The second review by the ICRC released its final report on 12 June 2002. The review report raised questions about the standard of service provided by ACT taxis. It noted that the service standards for wheelchair accessible taxis were generally not being met and the 85 per cent waiting time requirement for standard taxis (outside the designated 3–6 p.m. Monday to Friday peak) was only just being met. The ICRC review report also noted comments by review participants indicating that the standard of service is inadequate. The Law Council of Australia is reported as stating, for example, that it had hired a coach to transport delegates for a Friday evening conference dinner following waits of up to 90 minutes for booked taxis on previous occasions. The ICRC report also considered there is a case for review of the standard taxi service requirements.

The ICRC report concurred with the recommendation of the Freehills Regulatory Group's NCP review report that supply restrictions on taxi licences should be removed. The ICRC report canvassed three options to assist transition to a deregulated market. Two of these involve partial adjustment assistance for existing plate owners (of up to 80 per cent of the estimated market value) while the third involves no compensation. The ICRC stated that it supports 'some form of adjustment assistance for existing plate holders' (ICRC 2002b, p. 43). The ACT Government advised that it is

considering the ICRC recommendations and will respond on the issue of reform of the industry as soon as possible.

The ACT has not advanced the NCP review recommendation to remove all restrictions on the operation of hire cars. The ACT Legislative Assembly deferred any implementation of reform prior to the completion in 2001 of a Standing Committee Report on taxis and hire cars. The ICRC report supports the Freehills Regulatory Group's NCP review in recommending the removal of restrictions on the supply of hire car licences.

Assessment

The ICRC report's central recommendation to remove restrictions on the supply of taxi and hire car licences is consistent with the recommendation of the original NCP review. Action by the ACT Government in line with this recommendation would address the ACT's CPA clause 5 obligations.

The ICRC report also contains proposals on how the Government might assist industry adjustment to a deregulated market. The decision on whether there is to be adjustment assistance, and if so the appropriate level of assistance, is a matter for the ACT Government. It is not relevant to the assessment of the ACT's compliance with CPA clause 5.

The ACT has not announced a decision on the ICRC recommendations and so is yet to comply with its CPA clause 5 obligations relating to taxi licensing. The ACT is also still to implement the recommendations of its NCP review to remove all restrictions on hire car licence numbers. The Council acknowledges, however, that the ACT Government has only recently received the final ICRC report and that it has the recommendations of the report under active consideration. The Council will look for a substantive response to the ICRC report's recommendations in the course of assessing the ACT Government's compliance with its CPA clause 5 obligations in 2003.

The Northern Territory

The Northern Territory removed its restrictions on taxi and hire car licence numbers in January 1999. The Territory implemented the change via a buy-back of existing taxi licences at full market prices.[23] The Territory applies an annual taxi licence fee ranging from $4500 to $16 000, depending on the taxi area and a hire car licence fee of $1000 per annum plus an initial one-off payment of $10 000.[24] The Council considered in the 2001 NCP assessment

[23] The market price was determined by taking the price of the last licence sale in a given taxi area and adjusting this amount by the Consumer Price Index.

[24] The annual licence fee for a Wheelchair Accessible Taxi licence is half that for a general taxi licence.

that the Northern Territory's actions complied with obligations under CPA clause 5.

Subsequent to the 2001 NCP assessment, in November 2001, the Northern Territory Government imposed a temporary (six month) cap on the number of minibus, private hire car and taxi licences, with the exception of Wheelchair Accessible Taxis. The Government later extended the cap to December 2002, explaining that the cap is needed to assist the industry in adjusting to deregulation. The Government also announced a review of the regulatory framework to ensure a 'sustainable high quality service to the Northern Territory public and the tourism industry', releasing a discussion paper for this review in May 2002.

Assessment

The Northern Territory's 2002 discussion paper proposes a number of policy directions that suggest a potential for the introduction of arrangements that may restrict competition. The most significant of these are a proposal to transfer key regulatory powers to a board, which will have the role of advising the Government on the composition and size of the industry, and a proposal that public access hire car fares be at least 30 per cent higher than taxi fares. The proposed board membership appears likely to be dominated by industry interests, thus posing a substantial risk of 'regulatory capture'. The discussion paper also proposes increases in competency requirements for drivers, which significantly exceed requirements in other jurisdictions.

Given these proposals have the potential to restrict competition, and the Territory's decision to extend the cap on taxi, hire car and minibus licences to December 2002, the Council will continue to monitor outcomes from the Territory's current review process. If the Northern Territory were to introduce new restrictions, particularly in relation to taxi and hire car licence numbers, it would need to provide a substantive justification to show that the new restrictions are in the interests of the overall community. The Council will consider review and reform activity by the Territory in relation to the regulation of the taxi and hire car sector in the 2003 NCP assessment.

Table 5.1 summarises legislative review and reform activity by jurisdiction in the taxi industry, focusing on supply restrictions.

Table 5.1: Review and reform of legislation regulating the taxi industry

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Passenger Transport Act 1990*	Limitation on numbers of taxis and hire car licences.	Review was completed in November 1999. It recommended: • annual increase (5 per cent) in licences (limited term, non-transferable) during 2000–05; • deregulation of hire cars to increase competition; • further review in 2003; and • continuing fare regulation.	The Government supports 'transitional' recommendation for 5 per cent annual increase in licences but has not fully implemented it. The Government released 180 new licences (limited term, nontransferable). Partial deregulation of hire cars via a substantial reduction in annual hire car licence fee and relaxation of vehicle standards.	Council to finalise assessment in 2003.
Victoria	*Transport Act 1983*	Limitation on numbers of taxis and hire car licences.	Review was released in October 2000. It recommended: • removal of entry restrictions for taxis and hire cars; • buy-back of existing licences, to be funded by annual fees on operators; • continuing fare regulation pending development of a competitive market; and • improvement in the quality of fare regulation via transfer of responsibility to an independent economic regulator.	The Government announced reforms in May 2002, including annual issue of 100 new 'peak period' licences for 12 years, additional licences in years 7–12 via conversion of peak licences to full licences, and limited reforms of hire car regulation.	Council to finalise assessment in 2003.

(*continued*)

Table 5.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Transport Operations (Passenger Transport) Act 1994*	Limitation on numbers of taxis and hire car licences.	Report was publicly released in September 2000. It recommended: • revamping of regulatory structure around performance agreements with booking companies; and • allowing booking companies a measure of control over licence numbers.	The Government has asked the Department of Transport to develop policy measures. Indications are that Queensland's approach will reflect review recommendations.	Council to finalise assessment in 2003.
Western Australia	*Taxi Act 1994*	Limitation on numbers of taxi licences.	Review was completed in August 1999. It recommended: • removal of licence supply restrictions; • use of substantial training requirements to regulate entry; • similar requirements for hire car industry; • full compensation to existing plate owners; and • issue of new licences at a maximum rate of 20 per cent per year on a 'first come, first served' basis.	The Government does not support 'wholesale deregulation', but recognises there is a public interest case for a buy-back'. The Government has released 60 new licences, some with restrictive conditions	Council to finalise assessment in 2003.

(*continued*)

Table 5.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Passenger Transport Act 1994*	Limitation on numbers of taxi licences (free entry to hire car market).	Report completed in November 1999. It recommended: • retention of existing restrictions (the Act limits the number of new general taxi licences that the Passenger Transport Board can issue in a particular year to 50, although none has been issued); and • reliance on competition from hire cars, with removal of some restrictions.	The Government is yet to announce its response to the review.	Council to finalise assessment in 2003.
Tasmania	*Taxi and Luxury Hire Car Industries Act 1995*	Limitation on numbers of taxis and hire car licences.	Report was completed in April 2000. It recommended: • annual issue of new licences up to 5 per cent by tender, subject to reserve price, or 10 per cent if tender price exceeds valuations by ten per cent; • retention of maximum fare for rank/hail market only; and • free entry to hire car industry subject to $5000 licence fee.	The Government is yet to announce its response to the review.	Council to finalise assessment in 2003.

(*continued*)

Table 5.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Motor Traffic Act 1936*	Limitation on numbers of taxis and hire car licences	NCP review was completed in March 2000. On licence quotas, it recommended: • immediate removal of restrictions on supply of taxi and hire car licences; • full compensation to licence holders via a licence buy-back, with compensation to be funded via consolidated revenue or a long term licence fee regime. The ICRC released its report in June 2002. It endorses removal of supply restrictions and proposes three options for compensation (it does not recommend any particular option).	In December 2000, the Government announced it would be releasing 10 new Wheelchair Accessible Taxi licences. The Government has agreed with New South Wales to allow 16 New South Wales taxis in the ACT. The Government is expected to announce its decisions in response to the ICRC report by the end of 2002.	Council to finalise assessment in 2003.
Northern Territory	*Commercial Passenger (Road) Transport Act*	Limitation on numbers of taxis and hire car licences	Review was completed in 1998. It recommended: • elimination of restrictions on licence numbers; • compensation for the full market value of licences via a licence buy-back; and • substantial licence fees to recoup compensation costs.	The Government removed supply restrictions in January 1999, and implemented a buy-back. It imposed a six-month moratorium on the issue of new licences in November 2001 (this moratorium was later extended to December 2002). The Government issued a discussion paper containing new regulatory proposals in May 2002.	Council to finalise assessment in 2003.

Road transport related legislation

Tow truck legislation

Legislative restrictions on competition

Most jurisdictions have legislation governing the operations of tow truck owners.[25] Competition restrictions in tow truck legislation mostly cover safe and proper towing activities, procedures for towing and licensing. Some legislation provides for the central allocation of towing jobs and price-setting for some towing activities. Governments vary in the degree to which they regulate conduct.

Some jurisdictions use the licensing system to ration the number of operators to match the 'perceived need'. Restrictions based on perceived need for services give incumbent providers a competitive advantage over potential new entrants. This situation raises costs by concentrating market power, reducing the need for efficient delivery of services, placing artificially high values on licences and by contributing to regulatory risk if the regulator does not accurately predict need. Its main benefit is greater certainty.

Regulatory arrangements in some jurisdictions affect operators differently, depending on the location of the operator. Operators towing between jurisdictions may face different legislative effects, depending on where their business is located. These effects arise from prohibitions in the legislation (including the failure to recognise licences from another jurisdiction) or are the unintended effects of other registration or licensing provisions.

Regulating in the public interest

Many restrictions on tow truck operators have arisen in response to concerns about probity, consumer protection and safety. While the community benefits from assurance of probity and consumer protection, licensing and enforcement impose costs. Tight regulation of the number of licences and the structure of the industry can reduce competition by significantly raising costs for users of towing services where entry requirements are too onerous or the conduct rules are too restrictive. There are also compliance and enforcement costs for operators and governments respectively.

25 The national road transport reforms affect tow truck operators, but do not specifically cover the tow truck industry.

Consistency is another important issue, particularly for tow truck operators whose businesses are located close to State borders. Lack of a consistent legislative framework, or the failure of one jurisdiction to recognise licences issued by another, inhibits the ability of operators to work across State borders.

Review and reform activity

New South Wales reviewed and reformed its tow truck legislation in 1998. The reformed *Tow Truck Industry Act 1998* and supporting regulations provide for the establishment of a job allocation scheme. The reformed legislation also introduces a (possibly unintended) restriction on competition. Clause 69(2) of the New South Wales tow truck Regulations permits a tow truck operator licensed in another State to tow a vehicle from that State into New South Wales, but does not allow an operator licensed interstate to collect a vehicle in New South Wales and tow it to another State unless the operator also has a New South Wales licence. Allowing tows one way and not the other on the basis of licensing would appear to restrict competition.

The New South Wales Government has committed to review the Tow Truck Industry Act six months after the job allocation scheme begins. It has begun drafting the terms of reference for the review and is establishing a steering committee. The terms of reference will provide for further analysis of clause 69(2). Given that New South Wales is establishing the review, the Council considers that New South Wales has met its obligations for the 2002 assessment. The Council will conduct a final assessment of compliance with CPA principles in 2003.

Victoria has reviewed its tow truck legislation. The legislation restricts market entry and conduct by limiting the number of licences available, and defining particular licence categories and the licence conditions. In particular, new accident towing licences (including heavy vehicle accident towing licences) can only be issued with Ministerial approval and then only after the licensing authority has assessed the need for the new licence (the need criterion). The legislation also manages charges, implements a central job allocation system within the Melbourne metropolitan area and places obligations on repairers. The review recommended that the Government:

- clarify the objectives of the legislation;
- replace the job allocation scheme with a mechanism to allow for bidding for franchised towing areas, or alternatively, modify the job allocation scheme;
- remove the need criterion from the accident towing licence approval process;

- clarify the zone boundaries and review the Melbourne metropolitan boundaries;

- continue the regulation of accident towing fees (this would not be necessary if the franchise bidding scheme is adopted), but allow greater transparency and independence in their establishment; and

- extend the cooling-off period for repairs.

The Victorian Government has announced that it supports many of the recommended reforms and has established a working party to facilitate implementation. Victoria has not announced its intentions concerning the recommendations for the franchise bidding scheme and the abolition of the needs criterion for new accident towing licences. The recommended changes would encourage greater competition and efficiency by lowering the barriers to entry, reducing licence values and other costs and eliminating the need for the Government to regulate tow fees.

Victoria's approach to tow truck licences has meant that licences have acquired a value because of their scarcity. In this regard tow truck licensing has some similarities to taxi licensing, although the licence values are somewhat lower for tow trucks. The review report noted that in 1999 there were 378 metropolitan accident towing licences which it estimated were worth around $22.7 million (approximately $60 000 per licence). In terms of the cost to consumers, the review report estimated that about half the accident towing fee could be attributed to servicing the capital cost of the licence.

Victoria has indicated that it is examining the effects on existing licence holders of different ways licences are used to define property rights, including the regulatory changes recommended in the review report. This will inform the Government's approach to further tow truck legislation reform. The Council acknowledges that potential changes in outcomes for existing licence holders may raise structural adjustment issues that warrant consideration by Victoria. Victoria will need to ensure, however, that the transitional issue of a reduction in the value of licences is not used to defer implementation of reforms that its NCP review has shown to be in the public interest. The Council will finalise its assessment in 2003.

Queensland's regulation of tow truck operations only applies to towage of vehicles damaged in an accident. The restrictions in the legislation aim to provide consumer protection where a consumer may be at a disadvantage because they have no prior knowledge of the service, are not in a position to shop around and/or are unable to make a clear decision because they are suffering an injury or trauma.

Queensland's review of its *Tow Truck Act 1973* and related regulations found a public benefit justification for the restrictions in the Act. It found that regulation is the only way in which to achieve the Government's consumer protection objectives and proposed amendments to strengthen the Act's

consumer protection provisions. The Council considers that Queensland has fulfilled its CPA clause 5 obligations.

South Australia has reviewed its tow truck legislation, but has not yet announced its response to the review. The Council will finalise its assessment of South Australia's compliance with CPA clause 5 in 2003.

The Northern Territory tow truck industry legislation contains few restrictions on competition. It contains no discriminatory elements and gives consumers the freedom to choose their supplier of towing services. The Territory's NCP review recommended only minor changes to the legislation, which the Government has implemented. The Council considers that the Northern Territory has met its CPA clause 5 obligations.

The ACT has no legislation governing tow truck operators. Neither Western Australia nor Tasmania have listed any legislation restricting tow truck operations for NCP review. The Council considers that these governments have met their CPA clause 5 obligations.

Table 5.2 summarises the progress of governments' review and reform activity relating to the tow truck industry.

Table 5.2: Review and reform of legislation regulating tow trucks

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Tow Truck Industry Act 1998*	Licensing, job allocation scheme, pricing controls	New legislation. Review is to begin six months after the job allocation scheme is established.		Council to finalise assessment in 2003.
Victoria	*Transport Act (Tow Truck) 1983* and Transport (Tow Truck) Regulations 1994	Market conduct, licensing, fee setting	Review was completed in 1999. It recommended: the removal of entry restrictions for the heavy vehicle towing market; the development of an industry code of practice; a more proactive role for insurers in educating their customers; the retention of the allocation scheme; and the introduction of a franchise scheme for the Melbourne metropolitan area.	The Government's response is yet to be legislated.	Council to finalise assessment in 2003.
Queensland	*Tow Truck Act 1973* and Tow Truck Regulation 1988		Review completed in 1999, finding a public benefit justification for the consumer protection and industry regulation provisions in the Act.	Act was amended in 1999.	Meets CPA obligations (June 2002).
South Australia	*Motor Vehicles Act 1959*	Market conduct	Review completed.	Review report is with the Government, awaiting response.	Council to finalise assessment in 2003.
Northern Territory	*Consumer Affairs and Fair Trading Act* (part 13)	Code of practice	Review was completed in October 2000. It recommended retaining the code of practice and formalising the right for all consumers to be offered a tow of their choice.	The Government approved the review recommendations in November 2000.	Meets CPA obligations (June 2001) for tow trucks.

Dangerous goods legislation

Dangerous goods legislation covers a wide range of activities and goods. The laws usually relate to the manufacture, transport, storage and use of explosives, fireworks, chemicals and other high-risk substances, including flammable, carcinogenic and radioactive materials. The principal objectives of legislation are to maintain health and safety, and to protect the environment.

Regulation of the transport of dangerous goods by road

Regulation of the transport of dangerous goods by road was reformed as part of the national road transport reform program that CoAG endorsed for the 1999 NCP assessment (NCC 1999b). All governments now have legislation, regulations and a code of conduct that are consistent with the national provision for the carriage of dangerous goods by road, so all comply with the national road transport reforms and CPA clause 5.

Other regulation of dangerous goods

In addition to regulations governing the road transport of dangerous goods, several other provisions governing dangerous goods restrict competition. These cover primarily the licensing of businesses and equipment operators such as shotfirers and gasfitters. The licences can be prescriptive, stipulating requirements for the manufacture, transport and handling of the goods. Some legislation stipulates conditions for displaying items such as fireworks.

More than 10 years ago, CoAG initiated moves to harmonise the regulation of safe handling of dangerous goods. As part of this process, the National Occupational Health and Safety Commission formally declared the National Standard for the Storage and Handling of Workplace Dangerous Goods and an accompanying national code of practice in 2000. The Commonwealth Government's economic impact assessment of the national standard found, in net present value terms, that the benefits may marginally outweigh the costs over 10 years. The assessment also identified qualitative benefits, including:

- *nationally consistent approach to the management of hazards arising from the storage and handling of dangerous goods;*
- *improved awareness and safety levels in workplaces and in the community generally;*
- *better protection of the environment;*

- *flexibility for industry in dealing with changes arising from the introduction of new technology, products and processes;*
- *consistency with other relevant legislative and regulatory frameworks; and*
- *reductions in impediments to trade.* (NOHSC 2001, p. 55)

Following the release of the national standard and the national code of practice, all States and Territories are now in a position to replace existing dangerous goods legislation (which mandates inflexible technical requirements and is inconsistent across jurisdictions) with the new standard and code of practice. Some jurisdictions have enacted harmonised legislation based on the code of practice. Codes of conduct are generally less restrictive than prescribed conditions because they allow flexibility in achieving outcomes. Inconsistencies among jurisdictions also hamper competition because more than one standard applies if an activity crosses State boundaries.

Review and reform activity

New South Wales has reviewed the *Dangerous Goods Act 1975* and regulations, but it is yet to implement the national standard. While New South Wales has not completed its review and reform activity by the CoAG deadline of 30 June 2002, the Council considers that the State's progress is sufficient to suggest that it will soon comply with its CPA obligations. The Council will finalise its assessment in 2003.

Victoria completed its review of dangerous goods legislation and enacted new regulations relating to explosives, storage and handling and occupational health and safety at major hazard facilities. These regulations do not substantially change previous arrangements, and retain licences and permits as the primary management tool. The national standard was proclaimed after Victoria finalised its review and reform activity. It is not clear whether the measures in the current legislation and regulations reflect the national standard. The Council needs confirmation of this so it can finalise its assessment of Victoria's compliance with its CPA obligations in 2003.

Queensland repealed its *State Transport Act 1960*, which covered the transport of dangerous goods. Queensland stated that any future legislative control of restricted goods will occur by regulation and will be subject to public benefit requirements. Queensland has enacted the *Dangerous Goods Safety Management Act 2001* and associated regulations, which are consistent with the national standard. The Council considers that Queensland has satisfied its CPA clause 5 obligations.

Western Australia's *Explosives and Dangerous Goods Act 1961* imposes requirements for licences, authorisations, permits and approvals to achieve safe handling. The State's review found that there are better ways in which to

achieve this objective. It recommended less onerous restrictions, an alignment of licensing requirements for dangerous goods with those for other chemicals, and industry responsibility for health and safety matters. A Bill to amend the Act is to be introduced in the autumn 2002 session of Parliament. While Western Australia has not completed its review and reform activity by 30 June 2002, it has made substantial progress. The Council will finalise its assessment of Western Australia's compliance in 2003.

The South Australian *Dangerous Substances Act 1979* imposes a general duty of care in keeping, handling, conveying, using and disposing of dangerous substances. Licences are required to keep and convey these substances. The State's review of this legislation recommended no changes to the legislation. South Australia has not yet provided the public benefit arguments supporting this review recommendation or explained how it proposes to introduce the national standard. The Council will finalise its assessment of South Australia's compliance in 2003.

Tasmania repealed its *Dangerous Goods Act 1976* and replaced it with the *Dangerous Goods Act 1998*. The new Act is based on the National Road Transport Council's legislative model for road transport of dangerous goods, which Tasmania has adapted and expanded to cover the use, storage and handling of dangerous goods. The new Act uses codes of conduct rather than licences and permits to achieve its objective. The Council considers that Tasmania has met its CPA clause 5 obligations.

The ACT reviewed its *Dangerous Goods Act 1984* as part of an overall review of occupational health and safety legislation. A new legislative framework will incorporate the national standard. While the ACT did not complete its legislative changes by 30 June 2002, it has made substantial progress. The Council will finalise its assessment of the ACT's compliance in 2003.

The Northern Territory reviewed its *Dangerous Goods Act* and replaced it with a new Act. The Northern Territory advised the Council that the regulations under the new Act are not finalised and that any licensing requirements in the new regulations will be subject to NCP review and analysis. While the Northern Territory did not complete all regulatory changes by 30 June 2002, it has made substantial progress. The Council will finalise its assessment of the Northern Territory's compliance in 2003.

Table 5.3 summarises the progress of governments' review and reform activity relating to the regulation of dangerous goods.

Table 5.3: Review and reform of legislation regulating dangerous goods

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Dangerous Goods Act 1975*	Licensing of premises, vehicles and vessels, and the sale of dangerous goods; special licences required for the import, manufacture, sale, supply and receipt of explosives. Does not apply to the transport of dangerous goods by road or rail.	Review of the Act and associated regulations (as part of the implementation of the national standard) completed.	The Government finalised the implementation of the *Occupational Health and Safety Act 2000* and the Occupational Health and Safety Regulation 2001. It will now prepare a detailed proposal for implementing the national standard in New South Wales.	Council to finalise assessment in 2003.
Victoria	*Dangerous Goods Act 1985* (s. 15)	Licensing, register of facilities, prior approval of facilities	Review was completed in 1999.	The Government established new regulations relating to explosives, storage and handling, and occupational health and safety measures at major hazard facilities.	Council to finalise assessment in 2003.
Queensland	*State Transport Act 1960*	Regulation of the transport of dangerous goods	Legislation was repealed		Meets CPA obligations (June 2002).
	Dangerous Goods Safety Management Act 2001 *Dangerous Goods Safety Management Regulation 2001*	Safety obligations		The Government enacted legislation consistent with the national standard for the handling and storage of dangerous goods.	Meets CPA obligations (June 2002).

(continued)

Table 5.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Explosives and Dangerous Goods Act 1961*	Licensing, permits, authorisations and approvals	Review was completed in 1998. It found that there are frequently more efficient and effective ways of achieving the objectives of the legislation. It recommended: aligning licensing requirements for manufacture, transportation and use with existing controls for other chemicals; shifting responsibility for safety and accreditation to industry; and having less onerous restrictions on sale, display and use of fireworks.	*Dangerous Goods (Transport) Act 1998* revised the classification of such goods and accounted for transport-related matters. A Bill to enact the remaining recommendations will be introduced into the autumn 2002 session of Parliament.	Council to finalise assessment in 2003.
South Australia	*Dangerous Substances Act 1979*	General duty of care in keeping, handling, conveying, using or disposing of dangerous substances; licences to keep and convey dangerous substances	Review was completed in 1999. It found that the benefits of restrictions outweigh the costs.	The review recommended no reform.	Council to finalise assessment in 2003.
Tasmania	*Dangerous Goods Act 1976*		Act was repealed and replaced by new dangerous goods legislation.	New legislation is based on the National Road Transport Commission's legislative model for transport of dangerous goods by road, which has been expanded to include the use, storage and handling of dangerous goods.	Meets CPA obligations (June 2001).

(continued)

Table 5.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Dangerous Goods Act 1998*	Code of conduct	Replacement legislation was assessed under the gatekeeper requirements.	Restrictions such as licences have been replaced with a code of conduct based on national road transport reforms.	Meets CPA obligations (June 2001).
ACT	*Dangerous Goods Act 1984* (applies the New South Wales legislation to the ACT)	Licensing of premises, vehicles and vessels, and the sale of dangerous goods; special licences for the import, manufacture, sale, supply and receipt of explosives. Does not apply to the transport of dangerous goods by road or rail.	Review was completed as part of overall review of the ACT's occupational health and safety legislation. A regulatory impact statement was prepared and released for public comment. A new national standard was released. The ACT is considering how this can be incorporated into a new legislative framework, taking into account the regulatory impact statement and public consultation.		Council to finalise assessment in 2003.
Northern Territory	*Dangerous Goods Act* and Regulations	Requirements for the transport, storage and handling of dangerous goods; business licences to manufacture, store, convey, sell, import or possess prescribed dangerous goods (ss 15–21); operators' licences for drivers of dangerous goods vehicles (Regulation 56), shotfirers (Regulation 132), gasfitters (Regulation 172) and autogasfitters (Regulation 202)	Review completed.	Act was repealed and the new *Dangerous Goods Act* was assented to on 30 March 1998. Draft regulations are being prepared. Restrictions in regulations will be subject to NCP review and analysis.	Council to finalise assessment in 2003.

Specialist and enthusiast vehicle scheme

The Commonwealth has responsibility for legislation relating to uniform vehicle standards. The objective of the *Motor Vehicle Standards Act 1989* is to set uniform standards to apply to road vehicles when they begin to be used in Australia, with particular emphasis on vehicle safety, emissions, anti-theft and energy savings. The benefits of requiring vehicles to meet safety, emission and anti-theft standards extend beyond the owner of the vehicle to the wider community. The standards assist, for example, in improving the safety of other road users, protecting the environment and deterring crime.

Legislative restrictions on competition

The Motor Vehicle Standards Act required all vehicles entering the Australian market to meet certain safety, emission control and anti-theft standards. The Act allowed for vehicles to be imported under one of two regimes: the full volume scheme, under which most vehicles were imported, and the low volume scheme. While the total cost of full volume certification was substantial, it was spread over a large number of vehicles and thus the cost per vehicle was low. The low volume scheme established concessional arrangements to reduce the unit cost for importers of small numbers of vehicles. Differences in the way in which suppliers were treated under these two schemes could have restricted competition.

Following a review of the Act, the Commonwealth introduced the specialist and enthusiast vehicle scheme to administer the importation arrangements for used vehicles. The scheme restricts imports of used vehicles to those satisfying certain criteria. It is available to both full volume and low volume importers, and removes the concessional arrangements for low volume imports. The Commonwealth's changes to the Motor Vehicle Standards Act introduced several new restrictions, however, including:

- the limit on imports of used vehicles (under the low volume scheme) to 'specialist' and 'enthusiast' vehicles, and the prevention, under this scheme, of the importation of what are effectively standard vehicles, for example, vehicles with diesel instead of petrol engines;
- a scheme to regulate registered automotive workshops; and
- a requirement that all imported used vehicles be inspected and approved by registered automotive workshops to ensure each vehicle's compliance with the appropriate national standards.

Assessment

For compliance with CPA clause 5, the Commonwealth needs to have demonstrated that the restrictions introduced by the changes to the Motor Vehicle Standards Act provide a net community benefit and are necessary to achieving the Commonwealth's safety, environmental and vehicle security objectives. The review report provides a public benefit argument for requiring vehicles to be inspected by registered automotive workshops, noting:

> *There are a number of advantages with the registered workshop concept which include:*
>
> - *the potential for development of co-regulation with industry;*
> - *the workshop will provide a higher level of assurance that the vehicles comply with the ADRs [Australian Design Rules];*
> - *the workshops can provide a network of service and spare parts;*
> - *the workshops may be held responsible to conduct safety recalls;*
> - *it would restrict the Scheme to legitimate vehicle converters;*
> - *the costs would be borne directly by the workshops;*
> - *the scope of the workshops could be extended to include after-market modifications (fitting additional seats and additional axles fitted to trucks) and modifying vehicles 15 years or more [old] and personally imported vehicles to meet State and Territory registration requirements; and*
> - *FORS [Federal Office of Road Safety] resources could be better aligned to core functions and towards its audit function to maintain industry standards.* (Review Task Force 1999, p. 93)

The review task force considered that the cost of some imported vehicles may rise as a result of the workshop scheme, but judged that the higher level of compliance and the consumer benefits would outweigh this cost. The Council considers that the Commonwealth's decision to implement the registered workshop scheme and the requirement for vehicle inspection is consistent with CPA clause 5.

The introduction of the specialist and enthusiast vehicle scheme is not consistent with the recommendations of the review of the Motor Vehicle Standards Act, so the review report does not provide a public interest justification for the scheme. The review task force recommended retaining the low volume scheme. It specifically rejected the option of limiting 'the number of models by tightening up current eligibility criteria to ensure only "specialist and enthusiast" vehicles are eligible' (Review Task Force 1999, p. 89). The task force stated that this option 'would have an adverse impact on the viability of small business and would reduce consumer choice. It did

not see any positive benefits from restricting imports to enthusiast vehicles and did not consider this to be an appropriate course of action' (Review Task Force 1999, p. 89). Further, the task force commented that:

> *It is clear to the Task Force that industry policy is more sensitive to increasing numbers of used vehicles rather than to the safety and emissions aims of the MVSA [Motor Vehicle Standards Act]. Early in the review the Task Force formed the view that the intertwining of industry policy and uniform vehicle standards in the operation of the Low Volume Scheme under the MVSA was the major cause for the administrative problems engendered by the Scheme. The Task Force would like to see industry policy addressed elsewhere and the legislation return to its safety, emissions and anti-theft objectives.* (Review Task Force 1999, p. 94)

To understand the Commonwealth's public interest reasoning, the Council examined the regulatory impact statement (RIS) prepared by the Department of Industry, Science and Resources in conjunction with the Department of Transport and Regional Services for the amendments to the Motor Vehicle Standards Act. The RIS sought to make a case that the number of used vehicles being imported far exceeded what had been originally intended and had the capacity to threaten Australia's motor vehicle industry, thus warranting the controls introduced by the specialist and enthusiast vehicles scheme.

The RIS argued that imports of used vehicles under the low volume scheme allowed for a broader range of vehicles to be imported than had been the intent of the legislation in 1971, and that the growth in used vehicle imports under the low volume scheme could undermine the passenger motor vehicle plan. It was unable, however, to provide solid evidence for the case that the cost to the new vehicle industry would be more than the benefits (to industry and consumers) of the existing criteria. It noted that imports of *used* vehicles under the low volume scheme in 2000 was 2 per cent of *new* vehicle sales in that year. It argued that the higher specifications of these vehicles meant that they could compete with some new cars despite their average age of between seven and nine years. In addition, one third of the used vehicles imported were four wheel drive vehicles (which are not manufactured in Australia). Many of the four wheel drive vehicles were imported under the low volume scheme because they were diesel (not petrol) powered. The task force recommended that a vehicle that is the same type as a full volume model except for the engine (such as diesel or high powered) could not reasonably be considered to be a specialist or enthusiast vehicle, so should be excluded from the scheme. The RIS did not specify the impact of the specialist and enthusiast vehicle scheme eligibility criteria on business and consumers.

The Commonwealth Office of Regulation Review, which provides the gatekeeper process for legislative amendments by the Commonwealth, considered that the RIS did not satisfy the Government's requirements. It raised concerns about the specification of the problem, the statement of the

Government's objectives and the analysis of the impact of the changes. In particular, it raised the issue of the Government using legislation aimed at safety and standards setting to implement industry policy where there was no quantification of the costs and benefits. The Council considers that the Commonwealth has not demonstrated compliance with CPA clause 5 in relation to the changes to the Motor Vehicle Standards Act.

Rail

While the NCP agreements do not specifically cover the rail sector, rail is subject to CPA's general provisions relating to competitive neutrality, structural reform of public monopolies and legislation review and reform.

Historically, the level of government ownership in the rail sector has been high — and still is in several States — but private sector involvement is increasing as governments move to fully or partly privatise their rail businesses. Western Australia and Victoria privatised their rail line and rail transport businesses. New South Wales maintains government ownership over its rail line infrastructure but privatised its rail freight business.

The application of competitive neutrality principles to government rail businesses is relevant, particularly where there is competition, or the potential for competition, with private sector rail businesses. Structural reform obligations arise where governments privatise rail monopolies and/or introduce competition through third party access regimes. Where separate organisations conduct the rail line and transport businesses, access regimes focus on removing the monopoly elements from access terms and conditions. Where a single organisation conducts rail line and rail transport businesses, access regimes commonly address competitive neutrality issues such as ensuring access seekers affiliated to the access provider are not advantaged over other access seekers.

Governments legislate in relation to rail services, typically to establish operating arrangements for government rail businesses (including establishing government-owned monopolies) and to impose requirements aimed at ensuring the safety of rail users. Legislation in these areas has generally restricted competition.

Competitive neutrality

The Council has considered competitive neutrality issues relating to the Commonwealth, New South Wales and Queensland in this 2002 assessment. The 2001 NCP assessment reported on complaints lodged by Capricorn Capital against the National Rail Corporation Limited, a rail freight business then owned jointly by the Commonwealth (majority owner), New South Wales and Victoria, and against FreightCorp, a bulk freight transport operator then

owned by New South Wales. Capricorn Capital alleged that neither corporation was satisfying competitive neutrality objectives because neither was earning a commercial return on assets, and that FreightCorp also had other advantages linked to its government ownership. These advantages included preferential access to strategic assets (such as port and metropolitan rail terminals), the receipt of government payments for community service obligations (CSOs) that were unconnected to costs incurred and services delivered, and the tendency for the Department of Transport to act as an agent of FreightCorp rather than as a neutral regulator. At the time of the complaints, the owner governments had announced their intention to sell both businesses.

The Commonwealth Competitive Neutrality Complaints Office investigated the complaint against the National Rail Corporation. The New South Wales Government deferred referring the FreightCorp complaint to its complaints body (the Independent Pricing and Regulatory Tribunal) because privatisation was pending, but it addressed the main focus of the Capricorn Capital complaint via a review of FreightCorp's CSOs. Arising from this review, the New South Wales Government introduced arrangements to improve the focus and transparency of the exclusive freight service contract between the Department of Transport and FreightCorp, and established a mechanism to examine third party complaints regarding CSO funding. Both rail companies were privatised in February 2002. Private companies are not subject to the CPA competitive neutrality obligations.

In 2001 the Queensland Competition Authority reported on a competitive neutrality complaint against Queensland Rail's livestock transportation service, Cattletrain. The complainant[26] alleged that Queensland Rail had breached the principle of competitive neutrality in central Queensland because it:

- offered more favourable prices to selected customers to attract them to Cattletrain;
- discounted livestock freight rates to particular businesses; and
- enjoyed a procedural and operational advantage as a result of animal welfare transport standards.[27]

The Queensland Competition Authority found the complaint relating to volume discount pricing on rail services between Richmond Shire (via Winton) and Rockhampton to be substantiated. It also found, however, that the open-ended financial arrangements between Queensland Rail and the

26 The complainant requested that its identity be kept confidential and that the Australian Livestock Transporters Association act as its agent.

27 Queensland rail was alleged to have influenced the development of the animal welfare standards for livestock transport, thus giving Cattletrain an advantage over its private sector competitors.

Queensland Government that supported the volume discount were no longer in place. It concluded that no further action was necessary on this matter. The authority found that other aspects of the complaint were not substantiated because:

- discounting to encourage improved operational efficiency is a common commercial practice and not necessarily due to Queensland Rail's Government ownership;
- the substitution of larger wagons for smaller wagons at the same price was due to operational requirements; and
- the Australian Model Code of Practice for the Welfare of Animals – Land Transport of Cattle is a voluntary code and can not be considered to be a regulatory requirement.

The Council considers that there are no outstanding issues with Queensland Rail's application of competitive neutrality principles.

Structural reform

New South Wales and Western Australia had structural reform obligations for this assessment. The Council concluded in the 2001 NCP assessment that Victoria had met CPA obligations in relation to the privatisation of V/Line Freight.

New South Wales

In 1996 New South Wales restructured the vertically integrated State Rail Authority to create four separate transport entities: the State Rail Authority, to provide passenger services; the Rail Services Authority, to maintain the track; the Rail Access Corporation, to manage the rail network and administer access by public and private operators; and FreightCorp (privatised in February 2002), to provide nonpassenger freight services.

The New South Wales Government further reviewed the structure of its rail businesses following the 2000 Glenbrook accident, given that the inquiry into the accident found that rail safety was not given sufficient weight following the 1996 changes. The Government legislated in late 2000 to accommodate the inquiry's findings, which involved creating the Rail Infrastructure Corporation with responsibility for owning and operating track infrastructure. In the 2001 NCP assessment, the Council noted that New South Wales needed to ensure that responsibility for safety regulation was vested outside the Rail Infrastructure Corporation to meet its clause 4 obligations, because the corporation is an entity with commercial operating responsibilities.

The New South Wales Government advised that it has now established the Rail Safety Regulator within the Department of Transport to manage rail safety and introduced other measures to enhance rail safety (New South Wales Government 2002). These actions satisfactorily address the concern raised by the Council in the 2001 NCP assessment.

Western Australia

In December 2000 Western Australia sold the freight business of Westrail (consisting of rolling stock and freight contracts) to a private consortium, the Australian Railroad Group. Western Australia retained ownership of the rail track but leased it to the consortium to manage track access for a 49-year term. A third party access regime, covering both interstate and intrastate rail services, became fully operative with the proclamation of the *Railways (Access) Act 1998* on 1 September 2001 and the subsequent appointment of an acting rail access regulator.

The decision to sell Westrail's freight business triggered a CPA clause 4 obligation on Western Australia to review the structure of Westrail. Western Australia's Rail Freight Sale Task Force completed this review in September 1999. The review found that the rail track, the rolling stock and the freight contracts should be sold as an integrated business. Further, the review concluded that privatisation would limit the need for competitive neutrality measures and that Western Australia had satisfied regulatory separation obligations by transferring responsibility for safety regulation to the Department of Transport under the *Rail Safety Act 1998*. The third party access regime contains ringfencing arrangements to ensure Westrail's operation of integrated businesses does not disadvantage access seekers.

Legislation review and reform

Several pieces of legislation that regulate the operation of rail businesses and impose requirements for rail safety are relevant to the assessment of governments' compliance with CPA clause 5. Table 5.4 notes the progress of governments' review and reform of rail sector legislation.

New South Wales has removed the restriction on the carriage of intrastate freight from the *National Rail Corporation (Agreement) Act 1991*. As discussed in the above section on structural reform obligations, New South Wales established the Rail Safety Regulator under the *Rail Safety Act 1993*, satisfying its obligation under CPA clause 4 to separate safety regulation from service provision.

Queensland initially had not scheduled the Transport Infrastructure (Rail) Regulation 1996 for review. It now has conducted a departmental review, however, which has proposed several changes to the regulation of rail safety.

While Queensland will not have implemented these changes by 30 June 2002, the Council accepts that additional time to complete review and reform activity is warranted where legislation is a later addition to a government's review and reform program. The Council will finalise its assessment of Queensland's compliance in this area in 2003.

Tasmania has repealed a number of Acts that restricted competition in the rail sector. The Council considers that Tasmania has met its CPA clause 5 obligations for these matters. Tasmania is yet to decide on the repeal of other Acts, however, the Council will consider these matters in 2003.

Table 5.4: Review and reform of legislation regulating rail services

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*National Rail Corporation (Agreement) Act 1991*	Approves and gives effect to an agreement between the Commonwealth, New South Wales and other States relating to the National Rail Corporation Limited.	During the pre-sale process, shareholders agreed to remove the restriction in S. 7 that prevented the corporation from carrying intrastate freight.	Section 7 was repealed through the *Statute Law (Miscellaneous Provisions) Act 2000* in August 2000. National Rail was privatised in February 2002	Meets CPA obligations (June 2002).
	Rail Safety Act 1993	Allows potential for restraint on competition in pursuit of the safe construction, operation and maintenance of railways.	Glenbrook Inquiry was completed in April 2001.	In response to the Glenbrook Inquiry's recommendations, rail safety regulation arrangements were established separately from the provider of rail network services.	Meets CPA obligations (June 2002).
Victoria	*Border Railways Act 1922*		Review concluded that legislation does not restrict competition.		Meets CPA obligations (June 2001).
	National Rail Corporation (Victoria) Act 1991		Review concluded that legislation does not restrict competition.	National Rail was privatised in February 2002.	Meets CPA obligations (June 2001).

(*continued*)

Table 5.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	Transport Infrastructure (Rail) Regulation 1996 under the *Transport Infrastructure Act 1994* Legislation was not initially scheduled for review.	Includes rails safety regulations that could restrict competition.	Departmental review proposed amendments, prepared a draft public benefit test and consulted with relevant agencies.	Timing for implementation is to be advised.	Council to finalise assessment in 2003.
Western Australia	*Government Railways Act 1904* and By-laws 1–53, 55, 59, 60, 62, 63, 64, 68, 74, 75 and 76.	Raises market power and competitive neutrality issues.		*Government Railways (Access) Act 1998* and the *Rail Safety Act 1998* have removed various advantages and disadvantages conferred on the Government business.	Meets CPA obligations (June 2001).
Tasmania	*Burnie to Waratah Railway Act 1939*	Provides a particular company with a competitive advantage by conferring the authority to operate and maintain a railway.	Review was deferred pending proclamation of the *Rail Safety Act 1997,* because the safety and access provisions will negate the need for this Act.	Tasmania is considering whether repeal is necessary to guarantee third party access.	Council to finalise assessment in 2003.
	Don River Tramway Act 1974	Provides a particular company with a competitive advantage by conferring authority to construct and operate a railway.	Review was deferred pending proclamation of the *Rail Safety Act 1997,* because the safety and access provisions will negate the need for this Act.	Act was repealed by the *Legislation Repeal Act 2000.*	Meets CPA obligations (June 2002).

(*continued*)

Table 5.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Ida Bay Railway Act 1977*	Excepts Ida Bay Railway from the provisions of the *National Parks and Wildlife Act 1950* and the *Railway Management Act 1935.*		Act was repealed in April 2001.	Meets CPA obligations (June 2002).
	Railway Management Act 1935	Gives the Transport Commission the power to issue licences to re-open abandoned railways. Exempts railway buildings from planning laws.	The Government no longer owns railways.	Legislation to repeal this Act has been passed and is scheduled for proclamation before the end of 2002.	Meets CPA obligations (June 2002).
	Railways Clauses Consolidation Act 1901	Authorises the construction of railways or tramways and sets fares, construction standards, rates and charges.		Act was repealed by the *Legislation Repeal Act 2000*.	Meets CPA obligations (June 2001).
	Van Dieman's Land Company's Waratah and Zeehan Railway Act 1895 *Van Dieman's Land Company's Waratah and Zeehan Railway Act 1896* *Van Dieman's Land Company's Waratah and Zeehan Railway Act 1948*	Provides a particular company with a competitive advantage by conferring the authority to construct and operate a railway, and prescribes the construction standards that must be met.	Review was deferred pending proclamation of the *Rail Safety Act 1997,* because the safety and access provisions will negate the need for these Acts.	Tasmania is considering whether repeal is necessary to guarantee third party access.	Council to finalise assessment in 2003.

(*continued*)

Table 5.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Wee Georgie Wood Steam Railway Act 1977*	Provides a particular company with a competitive advantage by conferring the authority to construct and operate a railway and prescribes the construction standards that must be met.	Review was deferred pending proclamation of the *Rail Safety Act 1997*, because the safety and access provisions will negate the need for this Act.	Act was repealed by the *Legislation Repeal Act 2000.*	Meets CPA obligations (June 2002).

Ports and sea freight

Australia, as an island nation, needs a competitive and well-organised shipping industry because it depends on shipping services to import goods and to export Australian-made products. The sea freight services include liner shipping services and bulk shipping services. Liner shipping mainly transports nonbulk cargo, usually in shipping containers. Bulk shipping usually involves the transport of a single product such as grain.

Legislative restrictions on competition

Ports, marine and shipping activity has been subject to government regulation for many years. Many of the statutes date from the early 1900s and were enacted to regulate, manage and set prices and safety standards for the use of shipping channels and port infrastructure. Regulations that restrict competition include:

- access to shipping berths, channels and port infrastructure;
- pilotage requirements;
- marine safety and navigation;
- vessel operating requirements, including crewing;
- organisations governing ports and shipping having the power to determine market products and to set prices and regulations;
- organisations governing ports and shipping being exempt from paying taxes and government charges; and
- provisions to issue licences for vessels and vessel operations.

Review and reform activity

All governments except the ACT listed legislation regulating ports, shipping and marine activity for review under the NCP. Table 5.5 summarises the progress of governments' review and reform activity in this area.

Commonwealth

The Commonwealth has reviewed several laws relating to ports and shipping, and has taken or is undertaking the following reforms.

- The Commonwealth completed reviews of the *Australian Maritime Safety Authority Act 1990* and part X of the *Trade Practices Act 1974* (TPA), and has implemented reforms. The Council concluded in the 2001 NCP assessment that the Commonwealth had met its CPA obligations in relation to this legislation.

- The Commonwealth's review of the *Shipping Registration Act 1981*, which provides for the registration of ships in Australia, recommended that Australia continue to legislate to fix conditions for the grant of nationality to its ships in accordance with international conventions. The review made recommendations to facilitate this outcome. The Government approved Act amendments to implement the review recommendations in 1998. The shipping industry has since raised concerns that proposed legislative amendments could have an impact on finance for shipping, particularly mortgage arrangements. The amendments have not proceeded. The Council will finalise its assessment of the Commonwealth's compliance in this area in 2003.

- The Commonwealth's Shipping Reform Group reviewed the coastal trade provisions of part VI of the *Navigation Act 1912*. In response to the Shipping Reform Group's report, the Commonwealth has streamlined the processes for engaging in coastal trade that are specified in part VI. The Commonwealth has also significantly reduced the charge for a permit to engage in coastal trade and broadened the criteria for issuing these permits. Other elements of part VI — which with other legislation (particularly immigration legislation) allow for cabotage in coastal shipping — are to be subject to separate consideration. The Commonwealth has not expanded on this matter or clarified whether a review (if any) would consider the NCP issues associated with cabotage's inherent restrictions on competition.

- The Commonwealth reviewed the remainder of the Navigation Act via a two-stage process. The first stage resulted in the Navigation Amendment (Employment of Seafarers) Bill 1998 aimed at removing the employment-related provisions that are inconsistent with the *Workplace Relations Act 1996* and the concept of company employment. Employment conditions for seafarers are now set via enterprise agreements certified by the Australian Industrial Relations Commission. The second-stage review, completed in June 2000, covered all the maritime and safety issues in the original Act, apart from those in part VI. The review found that the benefits of regulating ship safety and environmental protection outweigh the potential costs of restricting competition. The review recommended that Australia continue to base its regulations on internationally agreed standards, except where no international standard exists or where the Australian community expects standards to exceed international measures.

  The second-stage review also considered seafarers' employment arrangements that had been deferred from the first-stage process following Senate proposals to amend the Navigation Amendment

(Employment of Seafarers) Bill. The review found that some employment provisions are redundant or would be more appropriately addressed under modern company-based employment arrangements governed by modern industrial relations legislation. It recognised, however, that the legislation should continue to cover employment-related matters derived from international convention obligations that relate to safety or specific shipping operations. The review proposed a re-focus of the regulation towards the adoption of performance-based standards, but considered that this approach would need to be consistent with international regulations, much of which are prescriptive in nature.

The Commonwealth has advised that new shipping legislation, rather than amendments to the Navigation Act would be more efficient at handling changes proposed by the review. It indicated that new legislation cannot be developed, however, until several substantial matters are resolved in consultation with the industry, the States and the Northern Territory to ensure adequate regulatory coverage and workable solutions. The Council will finalise its assessment in 2003.

- The Australian Transport Safety Bureau, formed in 1999, is a multimodal investigation unit, bringing together the air and maritime investigation functions and the nonregulatory functions of the Office of Road Safety. The Commonwealth is also considering new legislation to consolidate under one Act all provisions relating to the Commonwealth's transport accident investigation functions. This legislation will replace the relevant provisions of the Navigation Act and address the concern raised in the Navigation Act review that the Commonwealth legislation overrides State and Northern Territory legislation covering investigations of marine incidents.

- The Commonwealth Department of Industry, Tourism and Resources completed its review of offshore petroleum safety and published a report in November 2001 (*Future Arrangements for the Regulation of Offshore Petroleum Safety*). The Ministerial Council for Mineral and Petroleum Resources considered the issue of offshore petroleum safety at its inaugural meeting on 4 March 2002 and Ministers agreed that the council's Standing Committee of Officials would implement a work program to examine how best to improve offshore safety outcomes primarily through a single national safety agency to be assessed against the agreed set of principles. The Standing Committee of Officials, under the chair of the Commonwealth, is to report to the Council in August 2002.

New South Wales

New South Wales repealed several pieces of shipping legislation, consolidating their provisions in the *Marine Safety Act 1998*. It removed some anticompetitive elements of the repealed legislation through its Licence Reduction Program. The Government intends to conduct an NCP review of the remaining competition restrictions in the Marine Safety Act once the Act

has been in operation for 12 months. The Council will assess the State's progress in 2003.

The *Ports Corporation and Waterways Management Act 1995* established statutory State-owned corporations to manage the State's port authorities, established the Waterways Authority, provides for pilotage and other port charges, and vests responsibility for waterways management and marine safety functions in the Minister. The legislation allows the Minister to fix port access charges, prescribes the structure of some charges and allows ports to fix pilotage charges. New South Wales completed a statutory review and an NCP review of the Act in December 2001. The Government is yet to announce its response to these reviews, so is yet to demonstrate that it has met its CPA clause 5 obligations. The Council will finalise its assessment of compliance in relation to this Act in 2003.

Victoria

Victoria completed a review of the *Marine Act 1988* to clarify the responsibilities of harbour masters. The review recommended:

- retaining the requirement for vessels to be registered, on the grounds that the benefits of registration outweigh the costs and that the fees generated contribute to safety and the provision of facilities;
- retaining licensing of ship pilots;
- increasing competition in the supply of ship pilot services by allowing the monopoly agreement for the provision of pilotage services to expire, supported by provisions in legislation aimed at ensuring safety;
- establishing performance-based standards for ship crewing; and
- retaining the provisions for recreational vessels.

The Victorian Government accepted all of the recommendations in the final report, but has deferred full implementation of the recommendations pending the outcome of a review of port reform since the mid-1990s. The review has focused on the *Port Services Act 1995*, which established new corporatised entities as successors to the old port authorities. The review is examining the structure and operation of Victorian ports. Victoria expects the drafting of the legislative amendments to begin in the second half of 2002 and the legislation to be ready for the autumn 2003 session of Parliament. Victoria has not completed the recommended reforms at 30 June 2002, but has agreed to remove some significant restrictions and is making progress in achieving this objective. The Council will finalise its assessment of Victoria's compliance in 2003.

Queensland

Queensland has reviewed several laws relating to ports and shipping and has taken or is undertaking the following reforms.

- The Harbours (Reclamation of Land) Regulation 1979, under the *Harbours Act 1955*, provides for approval procedures for activities in tidal waters (for example, land reclamation and harbour works). The Government originally intended to remove the Regulation by 30 December 2000, but extended it to the end of 2002 to enable the Integrated Development Approval System and coastal legislation to incorporate the approvals provisions. The *Coastal Protection and Other Legislation Amendment Act 2001* repealed the remaining provisions of the Harbours Act. The Council considers that this reform meets CPA clause 5 obligations.

- The Transport Infrastructure (Ports) Regulation 1994 under the *Transport Infrastructure Act 1994*, provides for harbour towage restrictions. The review of the Regulation recommended allowing individual ports flexibility and discretion for exclusive licensing as conditions warrant. The Government is considering its response. It has not completed reform activity at 30 June 2002, so is still to meet its CPA clause 5 obligations. The Council will finalise its assessment in 2003.

- The review of the Transport Infrastructure Act provisions relating to the potential restrictions on port activities outside port limits reported in July 2001. The reviewed provisions limit port activities of a substantial nature to authorised ports. When the legislation was enacted, the primary concern was that new ports might be developed while existing ports had excess capacity. The potential for adverse environmental impacts of more ports was also a consideration. The review recommended no change and the Government has accepted this recommendation, even though it has other legislation that imposes identical requirements. While Queensland's legislation review and reform activity does not fulfil CPA clause 5 commitments, the impact on competition may be negligible. In as much as the restrictions in the other legislation[28] which mirror these restrictions are in the public interest there is no need for further NCP action from Queensland in relation to the Transport Infrastructure Act.

- The *Transport Operations (Marine Safety) Act 1994* and the Transport Operations (Marine Safety) Regulation 1994 regulate pilot services within ports. A review of these Acts recommended some pro-competitive

[28] There were 12 Acts identified in the review report which together mirror the restrictions in that part of the Transport Infrastructure Act under review. Two of these are Commonwealth Acts. Of the other ten, six have been included in the Queensland legislation review schedule and the Council has assessed five of these as meeting CPA obligations. The Council is awaiting the Government's response to the review of the Land Act 1994.

amendments after a three-year transition period during which responsibility for pilotage services would be transferred from the Queensland Department of Transport to port authorities. The review report recommended that the Government retain responsibility for marine pilot licences and give each port authority the power to determine service delivery arrangements and pilotage fees. The new arrangements took effect on 1 July 2001. The Council considers that Queensland has met its CPA clause 5 obligations in this matter.

- The *State Transport (People Movers) Act 1989* provides for licences and agreements for the installation of people movers. Queensland's review of the legislation recommended repealing the Act but retaining provisions to ensure compliance with natural justice (for existing licence holders). The Act has been included for repeal in the Transport Legislation Amendment Bill 2001. Repeal would meet Queensland's obligations under CPA clause 5. After consulting with existing operators, however, the Queensland Department of Transport is re-examining the decision to repeal the Act. Acknowledging that the Act remains listed for repeal, the Council will finalise its assessment of Queensland's compliance in 2003.

Western Australia

The Western Australian Government has repealed the eight Acts that governed Western Australia's major ports, replacing them with the *Port Authorities Act 1998*. As part of the reform, port authorities were commercialised and became subject to local and federal government rate equivalents and all State taxes. Further, exclusive licensing provisions for port services, such as port towage and pilotage, can now occur only where the Minister considers that the public benefits of such exclusivity outweigh public costs. The Council considers that these actions by Western Australia meet its obligations under CPA clause 5.

Western Australia's proposed Maritime Bill will replace several other Acts and will introduce new legislation governing maritime activity. The Maritime and Transport Legislation Amendment Bill presented in conjunction with the Maritime Bill, will repeal the following legislation:

- the *Harbours and Jetties Act 1928*;
- the *Jetties Act 1926* and Regulations;
- the *Lights (Navigation Protection) Act 1938*;
- the *Marine and Harbours Act 1981* and Regulations;
- the *Marine Navigation Aids Act 1973*;
- the *Pilots Limitation of Liability Act 1962*;
- the *Marine Act 1982*; and

- the *Shipping and Pilotage Act 1967* and Regulations.

These two Bills were introduced into the previous Parliament in 1999 and have been reinstated into the new Parliament. Passage of the Bills will mean Western Australia will have fulfilled its CPA clause 5 obligations. Acknowledging that Western Australia has progressed this matter substantially, the Council will finalise the assessment of compliance in 2003.

South Australia

South Australia passed legislation for the sale/lease of the South Australia Ports Corporation in December 2000. The *SA Ports Corporation Act 1994*, which applied to the Ports Corporation's activities, is scheduled for repeal during 2002.

The *Harbors and Navigation Act 1993* governs the operations of South Australian harbours and facilities. It provides for harbour management, charges, vessel crewing, registration of vessels and licensing of pilot services, and specifies other vessel safety requirements in South Australian ports. South Australia has completed a review of this Act. The Government is considering amendments to the legislation.

South Australia has not completed its review and reform activity of ports and shipping legislation so the Council considers that it has not met its clause 5 obligations for 2002. South Australia has made progress, however, and the Council will finalise its assessment in 2003.

Tasmania

Tasmania repealed its *Marine Act 1976* in 1997 and replaced it with three pieces of legislation: the *Marine and Safety Authority Act 1997*, the *Port Companies Act 1997* and the *Marine (Consequential Amendments) Act 1997*. These Acts establish:

- the Marine and Safety Authority, which ensures the safe operations of vessels, provides and manages marine facilities and manages the environmental issues relating to vessels; and

- companies to provide port and shipping facilities and services to Tasmania.

Tasmania advised that these Acts have been assessed under the State's legislation gatekeeper requirements.

Tasmania also undertook a minor review of the *Roads and Jetties Act 1935* and found that the Act's restrictions on competition (relating to limited access provisions) are in the public interest. This review meets the CPA clause 5 obligations.

The Northern Territory

The Council reported in 2001 that it considered that the Northern Territory's actions in relation to the *Marine Act* met the CPA clause 5 obligations. The Northern Territory has continued to progress review and reform activity relating to ports legislation since the 2001 NCP assessment.

The review of the *Darwin Port Corporation Act* and associated legislation — the Port Bylaws, the Harbour Craft Bylaws and the *Darwin Port Authority Amendment Act* — has been completed and the reforms have been implemented, including the repeal of the Harbour Craft Bylaws. The Northern Territory has completed its CPA clause 5 obligations.

The *Marine Pollution Act* was assented to in 1999. It aims to protect the coastal and marine environment by minimising pollution from shipping. The Northern Territory's review of the Act found that it does not significantly restrict competition but imposes some small compliance costs on shippers and regulatory costs on the Government. The review concluded that these costs are small compared with the wider community benefit to the environment and public health. The Council considers that the Northern Territory has met its CPA clause 5 obligations regarding the Marine Pollution Act.

Table 5.5: Review and reform of legislation regulating port, marine and shipping activity

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	Part X of the *Trades Practices Act 1974*	Industry-specific legislated industry code exempts shipping conferences from ss 45 and 47 of TPA (with exception of third line forcing provisions). Conferences allow liner shipping companies to coordinate their services, set joint freight rates, pool earnings and costs, establish loyalty agreements with customers, rationalise capacity and restrict new entrants to the conference agreements. Australia's trading partners also exempt conferences from competition law.	The Productivity Commission completed review in 1999. It concluded that restrictions in part X are in the public interest because they result in Australian shippers obtaining quality services at the best possible prices and because there are no more efficient ways of achieving these results. The Productivity Commission recommended various improvements to part X to clarify the scope of the exemptions from the TPA with regard to land-based activities. These would extend the range of sanctions available to the Minister in the event of a breach of an undertaking by a conference.	*Trades Practices Amendment (International Liner Cargo Shipping) Act 2000* was enacted on 5 October 2000. It picks up, with some minor changes, all the recommendations made by the Productivity Commission. The Act limits the exemption relating to rate setting by more clearly defining the service to which the exemption applies. Exemption covers terminal-to-terminal services solely for ocean transport and cargo handling at the terminal. Definition of terminal was widened to include terminals away from ports where exports/imports are made/distributed. Exemptions do not apply to inland haulage rates. Act changes arrangements for stevedoring conferences. There are exemptions to endorse current stevedoring practices. Generally, importers are given similar countervailing protection from the TPA. The Act grants additional powers to the Minister and the Australian Competition and Consumer Commission to review agreements that may result in an unreasonable reduction in shipping services and/or an unreasonable increase in liner shipping freight prices. Act also repeals the section that prohibited price discrimination.	Meets CPA obligations (June 2001).

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth (continued)	*Australian Maritime Safety Authority Act 1990*		Review was completed in 1997. It recommended that the Government continue to undertake the safety regulatory functions of Australian Maritime Safety Authority and that the current administrative arrangements should continue (with the board able to review the scope to contract out administrative activities).	Recommendations have been implemented.	Meets CPA obligations (June 2001).
	Shipping Registration Act 1912	Provides for registration of ships in Australia.	Review was completed in 1997.	The Government accepted all of the recommendations and is implementing legislative amendments. Industry, however, raised concerns about the financing implications of new legislation, especially for mortgages.	Council to finalise assessment in 2003.

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth (continued)	*Navigation Act 1912*	Provides a legislative basis for many of the Commonwealth's responsibilities for maritime matters including ship safety, coastal trade, the employment of seafarers and shipboard aspects of the protection of the maritime environment. It also regulates wreck and salvage operations, passengers, tonnage measurement of ships and a range of administrative measures relating to ships and seafarers. Part VI relates to processes for engaging in coastal trade.	The coastal trade provisions of part VI of the Act were scheduled for review in 1998-99 and the Shipping Reform Group considered these provisions in its report. Accordingly, a comprehensive review of the other parts of the Act was substituted for part VI review. The Act was reviewed in two stages. The first stage considered the repeal of matters that impede shipping reform or are inconsistent with the concept of company employment. This was completed in 1998. The second stage was a comprehensive review of the Act (except for part VI dealing with coastal trade) and was completed in June 2000. The report was publicly released in August 2000. The review found that the benefits of regulating ship safety and environmental protection outweigh the potential costs of restrictions on competition.	Stage one review led to the Navigation Amendment (Employment of Seafarers) Bill 1998. The Bill removes the employment-related provisions in the Act that are inconsistent with the *Workplace Relations Act 1996* and the concept of company employment. The Bill was introduced into Parliament on 25 June 1998. During the Senate debate on the Bill, a significant number of items were rejected. No further action was taken on the Bill. The Government is considering the recommendations of the second-stage review.	Council to finalise assessment in 2003.

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Marine Safety Act 1998*	Provides for vessel operations, licensing and navigation. Regulates the use of vessels, motors, marking of load lines and the carriage of certain equipment. Provides for licensing of pilots and navigation requirements. The Act repeals and consolidates: *Commercial Vessels Act 1979*; *Maritime Services Act 1935*; *Marine Pilotage Licensing Act 1971*; *Marine (Boating Safety — Alcohol and Drugs) Act 1991*; and *Navigation Act 1901*.	NCP review is to be undertaken 12 months after the Act is fully commenced.		Council to assess progress in 2003.
	Ports Corporation and Waterways Management Act 1995	Provides for marine administration, safety, port charges and pilotage.	Statutory and NCP reviews were completed and presented to the Minister in December 2001.		Council to finalise assessment in 2003.
	Commercial Vessels Act 1979	Provides for the use of certain vessels.	Review not required.	Act was repealed and replaced.	Meets CPA obligations (June 2001).
	Maritime Services Act 1935	Provides for harbour operations.	Review not required.	Act was repealed and replaced.	Meets CPA obligations (June 2001).

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales (continued)	*Marine Pilotage Licensing Act 1971*	Provides for pilotage.	Review not required.	Act was repealed and replaced.	Meets CPA obligations (June 2001).
	Navigation Act 1901	Restricts market conduct and entry.	Review not required.	Act was repealed and replaced.	Meets CPA obligations (June 2001).
	Marine (Boating Safety-Alcohol and Drugs) Act 1991	Provides for using vessels under certain conditions.	Review not required.	Act was repealed and replaced.	Meets CPA obligations (June 2001).
Victoria	*Marine Act 1988*	Provides for pilotage, licensing of pilots and harbour masters, and vessel registration.	Review was completed in 1998. It recommended the retention of vessel registration, amendments to licensing standards and the discontinuation of the monopoly pilotage agreement.	Recommendations have been accepted but new legislation is not yet in place.	CPA obligations will be fully met when legislation in place. The Council will finalise its assessment in 2003.
	Transport Act 1983 (passenger ferry services)	Provides for ferry operation.	Review completed.	Act was repealed.	Meets CPA obligations (June 2001).
Queensland	Harbours (Reclamation of Land) Regulation 1979	Provides for approval procedures for activities in tidal waters (for example, land reclamation and harbour works).	Not for review	Act was repealed with certain approval provisions incorporated in other existing legislation.	Meets CPA obligations (June 2002).

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	Transport Infrastructure (Ports) Regulation 1994 under the *Transport Infrastructure Act 1994*	Provides for harbour towage restrictions.	Review completed.	Cabinet submission was prepared for March 2002.	Council to finalise assessment in 2003.
	Transport Infrastructure (Ports) Regulation 1994 under the *Transport Infrastructure Act 1994*	Provides for port activities outside of port limits.	Review was completed in 2001.	No reforms were proposed.	Does not meet CPA obligations (June 2002).
	Transport Operations (Marine Safety) Act 1994 Transport Operations (Marine Safety) Regulation 1994	Provides for marine safety, pilotage services.	Review was completed in 1999.	Legislative amendments took effect from 1 July 2001.	Meets CPA obligations (June 2002).
	State Transport (People Movers) Act 1989	Provides for licences and operational requirements for vehicles.	Review is under way.	The Act has been included in the schedule for repeal in the Transport Legislation Amendment Bill 2001, scheduled for April 2002. After consultation with both existing operators in 2001, however, the Government is re-examining whether to repeal the Act.	Council to assess progress in 2003.
	Sea Carriage of Goods (State) Act 1930	Provides for operating requirements for the carriage of sea goods.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Port Authorities Act 1998*	Provides for pilotage, licensing, planning and borrowing.	Review was completed in 1997. It concluded that the objectives of the legislation could not be achieved by means other than the licensing restrictions. Act repeals individual port Acts.	No reform is planned.	Meets CPA obligations (June 2001).
	Jetties Act 1926 and Regulations	Licensing, competitive neutrality.	No review undertaken.	Act is to be repealed pending the enactment of the Maritime Bill.	Council to finalise assessment in 2003.
	Lights (Navigation) Protection Act 1938	Licensing.	No review undertaken.	Act is to be repealed.	Council to finalise assessment in 2003.
	Marine and Harbours Act 1981 and Regulations	Provisions for harbour operations.	Review was completed in 1999.	Act is to be repealed by the Maritime and Transport Legislation Amendment Bill.	Council to finalise assessment in 2003.
	Ports (Model Pilotage) Regulations 1994		Not for review.	Act was repealed.	Meets CPA obligations (June 2001).
	Ports Function Act 1993	Restricts market conduct.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).
	Shipping and Pilotage Act 1967 and Regulations	Provides for pilotage services.	Review was completed in 1999.	Act is to be repealed by the Maritime and Transport Legislation Amendment Bill.	Council to finalise assessment in 2003.

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Albany Port Authority Act 1926* and Regulations	Restricts market conduct and market entry.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).
	Bunbury Port Authority Act 1909 and Regulations	Restricts market conduct and market entry.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).
	Dampier Port Authority Act 1985 and Regulations	Restricts market conduct and market entry.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).
	Fremantle Port Authority Act 1902 and Regulations	Restricts market conduct and market entry.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).
	Geraldton Port Authority Act 1968 and Regulations	Restricts market conduct and market entry.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).
	Marine Act 1982	Provides for harbour operations.	Review was completed in 2000.	Act is to be repealed by the Maritime and Transport Legislation Amendment Bill.	Council to finalise assessment in 2003.
	Shipping and Pilotage Act 1967 and Regulations	Governs pilotage services (licensing, competitive neutrality issues).	Not for review.	Act is to be repealed by the Maritime and Transport Legislation Amendment Bill.	Council to finalise assessment in 2003.
	Port Hedland Port Authority Act 1970 and Regulations	Restricts market conduct and market entry.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Esperance Port Authority Act 1968*	Restricts market conduct and market entry.	Not for review.	Act was repealed.	Meets CPA obligations (June 2001).
South Australia	*South Australian Ports Corporation Act 1994*	Restricts market conduct and market entry.	Divestment of Ports Corporation occurred in November 2001. The *South Australian Ports (Disposal of Maritime Assets) Act 2000* includes a provision to enable the Governor to repeal the South Australian Ports Corporation Act 1994.	Parliament passed legislation for the lease/sale of the corporation in December 2000. The Act is likely to be repealed during 2002.	Council to finalise assessment in 2003.
	Harbours and Navigation Act 1993	Provides for harbour operations.	Review was completed in 1999.	Intergovernmental agreement made for national moves to develop consistent legislation.	Council to finalise assessment in 2003.
Tasmania	*Marine Act 1976*	Restricts market conduct and market entry.	Completed.	Act was repealed and replaced by the *Marine and Safety Authority Act 1997*, the *Marine and Safety Authority Act 1997* and the *Marine (Consequential Amendments) Act 1997*	Meets CPA obligations (June 2001).
	Roads and Jetties Act 1935	Provides for access restrictions.	Minor review was conducted. It recommended retaining access restrictions in the public interest.	Recommendations have been accepted.	Meets CPA obligations (June 2001).
	Hobart Bridge Act 1958		Completed.	Act was repealed.	Meets CPA obligations (June 2001).
	Port Huon Wharf Act 1955	Provides for access restrictions.	Completed.	Act was repealed.	Meets CPA obligations (June 2001).

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Darwin Port Corporation Act*	Establishes the Darwin Port Authority. Prescribes functions and powers: monopoly powers; licensing arrangements and fees; issue, renewal and cancellation of stevedoring licences; control of shipping movements in port; exemption from local government charges; harbour craft bylaws; vessels engaged in commercial activities (safety issue); exemptions from pilotage requirements; partial exemption from the Corporations Law.	Review was completed in 2001.	Most recommendations were accepted. Recommendation to remove the licensing of stevedores was not accepted. The Government considered licensing to be most cost-efficient way of monitoring environmental health and safety at Darwin Port.	Meets CPA obligations (June 2001).
	Darwin Port Authority Act and Bylaws			Legislation was replaced by the Darwin Port Corporation Act in 1999 (see above). Repeal of the legislation completed in mid-2002.	Meets CPA obligations (June 2001).

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory (continued)	*Marine Pollution Act*	The purpose of the Act is to protect the Northern Territory's marine and coastal environments by minimising intentional and negligent discharges of ship-sourced pollutants through giving effect to the MARPOL international convention dealing with pollution by oil, noxious liquid substances in bulk, harmful substances in packaged form, sewage and garbage. With the exception of Australian Defence Force and a warship, naval auxiliary or other ship owned or operated by a foreign country and used, for the time being, only for government, noncommercial service of the country, the Act applies to all ships plying Northern Territory coastal waters.	Review was completed in September 2001. It found that the restrictive elements of the Act are justified under NCP principles.	The Government endorsed the review's recommendations.	Complies with CPA obligations (June 2002).

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory (continued)	*Marine Act* and Regulations	Applies national uniform shipping law codes. Provides for licensing of certain commercial operations (part V), certificates of survey (s. 79(a)), permits for the operation of hire-and-drive vessel (s. 4), certificates of competency (coxswain) (schedule 3), certificates of competency (masterclass-all) (Regulation 9).	Review was completed in 2001. It found that restrictions in the Act are in the public interest.	The Government accepted the review recommendations.	Meets CPA obligations (June 2001).

Competitive neutrality

Most government regulation of ports and shipping has evolved from statutes developed in the early to mid-1900s. Then, governments often insulated their businesses from many of the pressures facing private sector firms; for example, many government-based institutions were given tax-free status even though they might have marketed and sold products and/or services.

Clause 3 of the CPA requires governments to apply competitive neutrality principles to significant government businesses. These principles require, at a minimum, that significant government business activities set prices that at least cover costs. Where a government-owned port is classified as a 'public trading enterprise', clause 3 calls for the jurisdiction to adopt a corporatisation model to provide the port with a commercial focus and independence from government for day-to-day decisions.

The Council's 2001 NCP assessment found that governments had mostly completed the process of establishing their port authorities as government-owned corporations subject to competitive neutrality principles (NCC 2001). No government competitive neutrality complaints mechanism received complaints about port authorities during 2001-02, confirming that Council's 2001 finding that governments' process of corporatising ports and applying competitive neutrality principles had proceeded satisfactorily.

For the 2002 NCP assessment, the Council indicated that it would monitor some residual implementation questions in the NCP 2001 assessment. These questions related to Victoria's progress with the review of the Port Services Act, the tax treatment of Western Australian ports and the privatisation of the South Australian ports. In addition, the review of the Darwin Port Corporation Act has raised some competitive neutrality issues. This assessment addresses these matters.

Victoria

The Port Services Act provides for the establishment of the following port corporations:

- the Hastings Port (Holding) Corporation;
- the Melbourne Port Corporation; and
- the Victorian Channels Authority.

The Act provides for access regulation, the separation of regulatory and commercial functions, and the integration of commercial ports into the broader regulatory environment. The Victorian Government has undertaken an independent review of its port reforms, aimed at improving the effectiveness and efficiency of ports. A report detailing review

recommendations was presented to the Minister for Ports for consideration, in consultation with the Treasurer and the Minister for Finance, in December 2001. The report has not been publicly released.

The Council reported in 2001 that it considered that Victoria had fulfilled its clause 3 obligations for the Melbourne Port Corporation and the Victorian Channels Authority. If the review of the Act recommends changes to the current arrangements, however, the Council may need to reconsider its assessment.

Western Australia

The Western Australian Government controls essential marine transport infrastructure through its ownership of regional and metropolitan port authorities. The Government stated that it is committed to ensuring a competitive and efficient ports system. As part of the reform process, Western Australia commercialised its port authorities. The ports are subject to all federal and State taxes and local government rates (or equivalents). The Council considers that Western Australia has met its clause 3 obligations.

South Australia

The SA Ports Corporation managed and owned 10 ports in South Australia. The South Australian Government recognised that the corporation was a significant Government entity with business and regulatory interests and powers. It corporatised the port entity with a view to improving its performance. Subsequently, the Government has privatised the operations at the seven main ports and enacted legislation to repeal the South Australia Ports Corporation Act. Responsibility for the remaining three ports — Cape Jervis, Penneshaw and Kingscote — has been transferred to Transport SA. South Australia has not indicated what competitive neutrality processes apply to these three ports.

Northern Territory

The Northern Territory Government implemented competitive neutrality principles mainly by commercialising all significant Government business operations (called Government business divisions in the Northern Territory). The Darwin Port Authority was established as a Government business division in 1995. The authority's title was changed to the Darwin Port Corporation in 1995 following the implementation of further competitive neutrality reforms, the adoption of a commercial charter and the appointment of a commercial board of directors.

The review of the Darwin Port legislation recommended removing the Port Corporation's exemption from local government taxes and charges. In

response to the review, Darwin Port Corporation began paying local government rate equivalents from 1 July 2001. The Government is also considering application of the Government Owned Corporations framework to the Corporation.

Structural reform of port authorities

Over recent years, several jurisdictions have privatised or considered privatising their port authorities. Some governments have also looked at introducing third party access regimes that cover various port services. Access regimes are a form of regulation aimed at introducing competition in markets supplied by natural monopoly infrastructure.[29] Both privatisation and the introduction of competition via third party access trigger obligations under the CPA clause 4 (see chapter 2).

In the 2001 NCP assessment, the Council found that New South Wales, Victoria, Queensland, Western Australia, Tasmania and the Northern Territory had met their CPA clause 4 structural reform obligations relating to ports.

South Australia

South Australia reviewed the structure of its ports before taking an in-principle decision to lease/sell the SA Ports Corporation. The Government enacted legislation for the lease/sale in December 2000. As part of the lease/sale arrangements, the Government introduced a legislated third party access scheme covering maritime services. These services include channels, defined common user berths, berths adjacent to grain handling facilities and grain handling facilities (belts). South Australia has sought certification, in accordance with clause 6(3) of the CPA, of the State-based access regime contained in the legislation for the lease/sale. The Council is considering this application.

As the Council noted in the 2001 NCP assessment, these developments triggered the structural review obligation under clause 4 of the CPA. South Australia has subsequently undertaken a clause 4 review of its ports structure. The review is supported by a scoping review undertaken by SBC Warburg Dillon Read and Fay Richwhite Securities Ltd.

The review found that it is preferable to sell the ports as a group. It considered that disaggregation would have several adverse effects (including damaging the viability of regional ports, increasing the cost of port services to the South Australian community and reducing the overall sale price) and

29 A natural monopoly exists where it is more cost-effective for one facility, rather than two or more competing facilities, to provide the service.

would not increase competition. The scoping study considered that structural reform through the separation of the ports held by Ports Corporation was unlikely to result in effective interport competition. The study noted the regional nature of the ports and their co-location with commodity production or commodity bulk storage/handling facilities. In most cases, these bulk ports are highly specific to regional production, which limits the scope for interport competition. The study noted some competition in commodity trade between the Ports Corporation facilities and the port of Portland in Victoria. It concluded, however, that disaggregation of the Ports Corporation ports would be unlikely to add to these competitive pressures.

The study also noted some competition in the container trade between the Ports Corporation ports and the ports of Melbourne and Fremantle. It concluded, however, that the nature of the scale economies in container services means that disaggregation of Ports Corporation's existing asset base would be unlikely to facilitate the introduction of an additional competing container facility into South Australia.

South Australia's CPA clause 4 review accepted the recommendations of the scoping study, and the Government privatised the ports as a group. South Australia told the Council, however, that bidders had the option of bidding for all or any of the ports and that nothing prevents the successful bidder, Flinders Ports, from disaggregating the ports and selling them individually. The Council considers that South Australia has met its CPA clause 4 obligations.

Air transport

Air transport industries are generally characterised by a mix of government and private ownership, with governments regulating aspects of both industries. Airports are both government and privately owned, with some only recently privatised. Private operators own the airlines. Air traffic control is provided by a Government monopoly.

Price regulation of aeronautical services

The Council has considered price regulation of airports in the context of the privatisation of airports. This issue is still relevant for the privatisation of Sydney (Kingsford Smith) airport.

The 1997 and 1998 changes to airport ownership and the structure of the Federal Airports Corporation included transitional price regulation measures to allow parties to adjust to the new operating environment for airports. Price regulation comprised a five-year, CPI–X annual cap on the prices of

aeronautical services provided at 11 of the largest airports, except Sydney (Kingsford Smith). The cap was complemented by special access arrangements designed to facilitate new airline entrants. Aeronautical services were also subject to price notification under the *Prices Surveillance Act 1983* at the 11 price capped airports and Sydney (Kingsford Smith).

Following a Productivity Commission review of airport pricing regulation, the Government announced it would modify some of these arrangements. From 1 July 2002, Melbourne, Brisbane, Perth, Adelaide, Canberra and Darwin airports no longer have price caps on their aeronautical services but, along with Sydney (Kingsford Smith) airport, are subject to price monitoring for five years. An independent review will be carried out towards the end of the five-year period to determine the need for future price regulation. In addition, the special access arrangements under s. 192 of the *Airports Act 1996* will lapse and part IIIA of the TPA will apply. The Government reserved its right to reimpose price controls if the airport operators abuse their market power by unjustifiably raising prices.

Sydney Basin airports (Commonwealth)

In the 2001 NCP assessment, the Council found that the remaining matter for review under the CPA clause 4 is the appropriate structure of the Sydney Basin airports (including any second airport) before privatisation. The Commonwealth gave an undertaking that its future processes would consider structure and competition issues for Kingsford Smith Airport and any second international airport.

On 29 March 2001, the Commonwealth Government announced that Kingsford Smith Airport would be sold as a 100 per cent trade sale to be completed in the second half of 2001. Further, the new owner would be given the first right of refusal by the Commonwealth to build and operate any second major airport within 100 kilometres of the Sydney central business district. The other Sydney Basin airports (Bankstown, Camden and Hoxton Park) will also be sold through a 100 per cent trade sale, to be completed in the second half of 2002.

The airport sale process for Sydney Airport began in early 2001 and binding bids were originally due by 17 September 2001. Following the terrorist attacks on the United States of America on 11 September 2001 and the subsequent level of disruption in the global financial markets and aviation sectors, the Government deferred the sale until 2002.

In accordance with the privatisation timetable, the Department of Finance undertook a CPA clause 4 review of the Sydney Airports Corporation.

As a Corporations Law company subject to the Commonwealth's government business enterprise accountability guidelines, the corporation is required to earn a fair and reasonable return on the investment of its owner, the Commonwealth. Unlike the privatised airports, the Government did not place

a price cap on the corporation's aeronautical charges, given significant recent re-development and continued Government ownership. In setting out its sale objectives for Sydney Airport, the Government announced that the ACCC would ensure prices for regional carriers at Sydney Airport would be maintained during the sale process and would not increase in any year in excess of increases in the CPI–X.

In the 2001 NCP assessment, the Council had only one matter outstanding for the CPA clause 4 review: the structure of the Sydney airports. While the Commonwealth separated the Sydney Airports Corporation from the other existing airports, the proposed second Sydney airport was still an issue. The Commonwealth argued that the development of the second airport would be unlikely without some level of subsidy from either the existing airport (Kingsford Smith Airport) or directly from the Government. Drawing from international experience on the development of second airports at major cities, the Commonwealth argued that the involvement of existing airport is essential for the success of the development of the second airport. It proposed:

> *… prior to and during its development, the SSA [second Sydney airport] should be associated with KSA [Kingsford Smith Airport]. KSA should have rights and potentially obligations in respect of the future development of any SSA. These should include:*
>
> - *a right of first refusal on any proposal (including by the Commonwealth or a State government) to develop a competing facility within 100km from the Sydney CBD;*
>
> - *the Commonwealth considers that a second airport will not be necessary within the next ten years, but the Commonwealth will again review Sydney's airport needs in 2005.* (Department of Finance 2002 p. 24.)

The Council considers the Commonwealth to have met its CAP clause 4 obligations.

Airservices Australia

Airservices Australia is a Commonwealth Government-owned business providing air traffic management, air navigation support services and aviation rescue and fire fighting services at airports. Under the Civil Aviation Regulations 1988 only Airservices and the defence forces can provide air traffic control services.

In the 2001 NCP assessment, the Council noted moves by the Commonwealth towards introducing contestability in the provision of the services provided by Airservices Australia. This was dependent on the development of a regulatory framework to ensure the safe provision of air traffic control services and aerodrome rescue and fire fighting services by the Civil Aviation Safety Authority (CASA). CASA has subsequently developed a safety regulatory

framework for the provision of air traffic control, aerodrome rescue and fire fighting and related services. The Governor-General signed these regulations on 26 June 2002. Once these regulations are in place and the transition period provided for in the regulations has passed, aerodrome operators will become responsible for ensuring the provision of aerodrome rescue and fire fighting services.

The Government is expected to consider the structure and timing of the corporatisation of Airservices in the near future. It will also need to establish a separate airspace directorate to take over Airservices Australia's remaining regulatory function of airspace designation once Airservices Australia is corporatised.

Once this framework is in place and the necessary legislative amendments have been made, the Government will consider the timing for the introduction of competition for alternative service providers for tower-based air traffic control services. En-route and terminal approach services are, and will remain, an Airservices Australia monopoly.

Regulation of regional air passenger transport routes

There is some remaining regulation of intrastate air passenger transport routes. The regulation restricts competition by granting rights to service particular regional or remote locations.

Queensland

Queensland completed an NCP review of the *Transport Operations (Passenger Transport) Act 1994*. The Act covers public transport operations in Queensland, including buses, taxis, limousines and aviation. While air transport in Queensland is largely deregulated, services to some remote areas are restricted. The services are regulated through exclusive service contracts which specify minimum service levels, such as aircraft type, frequency of service and fares. Each contract is for five years, after which it is retendered.

The review found that these restrictions are in the public interest because the contracted operators provide services which would otherwise not be available, or would only be available at greater cost or with lower service levels if the contracts were not exclusive. The review report argued that, because the contract to provide these services is open to tender every five years (that is, there is competition for the market), the exclusive service contract is likely to provide a net community benefit.

The Government is considering the review recommendations. The Council will consider the Government's response in the 2003 NCP assessment.

Western Australia

Western Australia has completed a review of the *Transport Co-ordination Act 1966*. The Act provides for the licensing of vehicles used for commercial purposes, including aircraft, and the regulation of the transport services provided by these vehicles.

The Act allows for the Minister to grant a licence in respect of an aircraft. The review report recommended that this general provision be circumscribed so that licences are required only where there is a public benefit. The Government has endorsed this recommendation and this section of the Act is to be repealed and replaced with provisions which relate the requirement for a licence to the public interest. The Council will finalise its assessment of the review and reform activity in the 2003 NCP assessment.

Western Australia reported that the collapse of Ansett in September 2001 has had a significant impact on the intrastate air transport market in Western Australia. Western Australia is therefore reviewing its intrastate aviation policy, including the application of the licensing provisions in the Transport Co-ordination Act.

6 Health and pharmaceutical services

Australians rely on health care services to restore and maintain health and wellbeing. National expenditure on health services has grown steadily over time. In 1999-2000, Australians spent $53.7 billion on health and pharmaceutical services — around 8.5 per cent of gross domestic product. Governments contributed around 71 per cent of this amount, while private spending comprised the remainder (ABS 2002a).

All Australian governments have enacted legislation that restricts competition in the health and pharmaceutical sector. The States and Territories regulate a range of health professions and the pharmacy sector. Commonwealth legislation underpinning the Medicare system — which provides rebates for medical services in the private sector, free point-of-service hospital care based on need, and subsidised access to pharmaceuticals — affects competition among health professions and providers of related services such as pathology. Governments also have a wide variety of population health legislation.

In this 2002 National Competition Policy (NCP) assessment, the National Competition Council has considered key competition issues relating to the regulation of health professionals, drugs and poisons, pharmacy, Medicare, pathology licensing, private health insurance and population health.

Regulating the health professions

Health services are delivered by a range of different health practitioners, including doctors, nurses and allied health vocations. Each State and Territory has legislated to protect public health and safety by limiting who may practise as a health professional and how service providers may represent themselves.

Most health practitioner legislation requires practitioners to hold certain qualifications before they can enter a profession, and to be licensed by a registration board while they continue to practise. Some health practitioner legislation also reserves the right to practise in certain areas of heath care exclusively for certain professions. In addition, health practitioner legislation often regulates the business conduct of registered professionals.

The Council released a staff paper in 2001 that sets out how these measures restrict competition and explores issues raised by professional regulation

(Deighton-Smith, Harris and Pearson 2001). The staff paper highlights the importance of governments clearly identifying regulatory objectives, linking any restrictions on competition to the objectives, and then (by applying the principles of transparency, consistency and accountability) ensuring the restrictions represent the minimum necessary to achieve their objectives.

Key competition issues in regulating the health professions

Business ownership and association

Many health services in Australia have traditionally been delivered through small suburban practices run as sole practices or as partnerships of health professionals. In some areas of health care, such as general medical practice, increasing numbers of practices are owned by nonprofessional entities such as corporations. In other areas, such as dentistry and optometry, some jurisdictions prohibit employment of health professionals by nonprofessionals, or ownership of health care practices by nonhealth professionals.

Ownership restrictions potentially impose significant costs on the community. They limit health care businesses' access to capital, thus constraining innovation and growth. As a result, ownership restrictions may increase the cost of health care and limit the range of services that health practitioners are able to offer to their patients. Ownership restrictions also impose costs on health care practitioners. They reduce employment options for practitioners who prefer to concentrate on clinical care rather than management, and those who prefer salaried employment to the financial risk of partnership or self-employment. The principal benefit attributed to ownership restrictions is that they ensure the owners of a practice are held accountable for the standard of care provided, thus protecting the public from inappropriate commercial influences on clinical decision-making.

The Council accepts that it may be in the public interest to place some controls on business conduct to protect patients. Generally, it is not in business owners' interest to expose themselves to the loss of income/profit or litigation due to fraud or negligence. In some circumstances, however, owners of health care practices may have a commercial incentive to act in ways that may not be in the best interests of their patients.

Registered health practitioners who own health care businesses risk disciplinary action (and potential de-registration) if they engage in unprofessional conduct; nonregistrant owners do not face this risk. Requiring the owners of health care businesses to be health practitioners ensures that only people who can be held accountable for their professional conduct through the disciplinary system can own health care businesses.

There are, however, alternative ways of protecting patients from inappropriate commercial interference in clinical decision-making. Making it an offence for an employer to direct or incite a health practitioner to engage in unprofessional conduct is a more direct way of addressing the problem. Although governments may incur some costs in enforcing the offences, this approach avoids the costs associated with ownership restrictions.

Several governments have established offences along these lines. In some cases, they have combined the offence provisions with a power to ban people found guilty of an offence from participating in a health care business in the future. This approach provides an additional level public protection, while still avoiding the costs of prohibiting nonpractitioner ownership of health care businesses.

The other benefit sometimes attributed to ownership restrictions is that they protect incumbents from competition with new entrants, including large corporate interests. This protection benefits the existing owners of health care businesses and, arguably, also the broader community because otherwise corporate owners might purchase independent practices in smaller towns and then rationalise services to major regional centres. The general difficulties of attracting practitioners to these areas mean that new competitors might not enter the small town market, even if entry would be profitable. The ownership restrictions therefore help to maintain access to services and employment in regional areas.

Potential impacts on regional services and employment are legitimate concerns, which should be considered in assessments of whether restrictions are in the public interest. It is important to assess these impacts carefully, however, because maintaining anticompetitive ownership restrictions may not deliver the intended welfare benefits. In particular, legislation reviews have revealed little evidence to support the argument that removing ownership restrictions would result in large corporate interests purchasing independent practices and then rationalising services to major regional centres.

Further, ownership restrictions have drawbacks that may outweigh any potential employment benefits. As discussed above, much of the benefit of restricting ownership flows to the owners of the businesses, while some community welfare is lost because the barrier to competition increases the cost of health care. This cost increase may pressure governments to increase health care subsidies and/or cause patients to pay more or wait longer for treatment than they would in a competitive market.

Governments determine the objectives of their legislation, including employment and access objectives. Alternatives to ownership restrictions (such as incentive schemes or labour market programs) may offer more efficient and effective means of achieving these objectives.

Reserved areas of practice

Practice reservations help to protect patients by ensuring only professionals with the skills and expertise to provide safe and competent care perform certain potentially risky activities. Practice reservations can also increase costs for patients, however, if they prevent patients seeking treatment from other competent professions.

Reserving broadly defined practices or even entire disciplines can raise competition issues. Most professional disciplines involve a range of activities. Many activities are common to a number of professions, and some activities are more risky than others. Limiting the scope of the restriction to specific high risk 'core practices' minimises the costs of the practice restriction. Restricting an entire discipline is likely to create anomalies because it can mean some common low risk activities are inappropriately restricted.

The method of practice reservation can also raise competition issues. Most health practitioner legislation prohibits unregistered persons from performing a task, but sometimes the legislation places a restriction on performing the task for financial reward. Restricting financial rewards (but not proscribing the task) often implies a commercial objective rather than public protection.

Professional indemnity insurance

Professional indemnity insurance is designed to meet client or third party claims of civil liability that may arise from practitioners' negligence or error. Until recently, few health professionals were required by law to hold professional indemnity insurance. Many health practitioners, given the risks involved, voluntarily purchased professional indemnity insurance. Other practitioners were insured through their employer.

An emerging trend of legislation reviews is to propose requiring practitioners to hold (or be covered by) adequate professional indemnity insurance as a condition of registration. As discussed in the 2001 NCP assessment, the Council considers that mandatory professional indemnity insurance requirements are consistent with the objectives of the NCP (NCC 2001, p. 16.6).

In response to recent premium increases and the collapse of United Medical Protection, some stakeholders have called for reforms to professional indemnity insurance arrangements. The Royal Australasian College of Surgeons, for example, proposed creating a single monopoly provider of professional indemnity insurance for medical practitioners (RACS 2002). Chapter 10 discusses the competition questions associated with statutory insurance monopolies.

Review and reform activity

More than 80 legislative instruments regulate around a dozen health professions across the States and Territories. New South Wales, Victoria, South Australia and Tasmania reviewed each piece of health practitioner legislation individually. Victoria has completed its review and reform activity, while the other three States have completed their legislation review but still have some legislation that they have not yet reformed.

Queensland, Western Australia, the ACT and the Northern Territory each conducted an omnibus review of most or all of their practitioner legislation. Queensland adopted a three-stage reform process. The first two stages involved establishing common complaint and disciplinary processes, and enacting new registration legislation for each profession. The third stage (which is under way) involves reviewing and reforming practice restrictions. Western Australia announced key directions for reforms to its health practitioner legislation (with the exception of medical practitioners) in June 2001, and is preparing separate replacement legislation for each profession. The ACT and the Northern Territory are both preparing omnibus Acts to replace most of their existing health practitioner legislation.

Chiropractors

The 2001 NCP assessment reported that New South Wales, Victoria and Tasmania had met their CPA clause 5 obligations in relation to the review and reform of legislation governing chiropractors. The 2002 NCP assessment considers whether the other jurisdictions have met their CPA clause 5 obligations in this area.

Queensland

Queensland is reforming its health practitioner legislation in three stages.

- The first stage, completed in February 2000, involved enacting new legislation to govern the health practitioner registration boards and their complaints and disciplinary systems.

- The second stage, completed in May 2001, involved enacting new registration legislation for each registered health profession. The *Chiropractors Act 2001*:

  – continues to reserve the title of 'chiropractor' for registered practitioners, but simplifies the registration eligibility criteria and provides for alternative routes to registration;

  – significantly scales back restrictions on commercial and business conduct by replacing prescriptive advertising restrictions with

provisions that reflect consumer protection legislation and by removing business licensing requirements; and

- prohibits conduct that compromises registrants' autonomy and the making or accepting of payments for recommendations or referrals.

- The third stage, which is under way, will reform practice restrictions. The Chiropractors Act retains the practice restrictions from the *Chiropractors and Osteopaths Act 1979,* pending the outcomes of the core practices review (see below).

Core practices review

Queensland commissioned PricewaterhouseCoopers to review and refine a set of possible core practices, and to conduct a public benefit test assessment of the costs and benefits of reserving the right to perform these practices for registered members of particular health professions. The Queensland Treasurer endorsed the public benefit test report in January 2001. Following Cabinet approval, Queensland Health released the report for public consultation in August 2001 (Queensland Government 2002).

The public benefit test proposed reserving three core practices: thrust manipulation of the spine; prescription of optical appliances for the correction or relief of visual defects; and surgery of the muscles, tendons, ligaments and bones of the foot and ankle. It considered, but rejected, a range of activities including: the movement of spinal joints beyond a person's usual physiological range; the fitting of contact lenses; electrotherapy; physiological testing; psychotherapy; the assisted feeding of persons with a neurological impairment; pharmaceutical dispensing; and soft tissue and nail surgery of the foot.

The changes implemented in Queensland and the core practices model recommended by the public benefit test report appear consistent with the Competition Principles Agreement (CPA) clause 5 guiding principle. The Council cannot, however, finalise the assessment of overall compliance until Queensland has announced and implemented its response to the core practices review. Queensland advised the Council that it had yet to finalise its policy approach following public consultations on the public benefit test assessment, but that it expected to make legislative amendments by mid-2002. The Council will finalise its assessment of CPA compliance in 2003.

Western Australia

Western Australia has completed the review of its health practitioner legislation. In April 2001, the Government approved the drafting of a new template health practitioner Act and agreed to replace the majority of the State's laws governing health professions as soon as it finalises the template legislation.

Western Australia released *Key Directions*, a paper outlining the policy framework for the new health practitioner legislation, in July 2001 (after the 2001 NCP assessment). The proposed changes include:

- replacing prescriptive advertising restrictions with provisions that reflect consumer protection legislation,
- removing requirements for businesses to register with the board and for the board to approve business names,
- providing for codes of practice (relating to clinical matters only) to be approved by the Minister;
- requiring practitioners to hold professional indemnity insurance; and
- removing restrictions on business ownership.

Key Directions also states that Western Australia will replace current practice protection provisions with core practice restrictions. Western Australia will retain the existing practices for three years from June 2001, while the Health Department facilitates a project to help the professions identify the core practices that warrant restriction. If the professions are unable to determine core practices within three years, then the existing practice protection will be removed from the legislation (Health Department of Western Australia 2001, p. 5).

The reform proposals outlined in *Key Directions* would, if developed and implemented in relevant legislation, comply with the CPA clause 5 principles. Western Australia has advised the Council that Parliamentary counsel has been instructed to draft the legislation and that the Government is finalising its legislative priorities for 2002 (Department of Treasury and Finance 2002).

By retaining its existing practice restrictions for three years, Western Australia has not met the Council of Australian Governments' (CoAG) deadline of 30 June 2002 for completing the review and reform of legislative restrictions on competition. The Council accepts that the potential risks to public safety justify retaining the existing practice restrictions as a transitional measure while the core practices are developed. The Council also accepts that the core practices model is a significant reform, requiring substantial input and participation from health practitioners and other experts over time. The Council will consider Western Australia's progress with its core practices review in the 2003 NCP assessment, to ensure it remains on track for completion by June 2004.

South Australia

South Australia completed a review of the *Chiropractors Act 1990*, which registers both chiropractors and osteopaths, in 1999. The review recommended amending the Act to register chiropractors and osteopaths separately, and renaming the Act to reflect its administration of two separate

professions. The review also recommended limiting the practices reserved for chiropractors and osteopaths to 'manipulation or adjustment of the joints or spinal column', and removing business licensing. Further, the review recommended amending advertising restrictions to prohibit only false and misleading advertising.

South Australia has advised that it is preparing a Bill to amend the Act (Government of South Australia 2002). South Australia has yet to complete its review and reform activity, so has not met its CPA clause 5 obligations in relation to this legislation. The Council considers that the review recommendations satisfactorily address competition questions. It will finalise its assessment of CPA compliance in 2003.

The ACT

The ACT completed a consolidated review of its 11 health profession Acts in March 2001. The review found a net public benefit in maintaining a system for registering health professionals who meet specified statutory entry standards, and restricting the use of relevant professional titles to registered health practitioners. It did not find an overwhelming benefit from maintaining the current scope of practice restrictions, and recommended removing legislative restrictions on practice by unregistered persons.

The review recommended recasting existing restrictions on the conduct of health practitioners so they are expressed as specific, unambiguous requirements with an identifiable and direct public protection role. It also recommended replacing advertising restrictions with a general ban on misleading advertising.

The ACT Government approved the drafting of legislation that incorporates the review recommendations (ACT Government 2002). It will release an exposure draft Health Professions Bill 2002 in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002. The reforms recommended by the review appear consistent with CPA principles, but the Council cannot finalise the assessment of compliance until the Bill is introduced to, and passed by, Parliament. The Council will finalise its assessment of CPA compliance in 2003.

The Northern Territory

The Northern Territory registers chiropractors, Aboriginal health workers, occupational therapists, osteopaths, physiotherapists and psychologists under the *Health Practitioners and Allied Professionals Registration Act*. The Act sets entry standards, requires registration, protects the various titles and reserves the area of practice for each discipline.

The former Northern Territory Government commissioned the Centre for International Economics to review the Act. Completed in May 2000, the review recommended continuing to reserve the use of professional titles for

registered practitioners, but making entry requirements more flexible and clarifying personal fitness criteria.

The review also recommended giving the board the ability to restrict treatments or procedures that have a high probability of causing serious damage, if they are likely to be performed by people without the appropriate skills and expertise. Any person who demonstrates that they are appropriately qualified and experienced, however, would be permitted to perform these practices. The review envisaged that any practice restrictions would have the status of subordinate legislation, requiring them to undergo regulation impact assessment before introduction.

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Health Practitioners and Allied Professionals Registration Act and five other health practitioner registration Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The review recommendations regarding the regulation of chiropractors appear consistent with the CPA clause 5 guiding principle, but the Council cannot finalise the assessment of compliance until the Bill is introduced to, and passed by, Parliament. The Council will finalise its assessment of CPA compliance in 2003.

Table 6.1: Review and reform of legislation regulating the chiropractic profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Chiropractors and Osteopaths Act 1991*	Entry, registration, title, practice, discipline, advertising	New South Wales completed the review in January 2000. The review recommended limiting reserved practice to spinal manipulation and removing some advertising restrictions.	New South Wales enacted a new *Chiropractors Act 2001* in line with recommendations.	Meets CPA obligations (June 2001).
Victoria	*Chiropractors and Osteopaths Act 1978*	Entry, registration, title, practice, discipline, advertising	Victoria completed the review in 1996. The review recommended retaining title protection and removing commercial and practice restrictions.	Victoria enacted a new *Chiropractors Registration Act 1996* in line with the recommendations.	Meets CPA obligations (June 2001).
Queensland	*Chiropractors and Osteopaths Act 1979*	Entry, registration, title, practice, discipline, advertising, business	Queensland completed its health professions review in 1999. A brief summary appears in the 2001 NCP annual report. The review of core practice restrictions has been completed, but its recommendations are yet to be implemented.	Queensland enacted new chiropractic legislation in May 2001. The Government expected to amend legislation to implement reforms to practice restrictions by mid-2002.	Council to finalise assessment in 2003.
Western Australia	*Chiropractors Act 1964*	Entry, registration, title, practice, discipline	Issues paper was released in October 1998. *Key Directions* paper was released in June 2001.	The Government has instructed Parliamentary counsel to draft replacement legislation.	Council to finalise assessment in 2003.
South Australia	*Chiropractors Act 1991*	Entry, registration, title, practice, discipline, advertising	South Australia completed the review in 1999. The review recommended removing ownership restrictions and amending practice reservation and advertising codes.	Cabinet has approved drafting of amendments to the Act. A Bill is being drafted.	Council to finalise assessment in 2003.

(continued)

Table 6.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Chiropractors Registration Act 1982*	Entry, registration, title, practice, discipline, advertising	Tasmania enacted new legislation after assessing it under clause 5(5) of the CPA.	Tasmania enacted a new *Chiropractors and Osteopaths Act 1997*.	Meets CPA obligations (June 2001).
ACT	*Chiropractors and Osteopaths Act 1983*	Entry, registration, title, practice, discipline	The ACT completed its health practitioner legislation review in March 2001. The review recommended revisions to advertising and conduct provisions. It did not establish an overwhelming benefit from maintaining the scope of practice restrictions.	The Government will release an exposure draft of an omnibus Health Professions Bill 2002 (incorporating review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.	Council to finalise assessment in 2003.
Northern Territory	*Health Practitioners and Allied Professionals Registration Act*	Entry, registration, title, practice, discipline	Review was completed in May 2000. Its recommendations include retaining title restriction and removing generic practice restrictions.	Omnibus Bill is being drafted.	Council to finalise assessment in 2003.

Dental practitioners

Dental practitioners include dentists and related para-professionals such as dental auxiliaries (dental therapists and dental hygienists), dental prosthetists and dental technicians. The 2001 NCP assessment reported that Tasmania had met its CPA obligations in relation to dental practitioners. This 2002 NCP assessment considers other jurisdictions compliance with their CPA clause 5 obligations regarding dental practitioner legislation.

New South Wales

The *Dentists Act 1989* reserves the title 'dentist' and the practice of dentistry to dentists registered under the Act. It also restricts the employment of dentists by nondentists (which has the effect of preventing nondentist ownership of dental practices).

The Department of Health completed a review of the Dentists Act in March 2001. The review recommended continuing to regulate dental practitioners by reserving relevant titles for registered members of the profession; replacing the current restriction on the practice of dentistry with five restricted core practices; and removing restrictions on the employment of dentists and the ownership of dental practices (NSW Health 2001, p. 51).

The Government accepted the review recommendations except that regarding the ownership restrictions. The *Dental Practice Act 2001* (which replaces the Dentists Act) retains restrictions on the employment of dentists by nondentists.

New South Wales argues that the Dental Practice Act gives effect to the spirit of the review and delivers most of the benefits that would have resulted from removing the employment restriction, noting that:

- the new Act provides an exemption for health insurance funds (which are generally the only organisations to have indicated interest in entering the market, so are expected to be the main source of increased competition); and

- other nondentists can apply to the Dental Board for permission to employ dentists and therefore own dental practices, by demonstrating that it is in the public interest (excluding the interests of registered dentists) that they be allowed to do so (New South Wales Government 2002, p. 19–20).

To comply with the CPA clause 5 guiding principle, governments must demonstrate that any remaining legislative restrictions on competition are necessary to achieve the objectives of the Act. In this case, the object of the Act is to protect the health and safety of members of the public. The employment restrictions may contribute to this objective by screening out some potential employers (owners) who might seek to exploit dental patients.

The review of the Act found, however, that there less restrictive ways of protecting patients.

The Dentists Act review recommended negative licensing of dental practice owners, by making it an offence for an employer to direct a dentist to provide unnecessary services or engage in unprofessional conduct, and providing a power to ban people found guilty of an offence from participating in health care businesses. The review considered that this approach would eliminate the potential risk of commercial considerations overriding professional obligations while having only marginal impacts on competition (NSW Health 2001, p. 49).

New South Wales ruled out the negative licensing model on the basis that the costs of establishing and enforcing the offences would outweigh the benefits (New South Wales Government 2002, p. 19). It did not provide any evidence to support this claim, even though it applies a similar negative licensing approach to medical practices. That both Tasmania and Queensland operate similar systems of offences for dental practice owners raises further questions about New South Wales' argument.

Further, other options may be less restrictive than the New South Wales' approach. A formal positive licensing approach would be less restrictive of competition than the 'exemptions' model because it would provide greater transparency and accountability regarding decision-making. Alternatively, rather than requiring applicants to satisfy the board that it is in the public interest to approve their exemption, the Act could simply require applicants to show that approval is not contrary to the public interest.

The Council finds that as New South Wales has provided scant evidence to justify ruling out potentially less restrictive alternatives, it has not made a convincing case that employment and ownership restrictions are necessary to achieve its regulatory objectives. New South Wales has therefore not met its CPA obligations in relation to the review and reform of its dental practitioner legislation.

The competition impacts of New South Wales' employment and ownership restrictions will depend on how the Dental Board uses its power to grant exemptions. If the board uses the exemption power to protect patient welfare and not incumbent service providers, then adverse impacts on competition are likely to be minimal. The Council acknowledges that the Dental Practice Act directs the board to exclude the interests of the profession when assessing the public interest. The Premier indicated to the Council that New South Wales is not intending to use the employment and ownership restrictions to protect incumbents. The Council has sought information on how the board will apply the public interest test in practice, and it will finalise the assessment in 2003.

Victoria

Victoria reformed its regulation of dental professions (dentists and technicians) with the *Dental Practice Act 1999*. The Act retains the

requirement for registration and the reservation of title and practice, and introduced a requirement for registrants to be adequately covered by professional indemnity insurance. The Act removed a number of restrictions on the conduct of business, but retains a power for the registration board to examine advertising.

Victoria reviewed its general approach to regulating advertising by health practitioners during its review of the *Nurses Act 1993* and *Medical Practice Act 1994*. The review recommended a common set of advertising provisions for adoption in all Victorian health practitioner legislation. It also recommended empowering the boards to issue guidelines to clarify those provisions.

Victoria amended the advertising provisions of the Dental Practice Act in mid-2000. The amendments took account of the Medical Practice Act review but went beyond the review recommendation. They allowed the Dental Board to 'issue guidelines about the minimum standards acceptable to the board for or with respect to the advertising of dental services' (s. 66[1]). This gave the board a capacity to impose standards on any aspect of advertising services and potentially restrict practitioners' activity beyond what is necessary to clarify the provisions of the legislation. This provision could result in a net cost to the community if, for example, the board imposes restrictions that unnecessarily limit information flow.

Further, the amendments did not hold the board accountable to the Parliament for the content of any advertising guidelines that it issues. Often, where a board proposes professional standards, the relevant Minister must endorse the standards. This reduces the danger of 'regulatory creep' — the danger that a profession-dominated regulatory body will increase restrictions that reduce competition among members of the profession. The board's power to issue guidelines therefore appeared to exceed the CPA clause 5(1) test that restrictions on competition are necessary to achieve the objectives of the legislation.

In 2002, the Victorian Parliament passed further amendments to require Ministerial endorsement of advertising guidelines. External approval mechanisms help to ensure any guidelines issued by the board serve the interests of the public and do not sanction anticompetitive conduct. As a result, the Council considers that Victoria has met its CPA obligations in relation to the review and reform of legislation governing dental practitioners.

Queensland

Queensland introduced legislation to reform all of its health practitioner legislation. The new dental legislation — the *Dental Practitioners Registration Act 2001* and the *Dental Technicians and Dental Prosthetists Registration Act 2001* — mirrors most of the elements of the chiropractic legislation described earlier. The most significant difference is that the Dental Practitioners Registration Act provides for a register for specialist dentists (for example, oral maxilla-facial surgeons).

Like the chiropractic legislation, the Dental Practitioners Registration Act retains the existing practice restrictions pending the outcomes of a core practices review. Queensland commissioned PricewaterhouseCoopers to undertake a public benefit test of restrictions on the practice of dentistry. The Government released the public benefit test report for further consultation in June 2001.

The report recommended relaxing some of the restrictions on practice. The proposed model would limit the performance of invasive or irreversible procedures on the oral facial complex to dentists, dental specialists and medical practitioners, but would not restrict dental technical work, advice and diagnosis, or noninvasive and nonpermanent procedures.

The report also recommended removing or amending some commercial restrictions, including:

- removing the requirement that dental technicians work to the written prescription of a dentist, dental specialist or dental prosthetist;
- removing the requirement that dental therapists work in the public sector; and
- removing the prohibition on dental therapists treating adults (allowing dental therapists to treat adults under supervision) (PricewaterhouseCoopers 2000b).

Queensland advised that it needs to undertake further targeted consultations to resolve stakeholder concerns with some of the review recommendations, which it expected to complete by May 2002. It anticipated making legislative amendments to reform the practice restrictions in mid-2002.

The changes implemented in Queensland and the core practices model recommended in the public benefit test report appear consistent with the CPA clause 5 guiding principle. The Council cannot, however, finalise the assessment of compliance until Queensland has announced and implemented its response to the core practices review. Given that Queensland expected to make legislative amendments by mid-2002, the Council will finalise its assessment of CPA compliance in 2003.

Western Australia

The section on chiropractors discusses the general health practitioner legislation reforms announced in Western Australia's *Key Directions* paper. In addition, *Key Directions* announced some reforms specific to the dental professions. Western Australia will:

- remove the restriction on the number of dental therapists and dental hygienists that a dentist may employ;

- allow dental prosthetists to construct and fit partial dentures, providing the practitioner meets specific training requirements set by the board;
- remove the restrictions on the ownership of dental practices; and
- remove the ban on private sector employment of school dental therapists (Western Australia Department of Health 2001, pp. 5–6).

The Government has instructed Parliamentary counsel to draft legislation (Department of Treasury and Finance 2002).

Western Australia did not met CoAG's deadline of 30 June 2002 for completing the review and reform of legislative restrictions on competition The reforms outlined in *Key Directions* are likely to meet the CPA clause 5 obligations if developed and implemented in legislation. *Key Directions* is only a framework for reform, however, so the Council cannot use it as a basis for assessment. Further, Western Australia proposes to retain its existing practice restrictions until June 2004 as a transitional measure.

The Council accepts that the potential risks to public safety justify Western Australia retaining the existing practice restrictions as a transitional measure while the core practice restrictions are developed. The Council also accepts that the core practices model is a significant reform, requiring substantial input and participation from health practitioners and other experts. The Council will consider Western Australia's progress towards completing the core practices review in the 2003 NCP assessment to ensure that it remains on track for completion by June 2004.

South Australia

The Competition Policy Review Team in the Department of Human Services reviewed the South Australian *Dentists Act 1984* in 1998, producing a final report in February 1999. In response to the review, South Australia passed a new *Dental Practice Act 2001* in June 2001. This Act implements most of the recommendations of the review, but does not adopt one key recommendation.

The review recommended that 'all ownership restrictions, direct and indirect, contained in the Act should be removed' (Department of Human Services 1999a, recommendation 18). South Australia's new Act retains business licensing requirements, limits on the number of registrants able to be employed in a practice, and restrictions on ownership and association.

The new Act also includes a power for the Governor to grant exemptions by proclamation. The Government intends to use the exemption provisions 'to cater for situations on a case by case basis, such as Health Funds providing dental services via registered practitioners as part of their service to members, organisations providing dental services for their employees and families, and the South Australian Dental Service' (Brown 2000).

The Council raised the ownership restrictions with South Australia in November 2000. In its 2002 NCP annual report, South Australia noted that it had introduced new exemption powers and observed that there is already nondentist ownership of dental practices, which it expects to continue (Government of South Australia 2002).

South Australia, New South Wales and Western Australia are the only jurisdictions with restrictions on the ownership of dental practices. Western Australia has advised that dental legislation being drafted will remove the restriction on ownership of practices. Victoria removed ownership restrictions following its NCP review. Queensland's and Tasmania's new dental practitioner Acts did not introduce ownership restrictions.

To comply with the CPA principles, governments need to show that legislative restrictions on competition are necessary to achieve the objective of the legislation. In this case, the objective of the Act is to protect the health and safety of members of the public. The ownership restrictions may contribute to this objective by screening out some of the potential employers who might seek to exploit dental patients, but there are less restrictive alternatives.

South Australia's Dental Practice Act makes it an offence to pressure a dentist to act unlawfully, improperly, negligently or unfairly in relation to the provision of dental treatment. Where a government considers that such offence provisions alone may not provide adequate protection, it is open to the government to adopt additional measures, such as either

- a negative licensing system for dental practice owners, which would allow people found guilty of pressuring dentists to engage in unprofessional conduct to be banned from any further involvement in health care businesses; or

- a positive licensing system, which would allow potential dental practice owners to be screened before they purchase a business, but would still provide greater transparency and accountability than provided by South Australia's exemptions model.

The Council considers that South Australia has not met its CPA obligations in relation to the review and reform of its dental practitioner legislation, because it has not offered a public interest case for retaining the ownership restrictions. The impacts on competition will depend, however, on how the Government uses its power to grant exemptions from the restrictions. In particular, it will depend on the transparency and consistency of the decision-making process, and on whether decisions are based on protecting patients or incumbent dental practice owners.

If South Australia demonstrably uses the exemption power to safeguard the welfare of patients, then the ownership restrictions are likely to have negligible adverse impacts on competition. The Council recognises that South Australia already has some nondentist ownership of dental practices. It has sought a commitment that South Australia will focus the exemption power on

safeguarding patient welfare. It will monitor the exemption process and finalise its assessment of CPA compliance in 2003.

The ACT

The section on chiropractors discusses the general health practitioner reforms recommended by the ACT's health practitioner legislation review. In addition to the general recommendations applying to all health professions, the review made some specific recommendations in relation to dental practitioners.

- The review recommended removing requirements for the registration of dental technicians. The review considered that, given that dental technicians work to the order of registered dentists or dental prosthetists, the dentists/dental prosthetist is responsible for ensuring the technician is qualified and competent.

- The review recommended removing the requirement for dental prosthetists to hold professional indemnity insurance (and not imposing insurance requirements on other professions). The review found that while these requirements reinforce good commercial practice, it is not clear that they either provide a demonstrable public benefit or belong in legislation concerning the direct fitness and standards of a health professions.

- The review recommended removing the restrictions on the scope of practice of dental hygienists and dental therapists. The review noted that limiting hygienists' and therapists' practice minimises risks, but found that other provisions requiring hygienists and therapists (and any registered dentist who may direct their activities) to maintain safe standards of professional practice have a similar effect.

The Government approved the drafting of legislation that incorporates the review recommendations. It will release an exposure draft of the Health Professionals Bill in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.

The ACT did not meet CoAG's 30 June 2002 deadline for completing legislation review and reform. Given that it expects to introduce the Health Professionals Bill into the Legislative Assembly in late-2002, however, the Council will finalise its assessment of CPA compliance in 2003.

The Northern Territory

Dental services in the Territory are provided by dental specialists, dentists, dental therapists, dental hygienists (all of whom are regulated by the *Dental Act*), Aboriginal health workers (registered under a separate Act) and dental prosthetists (not currently registered). The former Northern Territory Government commissioned the Centre for International Economics to conduct a review of the Dental Act. Completed in May 2000, the review recommended:

- maintaining registration for practitioners covered by the Act and extending registration to dental prosthetists;
- requiring registrants to demonstrate continuing competency;
- clarifying personal fitness criteria in the legislation;
- restricting the right of title for the various classifications;
- amending reserved practice to promote mobility between oral health professionals, by:
  - expressing allowable activities in terms of core competencies and what each professional is capable of doing; and
  - including provisions for other persons (including nondental professionals) who can demonstrate competence to provide otherwise reserved treatments and procedures;
- removing restrictions on dental therapists working outside the public sector;
- removing restrictions on dental therapists providing services to adults;
- removing the ownership restrictions; and
- retaining the advertising restrictions, which are based on the principles of the *Trade Practices Act 1974* (the TPA).

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Dental Act and five other health practitioner registration Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The Northern Territory did not meet CoAG's 30 June 2002 deadline for completing the review and reform of its legislation regulating dentists. The Northern Territory will comply with the CPA clause 5 guiding principle, however, if the current Government implements the review recommendations. Given that the Northern Territory is making progress towards completing its review and reform activity, the Council will finalise its assessment of CPA compliance in 2003.

Table 6.2: Review and reform of the legislation regulating the dental professions

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Dental Technicians Registration Act 1975* *Dentists Act 1989*	Entry, registration, title, practice, discipline, advertising	Review was completed in March 2001. It recommended reserving 'core' practices only and removing restrictions on the employment of dentists and the ownership of dental practices.	Legislation was replaced by the *Dental Practice Act 2001,* which implements most review recommendations but retains some restrictions on the employment of dentists.	Employment/ownership restrictions - Council to finalise assessment in 2003. Other areas- meets CPA obligations.
Victoria	*Dental Technicians Act 1972* *Dentists Act 1972*	Entry, registration, title, practice, discipline, advertising, ownership	Review was completed in July 1998. It recommended retaining restrictions on use of title, types of work, and fair and accurate advertising; removing ownership restrictions; removing restrictions on 'disparaging remarks' in advertising; and allowing dental therapists to work in the private sector.	Legislation was replaced with the *Dental Practice Act 1999*. The new Act was amended in 2000 to require practitioners to hold professional indemnity insurance and allow the board to impose advertising restrictions. Further amendments made in 2002 require the Minister to approve advertising restrictions proposed by the board.	Meets CPA obligations (June 2002).
Queensland	*Dental Act 1971* *Dental Technicians and Dental Prosthetists Act 1991*	Entry, registration, title, practice, discipline, advertising, business	Review of health practitioner Acts was completed in 1999. Brief summary appears in the 2001 NCP annual report. Review of the restrictions on the practice of dentistry was also completed and released for public comment in June 2001.	New dental legislation was passed in May 2001. Government is considering the recommendations of the core practices review, and expected to make legislative amendments implementing the final policy approach by mid-2002.	Council to finalise assessment in 2003.
Western Australia	*Dental Act 1939* *Dental Prosthetists Act 1985*	Entry, registration, title, practice, discipline	Issues paper was released in October 1998. *Key Directions* paper was released in June 2001. It stated that ownership restrictions would be removed, but current practice restrictions would be retained for three years to allow the identification of core practices.	Amendments are being drafted.	Council to finalise assessment after core practices review.

(*continued*)

Table 6.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Dentists Act 1984*	Entry, registration, title, practice, discipline, ownership, advertising, business	Review was completed in February 1999. Its recommendations included: changing the disciplinary process; introducing paraprofessional registration; removing some areas of reserved practice; and removing ownership restrictions.	Act was repealed and replaced by the *Dental Practice Act 2001*. The new Act retains limits on ownership and related restrictions, contrary to review recommendations.	Ownership restrictions — Council to finalise assessment in 2003. Other areas — meets CPA obligations.
Tasmania	*Dental Act 1982* *Dental Prosthetists Registration Act 1996* *School Dental Therapy Act 1965*	Entry, registration, title, practice, discipline, advertising	Tasmania assessed the new *Dental Practitioner Act 2001* under clause 5(5) of the CPA.	Tasmania passed a new *Dental Practitioner Act 2001* in April 2001, removing some restrictions on practice and all specific restrictions on advertising, and clarifying that there are no restrictions on ownership.	Meets CPA obligations (June 2001).
ACT	*Dental Technicians and Dental Prosthetists Registration Act 1988* *Dentists Act 1931*	Entry, registration, title, practice, discipline	Review was completed in March 2001. It recommended revisions to advertising and conduct provisions. Review did not establish an overwhelming benefit from maintaining the scope of practice restrictions.	The Government will release an exposure draft of an omnibus Health Professions Bill 2002 (incorporating review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.	Council to finalise assessment in 2003.
Northern Territory	*Dental Act*	Entry, registration, title, practice, discipline, advertising, ownership	Review was completed in May 2000. Its recommendations included registering all paraprofessionals, amending practice restrictions and removing ownership restrictions.	Omnibus health practitioner Bill is being drafted.	Council to finalise assessment in 2003.

Medical practitioners

The 2001 NCP assessment reported that New South Wales had met its CPA obligations in relation to medical practitioners. This 2002 NCP assessment considers whether the other jurisdictions have met their CPA obligations in this area.

Victoria

Victoria began its review of the *Medical Practice Act 1994* with a discussion paper released in October 1998. The Victorian Parliament introduced amendments to the Act in mid-2000. These amendments required registrants to hold professional indemnity insurance and revised the advertising provisions to allowed the Medical Practitioners Board to issue guidelines regarding advertising (see the section on dentists).

The Medical Practice Act review recommended conferring on the Medical Practitioners Board a power to issue guidelines to clarify the advertising provisions (State Government of Victoria 2001a). The provisions enacted by Victoria were inconsistent with this recommendation, however, and appeared to have the potential to restrict competition more than was necessary to achieve the objectives of the legislation (see the section on dentists).

In response to concerns raised by the Council, Victoria amended the Medical Practice Act in April 2002 to require Ministerial endorsement of advertising guidelines developed by the board (see the section on dentists). External approval mechanisms help to ensure any guidelines issued by the board serve the interests of the public and do not sanction anticompetitive conduct. As a result, Council considers that Victoria has now met its CPA obligations in relation to the review and reform of its medical practitioner legislation.

In March 2002, the Medical Practitioners Board issued draft advertising guidelines for consultation. The draft guidelines appear to contain some new restrictions on competition. They prohibit, for example, any use of 'before and after photographs', whereas the Act appears to prohibit only the false, deceptive or misleading use of these photographs. The Department of Human Services is consulting with the board to resolve concerns about the additional restrictions, and expects that the final guidelines issued by the board will be consistent with the advertising provisions of the Medical Practice Act. The Ministerial approval process provides Victoria with scope to ensure any new restrictions in the final guidelines comply with CPA requirements.

Queensland

Queensland began its reform program for health professions regulation through the framework legislation enacted for all health professions late in

1999. The second stage of reform, new registration legislation, was completed in May 2001 (see the section on chiropractors).

The *Medical Practitioners Registration Act 2001* contains some differences from the chiropractic legislation. It contains specialist registration and special-purpose registration, and provides for the registration of interns. Practice restrictions are subject to further NCP review.

The reforms implemented in Queensland appear consistent with CPA principles, but the Government did not complete its reforms to practice restrictions before the CoAG deadline of 30 June 2002. Given that Queensland expected to make legislative amendments to implement practice restriction reforms by mid-2002, the Council will finalise its assessment of CPA compliance in 2003.

South Australia

South Australia completed a review of the *Medical Practitioners Act 1983* in March 1999. The Government introduced a new Medical Practice Bill to the Parliament in May 2001, which implements the recommendations of the review. Given that the Bill lapsed following the State election, the Council will finalise its assessment of CPA compliance in 2003 NCP.

Western Australia

Western Australia has completed an NCP review of its *Medical Act 1894* as part of a broader review of the Act, with the aim of producing new legislation that complies with NCP principles. The review released a draft report in October 1999, which recommended that the new Act should retain registration requirements, remove prohibitions on nonregistrants practising medicine, limit the number of reserved titles, incorporate major changes to the disciplinary system, and incorporate revised advertising restrictions (Medical Act Review 1999). The Government has advised that it is now finalising its response.

Western Australia did not complete its review and reform activity at 30 June 2002. Given that it has completed the review, however, and is finalising its response, the Council will finalise the assessment of CPA compliance in 2003.

Northern Territory

The former Northern Territory Government commissioned the Centre for International Economics to undertake a review of its *Medical Act*. Completed in May 2000, the review recommended continuing to reserve the title 'medical practitioner' for registered medical practitioner, but repealing residency requirements, allowing greater flexibility for assessing entry qualifications and introducing a requirement for continuing professional education. The review recommended removing the reservation of practice, but empowering

the board to restrict treatments or procedures that have a high probability of causing serious damage. The review also recommended removing advertising and ownership restrictions.

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Medical Act and five other health practitioner registration Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The Northern Territory did not meet CoAG's 30 June 2002 deadline for completing the review and reform of its legislation regulating medical practitioners. The Northern Territory will comply with the CPA clause 5 guiding principle, however, if the current Government implements the review recommendations. Given that the Northern Territory is making progress towards completing its review and reform activity, the Council will finalise its assessment of CPA compliance in 2003.

Other jurisdictions

Tasmania has completed a review of the *Medical Practitioners Registration Act 1996*, but did not complete its reform activity by 30 June 2002. Cabinet will, however, consider the review soon (Government of Tasmania 2002).

The ACT did not complete the reform of its health practitioner legislation before CoAG's 30 June 2002 deadline. The ACT Government has approved the drafting of legislation that incorporates the review recommendations (see the section on chiropractors) and expected to introduce the resulting Bill into the Legislative Assembly by late-2002.

Given that both jurisdictions are progressing reforms of their medical practitioner legislation, the Council will finalise its assessment of CPA compliance in 2003.

Table 6.3: Review and reform of legislation regulating the medical profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Medical Practice Act 1992*	Entry, registration, title, practice, discipline, advertising	Review report was released in December 1998. Its recommendations included inserting an objectives clause, clarifying entry requirements, reforming the disciplinary system and removing the business and practice restrictions.	*Medical Practice Amendment Act 2000* was passed in July 2000, which implemented the review recommendations.	Meets CPA obligations (June 2001).
Victoria	*Medical Practice Act 1994*	Entry, registration, title, practice, discipline, advertising	Victoria released a discussion paper in October 1998 and completed the review report in March 2001.	*Health Practitioner Acts (Amendment) Act 2000* amended advertising provisions, including the ability of the board to impose additional restrictions. Further amendments in 2002 required Ministerial endorsement of advertising restrictions proposed by the board.	Meets CPA obligations (June 2002)
Queensland	*Medical Act 1939*	Entry, registration, title, practice, discipline, advertising, business	Queensland completed a review of its health practitioner registration Acts in 1999. The review report is not publicly available, but a brief summary appears in Queensland's 2001 NCP annual report. The core practices review has been completed, but the Government is yet to decide on the final policy approach.	Framework legislation was passed in 1999. New *Medical Practitioners Registration Act 2001* was passed in May 2001, preserving practice restrictions subject to review.	Council to finalise assessment in 2003.
Western Australia	*Medical Act 1894*	Entry, registration, title, practice, discipline, advertising	Draft report released October 1999. Its recommendations included removing reserved practice, limiting the reservation on title, changing the disciplinary system and introducing new advertising restrictions.		Council to finalise assessment in 2003.

(continued)

Table 6.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Medical Practitioners Act 1983*	Entry, registration, title, practice, discipline, advertising, business	Review was completed in 1999. It recommended removing ownership restrictions, registering medical students, requiring declaration of commercial interests and requiring professional indemnity insurance.	New legislation was introduced in May 2001, but lapsed following the calling of the State election.	Council to finalise assessment in 2003.
Tasmania	*Medical Practitioners Registration Act 1996*	Entry, registration, title, practice, discipline, advertising	Review has been completed. Ownership restrictions are the key NCP issue.	Cabinet is to consider review shortly.	Council to finalise assessment in 2003.
ACT	*Medical Practitioners Act 1930*	Entry, registration, title, practice, discipline, advertising	Consolidated review of all ACT health professional legislation commenced with the release of an issues paper in May 1999 and was completed in March 2001.	The Government will release an exposure draft of an omnibus Health Professions Bill 2002 (incorporating review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.	Council to finalise assessment in 2003.
Northern Territory	*Medical Act*	Entry, registration, title, practice, discipline, advertising, ownership, business	Review was completed in May 2000. Its recommendations included removing generic practice, ownership and advertising restrictions, and retaining title protection.	Omnibus health practitioner Bill is being drafted to replace this and other Acts.	Council to finalise assessment in 2003.

Nurses

The 2001 NCP assessment reported that South Australia and Tasmania had met their CPA obligations in relation to nurses. This 2002 NCP assessment considers whether other jurisdictions have met their CPA obligations in this area.

New South Wales

NSW Health commenced a review of the *Nurses Act 1991* in 1999 and submitted the final report to the Minister for Health in February 2000. The Government approved the review's recommendations in November 2001 and agreed to the drafting of legislation to implement the recommendations (New South Wales Government 2002, p. 18).

The review considered that any regulation of nurses and midwifery should have two objectives: first, to protect the health and safety of members of the public by providing mechanisms to ensure nurses and midwives are fit to practise; and second, to provide mechanisms to enable the public and employers to readily identify nurses and midwives who are fit to practise.

The review recommended continuing to regulate nurses and midwives by restricting the use of their professional titles to registered members of the profession. It recommended maintaining the system whereby the board accredits education courses for registration purposes, but making the process more open and transparent by introducing an appeal mechanism. It also recommended removing the minimum age requirement for registration.

To ensure the ongoing competence of registered practitioners, the review recommended that nurses and midwives be required to make declarations about their professional activities and ongoing fitness to practise. It also recommended giving the board the power to inquire into a practitioner's competence or fitness to practise if it is not satisfied with the practitioner's declaration.

Other recommended changes included relaxing practice restrictions in the area of midwifery, requiring the board to seek the Minister's approval of any codes of conduct that it develops, changing the size and composition of the board, and reforming the complaints and disciplinary systems.

New South Wales has enacted legislation allowing advanced nurse practitioners to have limited prescribing and referring rights, but did not complete its reform activity by the CoAG deadline of 30 June 2002. Given that New South Wales has advised the Council that it intends to introduce amending legislation into Parliament during 2002 (New South Wales Government 2002, p. 18), the Council will finalise its assessment of CPA compliance in 2003.

Victoria

The Department of Human Services conducted a review of the *Nurses Act 1993* in combination with the Medical Practice Act during 1998-99. The department released an issues paper for consultation in October 1999, although the final report was not publicly released. The Government also commissioned a report into nurse practitioners, which was released in July 2000.

Victoria amended its nursing legislation in late 2000 in response to both reviews. In the 2001 NCP assessment, the Council considered that the remaining restrictions on competition generally appeared to provide a net community benefit, but it questioned the ability of the nursing board to impose additional advertising restrictions (see the section on dentistry).

In response to the Council's concerns, Victoria amended the Act to require Ministerial approval of any advertising guidelines issued by the board. External approval mechanisms help to ensure any guidelines issued by the board serve the interests of the public and do not sanction anticompetitive conduct. The Council considers that the advertising restriction now complies with CPA principles.

During the passage of the original amendments in 2000, the Minister for Health undertook to further consider outstanding concerns of key stakeholders. The Department of Human Services released a discussion paper in August 2001 which examined a range of issues, including the regulation of nursing agencies and the regulation of nursing practice.

In March 2002, the Government introduced legislative amendments to create a negative licensing scheme for nurses agents, with the aim of ensuring agents do not pressure nurses to engage in unprofessional conduct. As discussed in the 2001 NCP assessment, the Council considers that legislating limits on the influence of health care business owners on health professional's clinical decisions does not contravene CPA principles provided that the limits are applied in a nondiscriminatory manner.

Northern Territory

The former Northern Territory Government commissioned the Centre for International Economics to undertake a review of the *Nursing Act*. The review recommendations included:

- retaining restrictions on the use of professional titles;
- requiring registrants to demonstrate continuing competence;
- removing the reservation of practice (but empowering the board to restrict certain treatments or procedures that have a high probability of causing serious damage);

- retaining requirements for bodies corporate that provide nursing services to provide information to the board; and

- removing advertising restrictions.

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Nursing Act and five other health practitioner registration Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The Northern Territory did not meet CoAG's 30 June 2002 deadline for completing the review and reform of its legislation regulating nurses. The Northern Territory will comply with the CPA clause 5 guiding principle, however, if the current Government implements the review recommendations. Given that the Northern Territory is making progress towards completing its review and reform activity, the Council will finalise its assessment of CPA compliance in 2003.

Other jurisdictions

Queensland is reviewing the *Nursing Act 1992* separately from its review of other health practitioner registration legislation. Queensland Health commenced an NCP review of the Nursing Act in October 1999, and released a discussion paper in November 2001. Queensland expected to release the public benefit test report in March 2002 and implement amending legislation (if any) by mid-2002 (Queensland Government 2002).

Western Australia has completed an omnibus review of its health practitioner legislation and announced the policy framework for replacement legislation (see the section on chiropractors). Western Australia announced one reform specific to nurses: that is, nurses registered in other Australian jurisdictions or New Zealand who are responding to an emergency or retrieving organs in Western Australia will be deemed to be registered in Western Australia. Cabinet has instructed Parliamentary counsel to draft the replacement legislation (Department of Treasury and Finance 2002).

The ACT included the *Nurses Act 1988* in its review of health practitioner legislation. The review recommendations are outlined in the section on chiropractors. The review did not make any specific recommendations regarding nurses. The ACT Government has approved the drafting of legislation that incorporates the review recommendations, and expects to introduce the resulting Bill into the Legislative Assembly in late-2002 (ACT Government 2002).

Queensland, Western Australia and the ACT did not complete their review and reform activity by 30 June 2002. They have made considerable progress, however, so the Council will finalise its assessment of their CPA compliance in 2003.

Table 6.4: Review and reform of legislation regulating the nursing profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Nurses Act 1991*	Entry, registration, title, practice, discipline	Review commenced in 1999 with the release of an issues paper and was completed in February 2000.	The Government approved the review recommendations. Amending legislation is to be introduced during 2002.	Council to finalise assessment in 2003.
Victoria	*Nurses Act 1993*	Entry, registration, title, discipline	Discussion paper was released in October 1998. Review report is not publicly available.	Amending legislation was passed in November 2000. Further amendments to advertising provisions were made in 2002.	Meets CPA obligations (June 2002).
Queensland	*Nursing Act 1992*	Entry, registration, title, practice, discipline	Review commenced in October 1999. Discussion paper was released November 2001. Government expected to release the public benefit test report in March 2002, but has not yet done so.	The Government expected to implement amending legislation (if any) by mid-2002.	Council to finalise assessment in 2003.
Western Australia	*Nurses Act 1992*	Entry, registration, title, practice, discipline	Review has been completed. Issues paper was released in October 1998. *Key Directions* paper was released in June 2001.	Legislation is being drafted.	Council to finalise assessment in 2003.
South Australia	*Nurses Act 1984*	Entry, registration, title, practice, discipline	Review was completed in 1998. Its recommendations included improving accountability, removing restrictions on advertising and making minor changes to entry requirements.	New *Nurses Act 1999* was enacted in line with recommendations.	Meets CPA obligations (June 2001).
Tasmania	*Nursing Act 1995*	Entry, registration, title, practice, discipline	Review was completed in 1999. Restrictions related to registration were assessed as providing a net community benefit because they provide information to the consumer.	*Nurses Amendment Act 1999* removed practice restrictions.	Meets CPA obligations (June 2001).

(continued)

Table 6.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Nurses Act 1988*	Entry, registration, title, discipline	Consolidated review of all ACT health professional legislation commenced with the release of an issues paper in May 1999, and was completed in March 2001.	The Government will release an exposure draft of an omnibus Health Professions Bill 2002 (incorporating review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.	Council to finalise assessment in 2003.
Northern Territory	*Nursing Act*	Entry, registration, title, practice, discipline, advertising	Review was completed in May 2000. Its recommendations included removing advertising and practice restrictions, and retaining title protection.	Omnibus health practitioner bill is being drafted to replace this and other Acts.	Council to finalise assessment in 2003.

Optometrists and optical paraprofessionals

The 2001 NCP assessment reported that Victoria had met its CPA obligations in relation to the review and reform of its legislation governing optometry professions. This 2002 NCP assessment considers whether the other jurisdictions have met their CPA obligations in this area.

New South Wales

The Department of Health completed a review of the *Optometrists Act 1930* in December 1999. The review recommended extending prescribing rights, limiting reservation of practice and replacing restrictions on the ownership of optometry practices with a negative licensing system and restrictions on pressuring dental practitioners to engage in unprofessional conduct.

The Government introduced the Optometrists Bill 2001 to Parliament in October 2001. The Bill lapsed with the proroguing of Parliament in February 2002, so the Government introduced a revised Bill (the Optometrists Bill 2002*)* in April 2002. If passed, the Bill will implement most of the review recommendations, but it retains some ownership restrictions. Nonoptometrists may own optometry practices only if they owned the business before the ownership restrictions were introduced in 1945 (or, between 1945 and 1969, were granted an exemption) and they continue to operate at the same premises, or if they are exempted by the Minister or by regulation.

Most jurisdictions do not restrict optometry ownership. Western Australia and the ACT have never restricted ownership. Ownership restrictions were removed in South Australia in 1992, in Victoria in 1996 and in Queensland in March 2002. In addition, the Northern Territory has endorsed a recommendation to remove ownership restrictions. Tasmania is yet to complete its review.

New South Wales argued that it is in the public interest to retain ownership restrictions because:

- removing the ownership restrictions would result in a progressive concentration of optometry ownership that could undermine the viability of independent optometrists and therefore employment opportunities, particularly in small rural and regional areas;
- removing the ownership restrictions would, over time, reduce competition in some areas with only marginal improvements in competition in other areas that are already well served by competitive markets; and
- any net benefit arising from increased competition in some areas would not offset the costs of establishing offences to ensure nonoptometrist-owned practices maintain professional standards.

For the following reasons, the Council does not consider that these arguments provide a convincing public interest justification for retaining the ownership restrictions.

- It is not clear that removing ownership restrictions would undermine rural and regional employment opportunities.
  - The legislation review concluded that there is little evidence to suggest that large optical dispensing chains would purchase independent practices and then rationalise services to major regional centres, or engage in predatory conduct that would force smaller rural operators out of business.
  - The Australian Competition and Consumer Commission has found no evidence of regional monopolies. Its investigations have found evidence of effective entry in the past and of a growing competitive presence as a result of health funds establishing their own eye-care stores.
  - Australian Institute of Health and Welfare data on the optometrist workforce in 1998-99 show no relationship between jurisdictions with ownership restrictions and jurisdictions with high numbers of optometrists in rural and remote areas.
- Deregulating ownership would not necessarily reduce competition in some areas.
  - Contestable markets deliver competitive outcomes and the ACCC has found evidence of effective entry in the past.
  - The TPA provides a mechanism for dealing with concerns about regional monopolies.
- New South Wales has not provided any evidence to support its claim that the costs of establishing a system of offences outweigh the benefits of deregulating ownership.
  - The review identified benefits from removing the restrictions.
  - The review found that the risks associated with nonoptometrist ownership 'are of low level significance'. It also found that these risks have presented in optometrist-owned practices, raising doubts about the effectiveness of restricting ownership as a means of maintaining standards.
  - Queensland has applied similar offence provisions to its health professions, and New South Wales has applied this approach to owners of medical practices, suggesting that the costs of establishing the offences are not prohibitive.
- New South Wales did not investigate the use of a positive licensing system to ensure nonoptometrist owners maintain professional standards. A

positive licensing system would be less restrictive of competition than New South Wales' exemptions model because it would provide greater transparency and accountability.

The Council considers that New South Wales has not made a convincing case that the ownership restrictions provide a net benefit to the public and are necessary to achieve the objectives of the Act, so has not met its CPA obligations in relation to the review and reform of its optometry legislation.

The competition impacts of New South Wales's approach to regulating optometry ownership will depend on how the Government uses its power to grant exemptions. The Council considers that New South Wales will minimise the ownership restriction's adverse impacts on competition if it establishes a transparent and consistent process for making decisions on exemption applications, and bases decisions solely on community protection.

The Council raised its concerns with New South Wales during the 2002 NCP assessment and sought a commitment that the Government would use its ownership restrictions to protect the community rather than incumbent service providers. Although the Government assured the Council that its intention is not to restrict competition unless there is a clear consumer-based need, New South Wales has not yet explained how the exemptions will operate. The Council will monitor the exemption process and finalise the assessment in 2003.

Queensland

Queensland optometry regulation is undergoing a reform program common to the other health professions (see the section on chiropractors).

Queensland replaced the *Optometrists Act 1974* with the *Optometrists Registration Act 2001* in May 2001. The new Act removed restrictions on the ownership of optometry practices and the supply and fitting of optical appliances, but retained the previous Act's restrictions on the practice of optometry pending the outcomes of an NCP review of core practice restrictions.

Queensland Health released the core practice review public benefit test for public consultation in July 2001. In relation to optometry, the public benefit test recommended narrowing the restricted area of practice to 'prescribing optical appliances for the correction or relief of visual defects'. Queensland has yet to finalise details of its proposed policy approach following the consultation process (Queensland Government 2002).

Queensland did not finish the core practice reforms by 30 June 2002, so has not met its CPA obligations in relation to legislation regulating the optometry professions. Given that Queensland's reforms are consistent with the CPA clause 5 guiding principle and that the Government has indicated that it expected to make legislative amendments to implement the final core practice approach by mid-2002, the Council will finalise its assessment in 2003.

Western Australia

Western Australia has completed an omnibus review of its health practitioner legislation, and released a *Key Directions* paper outlining the policy framework for replacement legislation (see the section on chiropractors). The Government announced one reform specific to the optometry professions: it retained the *Optical Dispensers Act 1966* for 12 months to provide practitioners and other interested parties with an opportunity to provide submissions on why optical dispensers should remain regulated (Health Department of Western Australia 2001, p. 3). The review of this matter is under way: the Government has appointed the review committee, and expected it to complete the review in July 2002.

Western Australia did not complete the review and reform of its legislation regulating the optometry professions by 30 June 2002. Its review and reform activity is progressing, however, so the Council will finalise its assessment in 2003.

South Australia

South Australia completed its review of legislation regulating optometry in April 1999. The review recommended extending legislative coverage to optical dispensers, removing the restriction on training providers and introducing a code of conduct. The Minister is considering the review report (Government of South Australia 2002). South Australia did not complete its review and reform activity by 30 June 2002. The review recommendations appear consistent with the CPA clause 5 guiding principle, however, and the Government is considering its reform response, so the Council will finalise its assessment in 2003.

Tasmania

Tasmania is finalising a review of its optometry legislation. The key issues for the review are the extent of any restrictions on the ownership of practices and on the advertising of services (Government of Tasmania 2002). Tasmania did not complete its review and reform activity by 30 June 2002. Given that Tasmania is making progress, however, the Council will finalise its assessment in 2003.

The ACT

The ACT included the *Optometrists Act 1956* in its review of health practitioner legislation. The review recommendations are outlined in the section on chiropractors.

The review made one specific recommendation regarding optometrists: that is, to continue restricting the sale of spectacles or contact lenses that have not been prescribed by a medical practitioner or optometrist, but conduct a

further review of these restrictions. The review found a public protection case for keeping the restriction, but also found a case for undertaking a more focussed assessment of the restriction. The Council considers that this approach complies with the CPA clause 5, provided the further review is conducted within a reasonable timeframe.

The ACT Government has approved the drafting of legislation that incorporates the review recommendations and expects to introduce the resulting Bill into the Legislative Assembly in late 2002 (ACT Government 2002). The ACT did not complete its reform activity by the CoAG deadline of 30 June 2002. Its activity is considerably advanced, however, so the Council will finalise its assessment in 2003.

The Northern Territory

The former Northern Territory Government commissioned the Centre for International Economics to undertake a review of the *Optometrists Act* in 2000. The review recommendations include:

- retaining registration;
- requiring registrants to demonstrate continuing competency;
- defining fit and proper person criteria in the Act;
- modifying restrictions on practice to allow the board to authorise any person (regardless of professional classification) to practise aspects of optometry if they demonstrate competence;
- lifting restrictions on the use of drugs to measure the powers of vision for practitioners able to demonstrate competence; and
- removing ownership restrictions.

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Optometrists Act and five other health practitioner registration Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The Northern Territory did not meet CoAG's 30 June 2002 deadline for completing the review and reform of its legislation regulating optometrists. The Northern Territory will comply with the CPA clause 5 guiding principle, however, if the current Government implements the review recommendations. Given that the Northern Territory is making progress towards completing its review and reform activity, the Council will finalise its assessment of CPA compliance in 2003.

Table 6.5: Review and reform of legislation regulating the optometry professions

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Optical Dispensers Act 1963* *Optometrists Act 1930*	Entry, registration, title, practice, discipline, ownership	Review was completed December 1999 and released in April 2001. It recommended removing ownership restrictions, limiting reserved practice and extending prescribing rights.	Optometrists Bill 2001 lapsed on proroguing of Parliament; amended was Bill introduced in May 2002. Bill retains ownership restrictions.	Council to finalise assessment in 2003.
Victoria	*Optometrists Registration Act 1958*	Entry, registration, title, practice, discipline, advertising	Review was completed and new legislation assessed under the CPA clause 5(5). The new Act removes most commercial practice restrictions and reservation of practice, and retains reserved titles and investigation of advertising (to ensure it is fair and accurate).	Victoria enacted a new *Optometrists Registration Act 1996* in line with review recommendations.	Meets CPA obligations (June 2001).
Queensland	*Optometrists Act 1974*	Entry, registration, title, practice, discipline, ownership, advertising	Queensland completed a review of its health practitioner registration Acts in 1999. The review report is not publicly available, but a brief summary appears in Queensland's 2001 NCP annual report. The core practices review has been completed, but the Government is yet to decide on the final policy approach.	*Optometrists Registration Act 2001* was passed in May 2001, removing ownership restrictions but preserving practice restrictions subject to review.	Council to finalise assessment in 2003.
Western Australia	*Optical Dispensers Act 1966* *Optometrists Act 1940*	Entry, registration, title, practice, discipline, advertising	Issues paper was released in October 1998. *Key Directions* paper released 2001. Further review of need to regulate optical dispensers under way.	Parliamentary counsel has been instructed to draft legislation.	Council to finalise assessment in 2003.

(continued)

Table 6.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Optometrists Act 1920*	Entry, registration, title, practice, discipline, advertising	Review was completed in 1999. It recommended extending registration to optical dispensers.	The Government is considering the review recommendations.	Council to finalise assessment in 2003.
Tasmania	*Optometrists Registration Act 1994*	Entry, registration, title, practice, discipline, advertising	Review is nearing completion, with the final report in preparation.		Council to finalise assessment in 2003.
ACT	*Optometrists Act 1956*	Entry, registration, title, practice, discipline, advertising	Review was completed in March 2001, recommending revisions to advertising and conduct provisions. Review did not establish an overwhelming benefit from maintaining the scope of practice restrictions.	The Government will release an exposure draft of an omnibus Health Professions Bill 2002 (incorporating review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.	Council to finalise assessment in 2003.
Northern Territory	*Optometrists Act*	Entry, registration, title, practice, discipline, ownership	Review was completed in May 2000. Its recommendations included removing ownership restrictions, modifying practice restrictions and retaining title protection.	An omnibus health practitioner Bill is being drafted to replace this and other health practitioner Acts.	Council to finalise assessment in 2003.

Osteopaths

The 2001 NCP assessment found that New South Wales, Victoria, Queensland and Tasmania had met their CPA obligations in relation to the review and reform of legislation regulating the osteopathy profession. This 2002 NCP assessment considers whether the other jurisdictions have met their CPA obligations in this area.

Western Australia

Western Australia is using the *Osteopaths Act 1997* as model legislation in its review of health practitioner legislation. It expects to make minor amendments to the Act as a consequence of the review (Department of Treasury and Finance 2002). In addition, it will retain practice protection for osteopaths for three years, pending the completion of a project to determine core practices (see the section on chiropractors).

Western Australia did not complete the review and reform of its legislation regulating osteopaths by the CoAG deadline of 30 June 2002. Its review and reform activity is considerably advanced, however, so the Council will finalise the assessment in 2003.

South Australia

South Australia registers osteopaths as chiropractors. South Australia's review of its chiropractic legislation recommended establishing separate registers for osteopaths and chiropractors in a new Chiropractors and Osteopaths Act (see the section on chiropractors). South Australia did not meet CoAG's 30 June 2002 deadline for completing its review and reform of the Chiropractors Act 1990. Given that South Australia is preparing a Bill to amend the Act, however, the Council will finalise its assessment in 2003.

The ACT

The ACT included the *Chiropractors and Osteopaths Act 1983* in its review of health practitioner legislation. The review recommendations are outlined in the section on chiropractors. The review did not make any specific recommendations regarding osteopaths. The ACT Government has approved the drafting of legislation that incorporates the review recommendations and expected to introduce the resulting Bill into the Legislative Assembly in late-2002.

The ACT did not complete its reform activity by 30 June 2002. Its review and reform activity is considerably advanced, however, so the Council will finalise its assessment in 2003.

The Northern Territory

The Northern Territory registers osteopaths through the Health Practitioners and Allied Professionals Registration Act. The former Government commissioned the Centre for International Economics to conduct a review of the Act (see the section on chiropractors). The recommendations regarding osteopaths appear consistent with the CPA principles.

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Health Practitioners and Allied Professionals Registration Act and five other health practitioner Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The Northern Territory did not meet CoAG's 30 June 2002 deadline for completing the review and reform of its legislation regulating osteopaths. The Northern Territory will comply with the CPA clause 5 guiding principle, however, if the current Government implements the review recommendations regarding the regulation of osteopaths. Given that the Northern Territory is making progress towards completing its review and reform activity, the Council will finalise its assessment of CPA compliance in 2003.

Table 6.6: Review and reform of legislation regulating the osteopathy profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Chiropractors and Osteopaths Act 1991*	Entry, registration, title, practice, discipline, advertising	As for chiropractors.	New *Osteopaths Act 2001* was passed in line with review recommendations.	Meets CPA obligations (June 2001).
Victoria	*Chiropractors and Osteopaths Act 1978*	Entry, registration, title, practice, discipline, advertising	As for chiropractors.	New *Osteopaths Registration Act 1996* was enacted in line with review recommendations.	Meets CPA obligations (June 2001).
Queensland	*Chiropractors and Osteopaths Act 1979*	Entry, registration, title, practice, discipline, advertising, business	As for chiropractors.	New *Osteopaths Registration Act 2001* was passed in May 2001. The Act does not contain practice restrictions.	Meets CPA obligations (June 2001).
Western Australia	*Osteopaths Act 1997*	Entry, registration, title, discipline	As for chiropractors.		Council to finalise assessment in 2003.
South Australia	*Chiropractors Act 1991*	Entry, registration, title, practice, discipline, advertising, business	As for chiropractors.	As for chiropractors.	Council to finalise assessment in 2003.
Tasmania	*Chiropractors Registration Act 1982*	Entry, registration, title, practice, discipline, advertising	As for chiropractors.	New *Chiropractors and Osteopaths Act 1997* enacted in 1997.	Meets CPA obligations (June 2001).
ACT	*Chiropractors and Osteopaths Act 1983*	Entry, registration, title, practice, discipline, advertising	As for chiropractors.	As for chiropractors.	Council to finalise assessment in 2003.
Northern Territory	*Health Practitioners and Allied Professionals Registration Act*	Entry, registration, title, practice, discipline	As for chiropractors.	As for chiropractors.	Council to finalise assessment in 2003.

Physiotherapists

The 2001 NCP assessment reported that Victoria and Tasmania had met their CPA obligations in relation to the review and reform of legislation regulating the physiotherapy profession. This 2002 NCP assessment considers whether the other jurisdictions have complied with the CPA obligations in this area.

New South Wales

The Department of Health completed a review of the *Physiotherapists Registration Act 1945* in March 2001. The review recommended adopting a 'title and core practices' model for the regulation of physiotherapists. Under this model, the Act would restrict the titles 'physiotherapist' and 'physical therapist' to registered physiotherapists (although three other titles would no longer be protected). The Act would no longer reserve the practice of physiotherapy, but would restrict the core practices of spinal manipulation and electrotherapeutic treatments to physiotherapists (and certain other health professions).

Other recommendations included removing minimum age requirements for registration, giving the board the power to accredit training courses for the purposes of registration if the courses meet criteria set out in the regulations, and changing the structure of the board and the disciplinary system. The review also recommended that controls on advertising be brought in line with the TPA.

The New South Wales Parliament passed the *Physiotherapists Act 2001* in September 2001, to repeal and replace the Physiotherapists Registration Act in line with the recommendations of the review. The Physiotherapists Act 2001 has yet to be proclaimed. When it commences, New South Wales will meet its CPA obligations in relation to the review and reform of its legislation governing the physiotherapy profession.

Queensland

Queensland physiotherapy regulation is undergoing a reform program common to that for the other health professions (see the section on chiropractors).

Like other Queensland health practitioner registration Acts, the new *Physiotherapists Registration Act 2001* retains practice restrictions from the previous legislation pending the outcomes of an NCP review of core practice restrictions. The Government released the core practices review public benefit test for consultation in July 2001, but is yet to finalise its policy approach following the consultation process (Queensland Government 2002).

Queensland did not finish the core practices reforms by CoAG's deadline of 30 June 2002. Its reforms are consistent with the CPA clause 5 guiding principle, however, and Queensland expected to make legislative amendments to implement the final core practices approach by mid-2002, so the Council will finalise its assessment in 2003.

Western Australia

Western Australia has completed an omnibus review of its health practitioner legislation, and released a *Key Directions* paper outlining the policy framework for replacement legislation (see the section on chiropractors). Western Australia did not complete the review and reform of its physiotherapist legislation by 30 June 2002. The Government has, however, instructed Parliamentary counsel to draft replacement legislation, so the Council will finalise its assessment in 2003.

South Australia

South Australia completed a review of the *Physiotherapists Act 1991* in February 1999. The review recommended:

- requiring physiotherapists to demonstrate continuing competence;
- replacing broad practice restrictions with core practice restrictions;
- publishing a code of conduct (without advertising restrictions);
- removing the requirement for the board to approve business names;
- removing restrictions on the ownership of physiotherapy practices; and
- banning the exercise of undue influence over registered physiotherapists.

The review recommendations appear consistent with CPA principles.

South Australia did not complete the reform of its physiotherapy legislation by the CoAG deadline of 30 June 2002. Given that South Australia has completed the review and prepared a Bill (Government of South Australia 2002), however, the Council will finalise its assessment in 2003.

The ACT

The ACT included the *Physiotherapists Act 1977* in its review of health practitioner legislation. The review recommendations are outlined in the section on chiropractors. The review did not make any specific recommendations regarding physiotherapists. The ACT Government has approved the drafting of legislation that incorporates the review recommendations and expects to introduce the resulting Bill into the Legislative Assembly in late 2002 (ACT Government 2002).

The ACT did not complete its reform activity by 30 June 2002. Given that the ACT's review and reform is considerably advanced, however, the Council will finalise its assessment of CPA compliance in 2003.

The Northern Territory

The Northern Territory registers physiotherapists through the Health Practitioners and Allied Professionals Registration Act. The former Government commissioned the Centre for International Economics to conduct a review of the Act (see the section on chiropractors). The recommendations in relation to physiotherapists appear consistent with the CPA clause 5 guiding principle.

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Health Practitioners and Allied Professionals Registration Act and five other health practitioner Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The Northern Territory did not meet CoAG's 30 June 2002 deadline for completing the review and reform of its legislation regulating physiotherapists. The Northern Territory will comply with the CPA clause 5 guiding principle, however, if the current Government implements the review recommendations regarding physiotherapists. Given that the Northern Territory is making progress towards completing its review and reform activity, the Council will finalise its assessment of CPA compliance in 2003.

Table 6.7: Review and reform of legislation regulating the physiotherapy profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Physiotherapists Registration Act 1945*	Entry, registration, title, practice, discipline	Review was completed in March 2001. Its 28 recommendations included lessening restrictions on practice and advertising.	*Physiotherapists Act 2001* was enacted in line with review recommendations.	Meets CPA obligations (June 2002).
Victoria	*Physiotherapists Act 1978*	Entry, registration, title, practice, discipline, advertising	Review was completed in 1997. It recommended removing most commercial practice restrictions and practice reservation, and retaining reserved titles and the investigation of advertising (to ensure it is fair and accurate).	*Physiotherapists Registration Act 1998* was enacted in line with review recommendations.	Meets CPA obligations (June 2001).
Queensland	*Physiotherapists Act 1964*	Entry, registration, title, practice, discipline	Queensland completed a review of its health practitioner registration Acts in 1999. The review report is not publicly available, but a brief summary appears in Queensland's 2001 NCP annual report. The core practices review has been completed, but the Government is yet to decide on the final policy approach.	Framework legislation was enacted in December 1999. New *Physiotherapists Registration Act 2001* preserves practice restrictions subject to review.	Council to finalise assessment in 2003.
Western Australia	*Physiotherapists Act 1950*	Entry, registration, title, practice, discipline	Issues paper was released in October 1998. *Key Directions* paper was released June 2001.	The Government has instructed Parliamentary counsel to draft replacement legislation.	Council to finalise assessment in 2003.
South Australia	*Physiotherapists Act 1991*	Entry, registration, title, practice, discipline, advertising, ownership	Review was completed in 1999. It recommended removing ownership and advertising restrictions.	Cabinet has approved drafting amendments. A Bill has been prepared.	Council to finalise assessment in 2003.

(continued)

Table 6.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Physiotherapists Registration Act 1951*	Entry, registration, title, practice, discipline, advertising	Tasmania assessed the replacement legislation under through its new legislation gatekeeping process under the CPA clause 5(5).	Act was repealed and replaced by *Physiotherapists Registration Act 1999*.	Meets CPA obligations (June 2001).
ACT	*Physiotherapists Act 1977*	Entry, registration, title, practice, discipline	Consolidated review of all ACT health professional legislation commenced with the release of an issues paper in May 1999 and was completed in March 2001.	The Government will release an exposure draft of an omnibus Health Professions Bill 2002 (incorporating review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.	Council to finalise assessment in 2003.
Northern Territory	*Health Practitioners and Allied Professionals Registration Act*	Entry, registration, title, practice, discipline	Review was completed in May 2000. Its recommendations included retaining title protection and removing generic practice restrictions.	Omnibus health practitioner Bill is being drafted to replace this and other Acts.	Council to finalise assessment in 2003.

Podiatrists

The 2001 NCP assessment reported that Victoria and Tasmania had met their CPA obligations with respect to the review and reform of legislation regulating the podiatry profession. The Northern Territory does not regulate the podiatry profession. This 2002 NCP assessment considers whether the other jurisdictions have complied with their CPA obligations in this area.

New South Wales

The Department of Health commenced a review of the *Podiatrists Act 1989* in 1999. The department has prepared a draft of the final review report and the Government is consulting with stakeholders. The review's major proposal is to replace the current whole-of-practice restrictions on podiatry with three core practice restrictions, which would allow podiatrists, nurses and medical practitioners to carry out foot treatments.

New South Wales did not complete the review and reform of its podiatrist legislation by the CoAG deadline of 30 June 2002, but its review and reform activity is well advanced. Given that the Government expected to complete the review and then introduce amending legislation in the current session of Parliament, the Council will finalise its assessment in 2003.

Queensland

Queensland podiatry regulation is undergoing a reform program common to the other health professions (see the section on chiropractors). The changes so far implemented in Queensland are consistent with the CPA clause 5 guiding principle, but as with other Queensland health practitioner registration Acts, the *Podiatrists Registration Act 2001* maintains restrictions on practice pending the outcomes of the core practices review. The Government released the core practices review public benefit test for consultation in July 2001, but has yet to finalise the details of its proposed policy approach following the consultation process (Queensland Government 2002).

Queensland did not complete the core practice reforms by the CoAG deadline of 30 June 2002. The only outstanding area of reform is the practice restrictions, however, and Queensland expected to make legislative amendments to implement the final core practices model by mid-2002, so the Council will finalise its assessment in 2003.

Western Australia

Western Australia has completed an omnibus review of its health practitioner legislation and released a *Key Directions* paper outlining the policy framework for replacement legislation (see the section on chiropractors).

Western Australia did not complete the review and reform of its podiatry legislation by 30 June 2002, but its review and reform activity is advanced. Given that the Government has instructed Parliamentary counsel to draft replacement legislation, the Council will finalise its assessment in 2003.

South Australia

South Australia completed a review of the *Chiropodists Act 1950* in January 1999. The review recommending changing references to chiropody in the Act to podiatry, limiting practice reservation and removing ownership and advertising restrictions. The review recommendations appear consistent with CPA clause 5 guiding principle.

South Australia did not complete the reform of its podiatry legislation by the CoAG deadline of 30 June 2002, but review and reform activity is advanced. Given that the Government has prepared a Bill to implement reforms (Government of South Australia), the Council will finalise its assessment in 2003.

The ACT

The ACT included the *Podiatrists Act 1994* in its omnibus health practitioner legislation review. The review recommendations are outlined in the section on chiropractors. The review did not make any specific recommendations regarding physiotherapists (Department of Health and Community Care 1999). The ACT Government has approved the drafting of legislation that incorporates the review recommendations and expects to introduce the resulting Bill into the Legislative Assembly in late 2002 (ACT Government 2002).

The ACT did not complete its reform activity by 30 June 2002. It appears that the Government will implement its reforms within the next few months, however, so the Council will finalise its assessment in 2003.

Table 6.8: Review and reform of legislation regulating the podiatry profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Podiatrists Act 1989*	Entry, registration, title, practice, discipline	Issues paper was released in April 2000. Review is nearing completion.		Council to finalise assessment in 2003.
Victoria	*Chiropodists Act 1968*	Entry, registration, title, practice, discipline, advertising	Review was completed in 1997. It recommended removing most restrictions on commercial practice and the reservation of practice restrictions.	Legislation was replaced with the *Podiatrists Registration Act 1997* in line with the review recommendations.	Meets CPA obligations (June 2001).
Queensland	*Podiatrists Act 1969*	Entry, registration, title, practice, discipline	Review of health practitioner legislation was completed in 1999. The review report is not publicly available, but a brief summary appears in Queensland's 2001 NCP annual report. The core practices review has been completed, but the Government is yet to decide its final policy approach.	Framework legislation was passed in December 1999. New *Podiatrists Registration Act 2001* was enacted in May 2001, preserving practice restrictions subject to review.	Council to finalise assessment in 2003.
Western Australia	*Podiatrists Registration Act 1984*	Entry, registration, title, practice, discipline	Issues paper was released in October 1998. *Key Directions* paper was released in June 2001.	Parliamentary counsel has been instructed to draft a Bill.	Council to finalise assessment in 2003.
South Australia	*Chiropodists Act 1950*	Entry, registration, title, practice, discipline, advertising	Review was completed in 1999. It recommended removing ownership and advertising restrictions and limiting reserved practice.	Cabinet has approved drafting amendments.	Council to finalise assessment in 2003.
Tasmania	*Podiatrists Registration Act 1995*	Entry, registration, title, discipline, advertising	Review was completed in 2000.	Amending legislation was passed in November 2000, removing advertising and ownership restrictions.	Meets CPA obligations (June 2001).

(continued)

Table 6.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Podiatrists Act 1994*	Entry, registration, title, practice, discipline	Issues paper was released in May 1999. The review was completed in September 1999.	The Government will release an exposure draft of an omnibus Health Professions Bill 2002 (incorporating review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.	Council to finalise assessment in 2003.

Psychologists

The 2001 NCP assessment reported that Queensland and Tasmania had met their CPA obligations in relation to the review and reform of legislation governing the psychology profession. This 2002 NCP assessment considers whether the other jurisdictions have complied with their CPA obligations in this area.

New South Wales

The Department of Health completed a review of the *Psychologists Act 1989* in December 1999. The review recommended retaining entry requirements, registration and title protection. The review found a continuing justification for government intervention to minimise the risks of harm or injury.

The Government introduced a Psychologists Bill in October 2000. Given concerns raised by the profession (New South Wales Government 2001, p. 449), the Government withdrew the Bill. It introduced an amended Bill in 2001, which was passed by Parliament and received the Governor's assent on 11 October 2001. New South Wales anticipated that the *Psychologists Act 2001* would commence on 1 July 2002.

In line with the review report's recommendations, the Psychologists Act 2001 contains an introductory clause to ensure its objectives are clear and continues to reserve the title of psychologists for registered professionals (to provide information to consumers). The Act also removes restrictions on business premises and advertising, overhauls the disciplinary system and improves accountability and administration. These reforms meet the State's CPA clause 5 obligations in relation to the review and reform of legislation regulating the profession of psychology.

Victoria

Victoria replaced the *Psychologists Act 1978* with the *Psychologists Registration Act 2000*. In the 2001 NCP assessment, the Council questioned the ability of the nursing board to impose additional advertising restrictions (see the section on dentistry). In response to the Council's concerns, Victoria amended the Act in April 2002 to require Ministerial approval of any advertising guidelines issued by the board. The Council considers that Victoria has now met its CPA obligations in relation to its psychologist legislation.

Western Australia

Western Australia has completed an omnibus review of its health practitioner legislation and released a *Key Directions* paper outlining the policy

framework for replacement legislation (see the section on chiropractors). Western Australia did not complete the review and reform of its podiatry legislation by 30 June 2002. Review and reform activity is well advanced, however, because the Government has instructed Parliamentary counsel to draft replacement legislation. The Council will finalise its assessment in 2003.

South Australia

South Australia completed a review of the *Psychological Practices Act 1973* in January 1999. The review recommended retaining title protection for psychologists, but removing the ban on unregistered people administering or interpreting intelligence tests or personality tests, instructing in the practice of psychology, and soliciting human subjects for psychological research. The review also recommended removing advertising restrictions. The review recommendations appear consistent with the State's CPA obligations.

South Australia did not complete the review and reform of the Psychological Practices Act by the CoAG deadline of 30 June 2002. Its review and reform activity is progressing, however, and a draft Bill has been prepared (Government of South Australia 2002), so the Council will finalise its assessment in 2003.

The ACT

The ACT included the *Psychologists Act 1994* in its omnibus health practitioner legislation review. The review recommendations are outlined in the section on chiropractors. The review did not make any specific recommendations regarding psychologists (Department of Health and Community Care 1999). The ACT Government has approved the drafting of legislation that incorporates the review recommendations and expects to introduce the resulting Bill into the Legislative Assembly in late 2002 (ACT Government 2002).

The ACT did not complete its reform activity by the CoAG deadline of 30 June 2002. Given that it is, however, preparing legislation to implement the review recommendations, the Council will finalise its assessment in 2003.

The Northern Territory

The Northern Territory registers physiotherapists through the Health Practitioners and Allied Professionals Registration Act. The former Government commissioned the Centre for International Economics to conduct a review of the Act (see the section on chiropractors). The recommendations relating to psychologists appear consistent with the CPA clause 5 guiding principle.

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Health Practitioners and Allied Professionals Registration Act and five other health practitioner Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The Northern Territory did not meet CoAG's 30 June 2002 deadline for completing the review and reform of its legislation regulating psychologists. The Northern Territory will comply with the CPA clause 5 guiding principle, however, if the current Government implements the review recommendations regarding psychologists. Given that the Northern Territory is making progress towards completing its review and reform activity, the Council will finalise its assessment of CPA compliance in 2003.

Table 6.9: Review and reform of legislation regulating the psychology profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Psychologists Act 1989*	Entry, registration, title, practice, discipline	Review report was completed December 1999. It recommended retaining registration, but removing restrictions on advertising and premises. A number of recommendations provide clarity and accountability.	New *Psychologists Act 2001* was passed in line with review recommendations.	Meets CPA obligations (June 2002).
Victoria	*Psychologists Act 1978*	Entry, registration, title, practice, discipline, advertising, business	Review was completed in 1998. It recommended removing most commercial practice restrictions and the reservation of practice, but retaining reserved title and the investigation of advertising (to ensure it is fair and accurate).	Act was repealed and replaced by the *Psychologists Registration Act 2000*. The new Act was amended in 2002 to require Ministerial endorsement of any advertising restrictions proposed by the board.	Meets CPA obligations (June 2002).
Queensland	*Psychologists Act 1977*	Entry, registration, title, practice, discipline, advertising	Review of health practitioner legislation was completed in 1999. The review report is not publicly available, but Queensland's 2001 NCP annual report contains a brief summary. The core practices review has been completed, but the Government is yet to decide its final policy approach.	Framework legislation was passed in December 1999. New *Psychologists Registration Act 2001* was passed in May 2001. It does not contain practice restrictions.	Meets CPA obligations (June 2001).
Western Australia	*Psychologists Registration Act 1976*	Entry, registration, title, practice, discipline	Issues paper was released in October 1998. *Key Directions* paper was released in June 2001.	Legislation is being drafted.	Council to finalise assessment in 2003.
South Australia	*Psychological Practices Act 1973*	Entry, registration, title, practice, discipline, advertising	Review was completed in 1999. It recommended removing advertising and practice restrictions.	Draft Bill has been prepared.	Council to finalise assessment in 2003.

(continued)

Table 6.9 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Psychologists Registration Act 1976*	Entry, registration, title, discipline, advertising	Review has been completed. Review report is not available to the Council. Tasmania assessed the replacement legislation under its CPA clause 5(5) new legislation gatekeeping process.	Act was repealed and replaced by *Psychologists Registration Act 2000,* which removes advertising restrictions and practice reservation.	Meets CPA obligations (June 2001).
ACT	*Psychologists Act 1994*	Entry, registration, title, practice, discipline	Issues paper was released in May 1999. Review completed in March 2001.	The Government will release an exposure draft of an omnibus Health Professions Bill 2002 (incorporating review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2002.	Council to finalise assessment in 2003.
Northern Territory	*Health Practitioners and Allied Professionals Registration Act*	Entry, registration, title, practice, discipline, advertising	Review was completed in May 2000. Its recommendations included retaining title protection and removing generic practice restrictions.	Omnibus health practitioner Bill is being drafted to replace this and other Acts.	Council to finalise assessment in 2003.

Other health professions

Four health professions are regulated in some, but not all, Australian jurisdictions: occupational therapists, speech therapists, radiographers and practitioners of traditional Chinese medicine.

Governments have recognised for some time the difficulties raised by partially registered professions. They set up a working party on this matter while developing the mutual recognition legislation in the early 1990s. The working party reported that the Australian Health Ministers Advisory Council (AHMAC) supported registration of radiographers in all States but found no case for continued registration of occupational therapists or speech therapists (VEETAC 1993, pp. 35–6).

Occupational therapists

Occupational therapists develop activities to help people with physical, psychological or developmental injuries and disabilities recover from their disease or injury, and (re)integrate into society. Their area of practice overlaps with that of other health professions. Nurses and physiotherapists provide a range of rehabilitative therapy services, for example, as do nonregistered practitioners such as rehabilitation counsellors and diversional therapists. Most occupational therapists are employed by hospitals (36 per cent), community health centres (21 per cent), rehabilitation services (15 per cent) and schools (7 per cent); relatively few (7 per cent) work in private practice (AIHW 2001, p. 8).

Queensland, Western Australia, South Australia and the Northern Territory have legislation regulating occupational therapists. In each case, the legislation reserves the title 'occupational therapist' for registered practitioners. To be eligible for registration, practitioners must hold certain qualifications, be of good character and pay fees. Any registrants who fail to comply with the Act are subject to disciplinary action, perhaps even de-registration. Western Australia also reserves the practice of occupational therapy for occupational therapists.

New South Wales, Victoria, Tasmania and the ACT do not regulate occupational therapists. These jurisdictions rely on general mechanisms such as the common law, the TPA and independent health complaints bodies to protect patients.

The Council of Occupational Therapists Registration Boards considers that regulation of occupational therapists protects the health and safety of the public. It also argues that Australia-wide registration would have several other benefits: it would reduce mutual recognition issues, support effective and inexpensive complaints mechanisms and enable accurate studies of the occupational therapy labour force.

The reservation of the title 'occupational therapist', however, potentially restricts competition between occupational therapists and other practitioners who provide similar services, by making it difficult for these other practitioners to describe their services in ways that are meaningful to potential consumers. In addition, the qualifications, character tests and fees required of applicants for registration restrict entry to the profession of occupational therapy and potentially weaken competition among occupational therapists.

Queensland

Queensland repealed the *Occupational Therapists Act 1979* and replaced it with the *Occupational Therapists Registration Act 2001*. The new Act retains title protection for occupational therapists. It does not include restrictions on practice. Queensland has provided a detailed public benefit rationale to support retaining title protection (Queensland Government 2002). It argues that title protection:

- protects consumers from the risk of being harmed by inadequately trained or incompetent providers, by ensuring that registered providers are competent and subject to complaints/disciplinary process;
- assures consumers that registered occupational therapists, having satisfied registration requirements, are appropriately trained and fit to practise safely and competently;
- provides consumers with information that reduces their search costs by enabling them to differentiate between registered and unregistered providers;
- minimises the volume of complaints to the Government and the Health Rights Commission about occupational therapists, thus reducing the administrative costs of dealing with these complaints;
- promotes public confidence in the Government's ability to protect health consumers because the registration system enables the government to assure consumers that occupational therapists are safe and competent; and
- benefits occupational therapists by giving them more ability than nonregistrants have to promote their services, and by increasing their perceived professional/social status.

Queensland also identified some costs to consumers, in that title reservation limits consumers' ability to gain information about services provided by nonregistrants, and may also increase the cost of occupational therapy due to registrants passing on their registration costs. In addition, it identified costs to the Government from administering the registration legislation and costs to the registered occupational therapists from having to pay the $120 initial registration fee and $181 annual renewal fee.

Queensland considered that the benefits of title protection for occupational therapists are significant, although maybe not as great as for other health professions. It argued that title protection provides net benefits for consumers, particularly in the area of consumer protection, and that this, in combination with the minimal impacts on the Government, the profession and nonregistrants, produces an overall net benefit to the public.

Queensland rejected two less restrictive alternatives — self-regulation and negative licensing — on the basis that they would not provide adequate consumer protection, for the following reasons.

- Self-regulation would not prevent inadequately trained practitioners from calling themselves 'occupational therapists'. Consumers generally assume that practitioners using a professional title have been objectively assessed as competent and fit to practise, and are subject to discipline by an appropriate regulatory body.

- Without title protection, consumers would have difficulty identifying competent occupational therapists.

  - Consumers would have difficulty determining the validity of professional qualifications.

  - Consumers would be unable to rely on membership of a professional association to indicate that a practitioner is competent, because unqualified practitioners could form their own association.

  - Consumers would be unable to rely on referrals from other health practitioners, as practitioners who do not regularly provide referrals to occupational therapists may have limited knowledge about the competency level of the therapists to which they refer patients.

- Consumers would not have access to a complaints/disciplinary system through which they could seek redress against unscrupulous or incompetent providers, as they would under a registration system.

Queensland ruled out a negative licensing approach because it would allow the Government to intervene only after the practitioners had shown themselves to be incompetent in practice, rather than before they started treating patients. It also considered that negative licensing would involve greater costs to the Government resulting from the need to take court action against providers.

The Council considers that the strength of the evidence supporting Queensland's claim of significant consumer protection benefits from protecting the 'occupational therapist' title is questionable. Title protection can reasonably be expected to protect patients from risks of harm only if, first, there is a risk that incompetently performed occupational therapy will result in harm to the patient; and, second, title reservation is likely to reduce the risk of occupational therapy being incompetently performed.

The first criterion may have been met. Legislation reviews in other jurisdictions have identified harms that could result from occupational therapy activities — although, as South Australia's occupational therapy legislation review acknowledged: 'there is not a significant risk of irreversible harm or injury, as in the case of other professions' (Department of Human Services 1999b, p. 9). It is not clear, however, that statutory registration will reduce the risk of these harms occurring.

In theory, title reservation protects the public by assuring patients that practitioners who use particular professional titles possess certain skills and qualifications. By enabling patients to identify competent practitioners, registration schemes reduce the risk that patients will expose themselves to harm by inadvertently engaging an unqualified health care provider.

The nature of occupational therapy and the structure of service provision mean that few patients are likely to make direct contact with a therapist. Most occupational therapy is provided through health facilities such as hospitals, nursing homes, community health centres and rehabilitation services. Patients seek the services of the facility, rather than an 'occupational therapist'. These facilities are well positioned to assess the competency of the staff they employ, and they have a common law duty to ensure that their employees are not employed to undertake activities for which they are not competent.

Some occupational therapists work in private practice. Many of their patients are referred by other professionals. Practitioners who make referrals infrequently may have limited knowledge of the competency of individual therapists, but they can be expected to make use of alternative information sources such as their more experienced colleagues. In addition, the TPA provides some protection for patients against unqualified practitioners holding themselves out to be qualified occupational therapists.

Further, there is considerable evidence to suggest that reservation of the title 'occupational therapist' is not necessary to protect patients. New South Wales, Victoria, Tasmania and the ACT do not regulate occupational therapists. To protect patients, these jurisdictions rely on self-regulation supplemented by general mechanisms such as the common law, the TPA and independent health complaints bodies.

While unqualified practitioners could form their own association only one professional association, OT Australia, represents occupational therapists at the moment. OT Australia administers and markets an occupational therapist accreditation scheme, which helps patients, referrers and employers identify therapists that meet high professional and ethical standards of practice. The scheme also features a process for handling complaints about accredited therapists.

Queensland, like other States, has an independent health complaints body to which complaints can be made about any health provider (registered or not), which provides some protection for patients. Complaints about occupational therapists are rare in Queensland, and are no more frequent in jurisdictions

that do not regulate occupational therapists. Queensland's Health Rights Commission received two complaints about occupational therapists in three years, while the Health Care Complaints Commission in New South Wales did not receive any in the past four years and Victoria's Health Services Commissioner received one in the past five years (Health Care Complaints Commission 2000, 2001; Health Rights Commission 1999, 2000, 2001; Health Services Commissioner 1999, 2000, 2001).

No legislation review has argued that patients in New South Wales, Victoria, Tasmania and the ACT experience unacceptable rates of harm from occupational therapy. AHMAC's finding that there is no case for continued registration of occupational therapists also gives cause for doubting Queensland's public interest case for registration.

The Council considers, therefore, that Queensland's decision to retain title protection for occupational therapists therefore does not comply with the CPA clause 5 guiding principle. The adverse impacts on competition from retaining this restriction are, however, insignificant. The cost of the restriction on the use of the occupational therapist title is trivial because nonregistrants can promote their services using unrestricted titles such as 'rehabilitation consultant', 'diversional therapist' and 'activity supervisor'. Further, the registration system's administration costs are low.

Western Australia

Western Australia reviewed the *Occupational Therapists Registration Act 1980* as part of an omnibus review of health practitioner legislation. It released a *Key Directions* paper in July 2001, after the 2001 NCP assessment. *Key Directions* indicated that the Government will continue to reserve the title 'occupational therapist' for registered practitioners, and that it will draft replacement legislation for occupational therapists. As with other proposed health practitioner legislation, this Act will also retain practice protection for three years to allow for a review of core practices (see the section on chiropractors).

Western Australia's justification for continuing to regulate occupational therapists by maintaining title protection is that it 'accepted that a range of activities practised by occupational therapists pose a potential risk of harm to the public that outweighed the benefits of further competition and therefore should continue to be regulated' (Department of Treasury and Finance 2002). As discussed in the assessment of Queensland's occupational therapy legislation, the Council has doubts about the strength of the evidence supporting claims of significant patient protection benefits from reserving the title of 'occupational therapist'. In addition, there is considerable evidence to suggest that title reservation is not necessary to ensure adequate patient protection.

The Council considers that Western Australia has not met its CPA obligations in relation to the review and reform of occupational therapy legislation. Western Australia has advised, however, that it will reconsider the legislation

review in the context of the core practices review, and at that time conduct a comprehensive net public benefit test for regulating occupational therapists. It expects to commence the core practices review in 2003. The costs of retaining this restriction on competition in the meanwhile are insignificant, as discussed in the assessment of Queensland's legislation.

South Australia

South Australia completed a review of the *Occupational Therapists Act 1974* in February 1999. The review recommended continuing to restrict the title 'occupational therapist' to registered practitioners, for the following reasons.

- Title reservation is a means of overcoming information asymmetry. The review stated 'this is particularly important in the context of occupational therapy, where consumers will often be vulnerable or "socially disadvantaged", due to the nature of their illness, age or disability' (Department of Human Services 1999b, p. 8).

- It provides a mechanism for addressing complaints against unprofessional and/or incompetent occupational therapists. The review noted that each jurisdiction that does not register occupational therapists has an independent health care complaints body to which complaints can be made about occupational therapists. South Australia did not have such a body at the time of the review.

- There is value in the consistent treatment of health professionals. The review suggested that 'all other health professions in South Australia are regulated by the same system of registration and title protection' (Department of Human Services 1999b, p. 13) and that 'consistency throughout Australia is important for … enabling movement between jurisdictions' (Department of Human Services 1999b, p. 13).

South Australia's Cabinet approved the drafting of amendments to the Act, and a draft Bill is being prepared (Government of South Australia 2002).

The Council does not consider that the review's reasoning provides a robust case justifying continued title protection for occupational therapists in South Australia, for the following reasons.

- The benefits of overcoming information asymmetry are unlikely to be significant in the case of occupational therapy.

  - The benefits of providing information through title protection are greatest where an ill-informed choice could result in a significant risk of harm. The review noted that 'in the case of occupational therapy, there is not significant risk of irreversible harm or injury as in the case of other professions' (Department of Human Services 1999b, p. 9).

  - The degree of information asymmetry is low. Approximately half of the occupational therapists in South Australia are employed in the public

sector (Department of Human Services 1999b, p. 9), and many in the private sector undertake work for Government agencies, other employers and WorkCover. Further, people are unlikely to seek occupational therapy services without assistance or referral, suggesting that most consumers are likely to be well informed about the services provided. Even without a referral from another health provider, consumers can access alternative information, such as reputation and membership of professional organisations. Trade practices legislation and common law provide further consumer protection.

- The Government introduced a Health and Community Services Complaints Bill into Parliament in 2001. The Bill lapsed following the calling of the State election. If re-introduced and passed, it would provide South Australia with an independent body to which complaints could be made about occupational therapists, as in other jurisdictions.

- Contrary to the review's assertion that all other health professions are regulated by title protection, several health professions (including speech pathologists, radiographers, Aboriginal health workers, naturopaths and personal care assistants) are not registered professions in South Australia.

- Further, the review concluded 'the system of registration in South Australia is a restriction on interstate applicants entering the market' (Department of Human Services 1999b, p. 22) and noted that South Australia may have to reconsider its position if other States and Territories repeal their occupational therapist legislation.

This raises questions as to whether legislation consistent with the review recommendations meets the CPA clause 5 guiding principle. As discussed in the assessment of Queensland's occupational therapy legislation, the costs of the noncompliance are not significant. Title reservation hinders nonregistrants' ability to promote their services, but the adverse impacts on competition are trivial because nonregistrants can still use unrestricted titles. The administration costs of the registration system are also low and are recovered through fees of $130 for initial registration and $120 for annual renewal.

The Northern Territory

The Northern Territory registers occupational therapists through the Health Practitioners and Allied Professionals Registration Act. The Centre for International Economics reviewed this Act in 2000 (see the section on chiropractors).

The legislation review recommended retaining title protection for occupational therapists. It claimed that title protection has the potential to reduce risks and costs to the Government from service users inappropriately choosing unqualified health care providers. It concluded that restricting the use of professional titles provides a net public benefit, provided the costs of operating the registration system are modest (CIE 2000d, p. 35). The review

did not, however, link the generic benefits of title protection to occupational therapy services in particular.

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus Health Practitioners Registration Bill to replace the Health Practitioners and Allied Professionals Registration Act and five other health practitioner Acts. The Department of the Chief Minister has advised the Council that the current Government will shortly be asked to consider the review recommendations and a draft omnibus Bill.

The Council has considerable doubt that the review's public interest reasoning supports the Northern Territory's decision to retain registration. As discussed in the assessment of Queensland's occupational therapist legislation, the Council has doubts about the strength of the evidence supporting claims of significant consumer protection benefits from reserving the 'occupational therapist' title. There is also considerable evidence that title protection is not necessary, particularly given that four jurisdictions do not regulate occupational therapists and AHMAC found no case for continued registration (VEETAC 1993).

The review recommendation and evidence in the review report did not address either the situation in other jurisdictions or the AHMAC conclusion. On the other hand, the review did note that fair trading legislation is sufficient, in principle, to avoid service users being misled without title protection under the Health Practitioners and Allied Professionals Registration Act (CIE 2000d, p. 35). This raises questions as to whether legislation consistent with the review recommendations meets the CPA clause 5 guiding principle.

The costs of any noncompliance are, however, insignificant. As discussed in the section on Queensland's occupational therapy legislation, title protection hinders nonregistrants' ability to promote their services but the adverse impacts are competition are likely to be negligible given that nonregistrants can still use unrestricted titles. The registration system's administration costs are also low.

Radiographers

Radiographers operate technical diagnostic equipment such as X-ray machines, often in conjunction with medically qualified radiologists or other health professionals. All jurisdictions have controls on radiation emissions levels and the storage and transport of radioactive materials; these controls influence the conduct of people working as radiographers. Queensland, Tasmania and the Northern Territory regulate radiographers under dedicated legislation.

The working party on partly registered occupations, which was set up to help develop the mutual recognition legislation in the early 1990s, reported

AHMAC support for the registration of radiographers in all jurisdictions (VEETAC 1993, p. 36). This recommendation provides a justification for governments to register radiographers. The CPA, however, allows individual governments to choose not to register radiographers if they consider that registration would not provide a net benefit to the community.

The 2001 NCP assessment reported that Queensland had met its CPA obligations for new legislation in relation to the *Medical Radiation Technologists Act 2001*, and that Tasmania had met its CPA obligations in relation to the review and reform of its *Radiographers Registration Act 1976*.

The Northern Territory did not complete the reform of the *Radiographers Act* by the CoAG deadline of 30 June 2002. The Government intends to repeal the Act, and transfer the current practising certificate and permit powers of the board to the licensing powers of the Chief Health Inspector under the *Radiation (Safety Control) Act*. Given that the national review of radiation safety legislation includes the Radiation (Safety Control) Act, the Northern Territory will delay the repeal of the Radiographers Act to avoid double handling the reform (Northern Territory Government, 2002).

The Council accepts that there is a benefit in synchronising these reforms, provided that this approach does not result in unreasonable delays. The Council will finalise its assessment of CPA compliance in 2003.

Speech pathologists

Speech pathologists assess and treat people who have communication disabilities (including speech, language, voice, fluency and literacy difficulties) and people who have physical problems with eating or swallowing.

Queensland is the only jurisdiction with legislation to reserve the use of the title 'speech pathologist' to practitioners registered under the Act. It repealed the *Speech Pathologists Act 1979* and replaced it with the *Speech Pathologists Registration Act 2001* in May 2001. The new Act retained restrictions on the use of the 'speech pathologist' title, but does not restrict the practice of speech pathology.

Queensland has provided a detailed rationale for providing title protection for speech pathologists. Its argument is identical to its case for providing title protection for occupational therapists: that is, that the net benefits to consumers (particularly in the area of consumer protection), together with the minimal impact on the Government, the profession and nonregistrants, produce an overall net public benefit (see the section on occupational therapists).

The Council has some doubt that these arguments provide a robust case that title protection provides significant consumer protection benefits. Title protection may not have a significant effect on the risk of speech pathology

resulting in harms to patients. Many speech pathologists work in hospitals, health centres, community clinics and schools. These facilities are well positioned to assess the competency of the staff they employ, and they have a common law duty to ensure their employees are not employed to undertake activities for which they are not competent.

Most patients accessing the services of speech pathologists working in private practice do so via referrals from other professionals, so they are likely to be well informed. In addition, the TPA provides some protection for patients against unqualified practitioners holding themselves out to be qualified occupational therapists.

Further, there is considerable evidence that reservation of the title 'speech pathologist' is not necessary to protect patients. Queensland is the only jurisdiction to regulate speech pathologists; to protect patients, every other state and territory relies on self-regulation supplemented by general mechanisms such as the common law, the TPA and independent health complaints bodies.

It is not necessary to create a registration system to provide consumers with a mechanism for seeking redress against incompetent speech pathologists. Consumers can register complaints with Queensland's independent Health Rights Commission, which has the power to investigate and conciliate complaints about any health care provider (regardless of whether they are registered or not).

In every other State and Territory, consumers use alternative information sources to indicate competency, such as whether the speech pathologist is a member of the Speech Pathology Australia (the professional association). Speech Pathology Australia limits membership to people with approved primary qualifications in speech pathology. Queensland argues that consumers may be unable to rely on professional association membership as a sign of competency because as unqualified providers could form their own association, but this does not appear to be an issue at the moment. Casting further doubt on Queensland's public interest case for registration is the AHMAC conclusion that no case has been established for continued registration of speech pathologists.

The Council considers, therefore, that Queensland's decision to retain title protection for speech pathologists does not comply with the CPA clause 5 guiding principle. As with registration of occupational therapists, however, the adverse impacts on competition from retaining this competition are insignificant. The cost of the restriction on the use of the 'speech pathologist' title is trivial because nonregistrants can promote their services using unrestricted titles such as 'speech tutor', while the registration system's administration costs are low.

Traditional Chinese medicine

Traditional Chinese medicine involves herbal medicine, acupuncture, massage, and food and exercise therapies. Victoria is the only jurisdiction to regulate traditional Chinese medicine. The Australian Council of Health Ministers agreed that Victoria should take the lead in developing model legislation. Victoria undertook an extensive review process before introducing legislation to the Parliament.

Victoria's *Chinese Medicine Registration Act 2000* contains a reservation of title, entry standards, a requirement to register and a disciplinary process. It also contains commercial restrictions such as a restriction on advertising (to ensure it is fair and accurate) and a requirement for professional indemnity insurance. In addition, the Act contains a new category of restricted goods, with prescribing rights available to only registrants and other health professionals.

The new legislation in Victoria is consistent with the review recommendations in most respects. In the 2001 NCP assessment, however, the Council questioned the ability of the board to impose additional advertising restrictions (see the section on dentistry). In response to the Council's concerns, Victoria amended the Act in April 2002 to require Ministerial approval of any advertising guidelines issued by the board. Given that external approval mechanisms help to ensure any guidelines issued by the board serve the interests of the public and do not sanction anticompetitive conduct, the Council considers that Victoria has met its CPA obligations in relation to this legislation.

Table 6.10: Review and reform of legislation regulating other health professions

Jurisdiction	*Profession*	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	Traditional Chinese medicine practitioners	*Chinese Medicine Registration Act 2000*	Entry, registration, title, practice, discipline, advertising, insurance, prescribing	The Australian Council of Health Ministers agreed that Victoria should take the lead in developing model legislation. Extensive review was completed in 1999.	Legislation was passed in 2000. Advertising provisions include the ability of the board to impose additional restrictions.	Meets CPA obligations (June 2002).
Queensland	Occupational therapists	*Occupational Therapists Act 1979*	Entry, registration, title, practice, discipline	Review of health practitioner registration Acts was completed in 1999. Review report is not publicly available, but a brief summary appears in Queensland's 2001 NCP annual report. Queensland has completed the core practices review, but is yet to finalise its final policy approach.	Framework legislation is in place. New *Occupational Therapists Registration Act 2001* was passed in May 2001, maintaining registration.	Does not comply with CPA requirements (June 2002).
	Radiographers	*Medical Radiation Technologists Act 2001*	Entry, registration, title, discipline	Review of health practitioner registration legislation was completed in 1999. It recommended registering radiation therapists, medical imaging technologists/radiographers and nuclear imaging technologists.	Framework legislation was passed in December 1999. New *Medical Radiation Technologists Act 2001* was passed in May 2001. It does not restrict practice.	Meets CPA obligations (June 2001).
	Speech pathologists	*Speech Pathologists Act 1979*	Entry, registration, title, practice, discipline	Review was completed in 1999. It recommended retaining registration, including the restriction of title and disciplinary provisions, but removing practice restrictions.	Framework legislation was passed in December 1999. New *Speech Pathologists Registration Act 2001* was passed in May 2001.	Does not comply with CPA obligations. (June 2002).

(continued)

Table 6.10 continued

Jurisdiction	*Profession*	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	Occupational therapists	*Occupational Therapists Registration Act 1980*	Entry, registration, title, practice, discipline	Issues paper was released in October 1998. *Key Directions* paper was released in 2001, indicating that the Government will maintain title protection for occupational therapists.	Parliamentary counsel has been instructed to draft replacement legislation.	Council to finalise assessment in 2003.
South Australia	Occupational therapists	*Occupational Therapists Act 1974*	Entry, registration, title, practice, discipline	Review was completed in 1999. It recommended maintaining registration requirements.	Cabinet has approved drafting of amendments to the Act.	Council to finalise assessment in 2003.
Tasmania	Radiographers	*Radiographers Registration Act 1976*	Entry, registration, title, discipline	Tasmania assessed the replacement legislation through its new legislation gatekeeping process under CPA clause 5(5).	*Medical Radiation Science Professionals Registration Act 2000* was passed in November 2000. The Act does not contain practice or advertising restrictions, but does contain requirements for professional indemnity insurance.	Meets CPA obligations (June 2001).
Northern Territory	Occupational therapists	*Health Practitioners and Allied Professionals Registration Act*	Entry, registration, title, practice, discipline, advertising	Review was completed in May 2000. It recommended retaining title protection and removing generic practice restrictions.	Omnibus Bill is being drafted for introduction into the Legislative Assembly in August 2002.	Council to finalise assessment in 2003.
	Radiographers	*Radiographers Act*	Entry, registration, title, practice, discipline, advertising	Review was completed May 2000. Its recommendations included repealing the Act and transferring powers to the Chief Health Inspector under the Radiation (Safety Control) Act.	The Government has approved the drafting of legislation in line with review recommendations.	Council to finalise assessment in 2003.

Drugs, poisons and controlled substances

Drugs, poisons and controlled substances include over-the-counter medicines, certain chemicals, pharmaceuticals that a doctor or other professional must prescribe and complementary medicines. Legislation at both the Commonwealth and State levels limits the availability of, and access to, drugs, poisons and medications. This chapter focuses on drugs and medicines for human use; agricultural and veterinary chemicals are discussed in chapter 4.

Legislative restrictions on competition

A complex framework of Commonwealth, State and Territory legislation aims to ensure the safe and effective use of potentially poisonous drugs, poisons and controlled substances. The Commonwealth regulates the quality and efficacy of medicinal products (and agricultural and veterinary chemicals) supplied in Australia. State and Territory legislation is more concerned with the safe use of these products. The States and Territories regulate the use of medicines throughout the supply chain and in the community, and also all aspects of household poisons.

Under the Commonwealth *Therapeutic Goods Act 1989,* new medicines must be assessed for safety and entered in the Australian Register of Therapeutic Goods before being supplied in Australia. Subsequently, the National Drugs and Poisons Schedule Committee classifies the substance under various Standard for the Uniform Scheduling of Drugs and Poisons 'schedules' according to its toxicity, purpose of use, potential for abuse and safety in use, and the need for the substance.

Each schedule has labelling, packaging and advertising requirements. The schedules also specify the conditions relating to the sale of the product; for example, schedule 4 pharmaceuticals must be prescribed by a medical practitioner and dispensed by a registered pharmacist (with limited exemptions). Scheduling decisions generally have no effect until they are adopted into State and Territory legislation (Galbally 2001, pp. 7-12).

Regulating in the public interest

Drugs, poisons and controlled substances legislation aims to ensure public safety by reducing accidental or deliberate poisoning, medical misadventures and abuse. Used appropriately, many of the products covered by this legislation have considerable benefits for the community: medicines help to

improve health, for example, while household chemicals make cleaning easier. Drugs, poisons and controlled substances can have serious or even fatal consequences, however, when not used appropriately. Best practice regulation seeks to protect the community, while maintaining reasonable access to these products.

Drugs, poisons and controlled substances regulation may involve input or outcome controls. Typical input controls include wholesaler licensing and restrictions on who may prescribe and dispense particular substances. Outcome controls govern the end use of these substances by, for example, proscribing the misuse of controlled substances. Generally, outcome regulation involves lower costs and fewer restrictions on competition than those of input regulation. With particularly dangerous goods, however, the community protection benefits may justify the high costs of a mix of input and outcome controls. Best practice regulation tailors the scope and nature of the restrictions to a substance's potential for harm.

Review and reform activity

The Commonwealth, State and Territory governments commissioned a national review of drugs, poisons and controlled substances legislation. The review, chaired by Rhonda Galbally, presented its final report to the Australian Health Ministers Conference in early 2001.

The review found sound reasons for Australia to have comprehensive legislative controls that regulates drugs, poisons and controlled substances, notwithstanding the fact that many of these controls restrict competition (Galbally 2001, p. xii). The review also found, however, that:

- the level of regulation should be reduced in some areas and, in other areas, a co-regulatory approach is appropriate;
- the efficiency of the regulatory system and its administration should be improved by:
  - developing a uniform approach to drugs, poisons and controlled substances legislation across jurisdictions,
  - aligning specific drugs, poisons and controlled substances legislation with other related legislation in a rational way that avoids duplication and overlap; and
  - ensuring the legislation is administered efficiently and without imposing any unnecessary costs on industry, government or consumers; and
- nonlegislative measures should be used to complement drugs, poisons and controlled substances legislation.

The review made 27 detailed reform recommendations. The key recommendations included:

- transferring controls on advertising, product labelling and product packaging to Commonwealth legislation, and developing model uniform legislation for all matters related to the supply or drugs, poisons and controlled substances;

- amending the prohibition on advertising prescription medicines to permit informational (but not promotional) advertisements regarding the price of medicines in accordance with statutory guidelines;

- amending prohibitions on the supply of medicines from vending machines to permit the supply of small doses of unscheduled medicines (provided that unsupervised children are unlikely to access the vending machines and that the operators commission independent evaluations after two years);

- streamlining licensing requirements for wholesalers of schedule 2, 3, 4, 8 and 9 products, and removing licensing requirements for sellers of low risk (schedule 5 and 6) products in those jurisdictions that still have them;

- reforming requirements to record the supply of scheduled substances, including repealing recording requirements for the retail supply of schedule 3 medicines and all recording requirements for schedule 5 and 6 poisons in those jurisdictions that still have them;

- repealing State and Territory regulations regarding the supply of clinical samples of medicines and poisons, and instead making compliance with a proposed industry code of conduct a condition of manufacturers' and wholesalers' licences; and

- implementing outcomes-focused licence requirements.

The review's terms of reference require the Australian Health Ministers Conference to forward the review report, and a response to the report, to CoAG. The response is being prepared in consultation with the Primary Industries Ministerial Council because implementation of some of the Galbally review recommendations will impact on regulation of agricultural and veterinary chemicals.

The Health Ministers referred the review report to AHMAC, which established a working party to develop a draft response for CoAG consideration. The working party sought comments on the review recommendations from State and Territory health and agricultural departments and from other stakeholders that contributed to the review. It has prepared a draft response, which has been endorsed by AHMAC and is now being considered by the Primary Industries Ministerial Council. Once any issued raised by the Primary Industries Ministerial Council have been resolved, the final response will be forwarded to CoAG.

Jurisdictions did not complete the review and reform of their legislation governing drugs, poisons and controlled substances by the CoAG deadline of 30 June 2002. Jurisdictions are close, however, to finalising their response to the Galbally review. In addition, jurisdictions have commenced preliminary work to support the implementation of some Galbally review recommendations likely to be endorsed by CoAG that relate only to therapeutic goods and that cannot be affected by the consultation with the Primary Industries Ministerial Council. For example, a working group is developing a code of practice for advertising prescription medicine prices.

As discussed in chapter 15, the Council is concerned by the delay in finalising some national reviews. It recognises that the requirement for intergovernmental consultation slows the process of responding to reviews. In this case, the need to coordinate input from both health and agriculture portfolios has created additional delays. The Council urges jurisdictions, however, to finalise their response to the review and develop firm transitional arrangements to implement reforms within a reasonable period. The Council will finalise its assessment of CPA compliance in the 2003 NCP assessment.

Table 6.11: National review of drugs, poisons and controlled substances

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Therapeutic Goods Act 1989*	Scheduling restrictions on the labelling, packaging and advertising of listed substances, and to whom a product may be sold and under what conditions. Licensing restrictions on the handling, storage and reporting requirements of controlled substances for wholesalers and retailers.	The Galbally Review of Drugs, Poisons and Controlled Substances issued a final report in January 200,1 which concluded that there are sound reasons for comprehensive legislative controls that regulate drugs, poisons and controlled substances, notwithstanding that many of these controls restrict competition. The report found that the level of regulation should be reduced in some areas, the efficiency of the regulatory system could be improved, and nonlegislative measures would be a more appropriate policy response in some areas. The final report was presented to the Australian Health Ministers Conference in early 2001. An Australian Health Ministers Advisory Committee working party is examining the report and (with input from the Primary Industries Ministerial Council) providing recommendations to CoAG.		Council to finalise assessment in 2003.
New South Wales	*Poisons and Therapeutic Goods Act 1966* *Drugs Misuse and Trafficking Act 1985*				
Victoria	*Drugs, Poisons and Controlled Substances Act 1981*				
Queensland	*Health Act 1937*				
Western Australia	*Poisons Act 1964* *Health Act 1911 (Part VIIA)*				
South Australia	*Controlled Substances Act 1984*				
Tasmania	*Poisons Act 1971* *Alcohol and Drug Dependency Act 1968* *Pharmacy Act 1908* *Criminal Code Act 1924*				
ACT	*Drugs of Dependence Act 1989* *Poisons Act 1933* *Poisons and Drugs Act 1978*				
Northern Territory	*Poisons and Dangerous Drugs Act* *Therapeutic Goods and Cosmetics Act* *Pharmacy Act*				

Pharmacy

Pharmacy is the retail arm of the distribution network for restricted drugs and pharmaceuticals. Pharmacies sell medicines and related goods and services such as toiletries, cosmetics and health care products. Pharmacy is a significant retail activity in Australia, with a turnover of around $6 billion per year. Sales of restricted medicines (medicines that only pharmacists may sell) provides about three-quarters of this turnover.

The Commonwealth Government's Pharmaceutical Benefits Scheme (PBS) aims to provide the Australian community with timely, reliable and affordable access to necessary and cost-effective medicines. Under the scheme, consumers purchasing approved medicines pay up to a fixed maximum fee. The Commonwealth meets the rest of the cost of the medicine, which gives it considerable leverage over listed drug prices and helps to limit the overall costs of the scheme.

Australia has about 5000 retail pharmacy outlets, employing about 52 000 people. Access to pharmacy services varies significantly across Australia. In 1996, there were 70.9 pharmacists per 100 000 population in urban areas, falling to 30.8 pharmacists per 100 000 population in remote centres (AIHW 2000).

Compared with other retail businesses, pharmacy profit margins are high. The Productivity Commission found that the average pharmacy operating profit margin in 1991-92 was 8 per cent, compared with an all-retail average of 2 per cent (PC 1999e, p. 13). Commonwealth estimates for 1997 showed profit margins of 7.5–15.6 per cent (Commonwealth of Australia 1999b, p. 6). The relatively high profit margins may indicate a lack of competition in the pharmacy sector.

Legislative restrictions on competition

Pharmacy regulation is closely interlinked with the regulation of drugs, poisons and controlled substances, which is discussed in the previous section. State, Territory and Commonwealth legislation controls or influences virtually every aspect of pharmacy, including who is able to provide pharmacy services, who can profit from them, where they can be provided and (for most prescription medicines) the cost at which they can be sold to consumers (Wilkinson 2000, p. 19).

State and Territory legislation regulates the profession of pharmacy. Each State and Territory has legislation that requires pharmacists to be registered and that controls aspects of the professional and commercial practice of pharmacies. As for other professions, the details of these regulations vary among jurisdictions.

Commonwealth legislation underpins the PBS, supplemented by a contract between the Commonwealth and the Pharmacy Guild of Australia — namely, the Australian Community Pharmacy Agreement. The agreement sets out the terms under which the Commonwealth remunerates pharmacies for dispensing PBS medicines, and the conditions for the approval of new pharmacies and the relocation of existing pharmacies for PBS medicines.

Some restrictions applied to pharmacy raise significant competition issues, including:

- provisions in State and Territory legislation that prohibit the handling and selling of certain pharmaceuticals in a retail environment by persons other than registered pharmacists;
- provisions in State and Territory legislation that restrict how pharmacy businesses can be run, including requirements that pharmacies be owned by registered pharmacists; and
- Commonwealth rules governing the number and location of PBS-licensed pharmacies.

Restrictions on the practice of pharmacy

The States and Territories regulate the pharmacy profession in similar ways to the regulation of other health professions. Each State and Territory requires persons wishing to practice pharmacy to hold appropriate qualifications and be registered by a pharmacy board (or, in the case of Western Australia, the Pharmaceutical Council of Western Australia). Only people who are registered may use the title 'pharmacist'.

State and Territory legislation also prohibits the handling or selling of certain pharmaceuticals in a retail environment by persons other than registered pharmacists. This restriction ensures consumers receive appropriate professional advice before they take potentially harmful medicines. It may also result in greater costs for pharmacy goods due to proprietors' needs to offer salaries sufficient to attract qualified staff pharmacists and to ensure the pharmacy business complies with the regulatory requirements.

As discussed previously, a 2001 Council staff paper sets out how these measures restrict competition and explores many of the issues raised by professional regulation (Deighton-Smith, Harris and Pearson 2001).

Restrictions on business conduct

In all States (but not the ACT or Northern Territory), pharmacy legislation confines the ownership of pharmacies to registered pharmacists, with limited exemptions. The main exemptions are pharmacies owned by friendly

societies, and pharmacies owned by nonpharmacists before the present ownership restrictions came into force.

Other related restrictions include:

- limits on the number of pharmacies that an individual may own (between two and four, depending on the jurisdiction);
- restrictions on the permitted ownership structures (for example, requirements for all shareholders and directors of a body corporate to be registered pharmacists); and
- provisions that prevent nonpharmacists having direct or indirect pecuniary interests in a pharmacy (for example, holding shares in a pharmacy business or profiting from the transactions of that business).

The discussion of the business association and ownership restrictions in the earlier section on health professions provides a guide to the costs and benefits of pharmacy ownership restrictions. A Council staff paper (Deighton-Smith, Harris and Pearson 2001) also examined this issue.

Location restrictions

In accordance with the Community Pharmacy Agreement, a Ministerial Determination under the *National Health Act 1953* limits new pharmacy approvals to pharmacies located in defined areas of community need, and more than a specified distance from existing pharmacies. The Determination also limits approvals for pharmacy relocations. Existing pharmacies may relocate within 1 kilometre of their current site without restriction; beyond that distance, they must maintain a specified distance from existing pharmacies. (There are some exemptions for relocations to shopping centres or private hospitals.)

The location restrictions support the PBS distribution network by ensuring adequate distances between pharmacies, and help to contain the cost of the PBS by limiting access to subsidised medicines. They also limit the opportunity for new entrants to local pharmacy markets, however, which protects inefficient pharmacies from effective competition on price and service, and thus increases costs to the community and limits consumer choice.

National review of pharmacy regulation

CoAG commissioned a major national review of restrictions on competition in State, Territory and Commonwealth pharmacy legislation in 1999. The National Review of Pharmacy Regulation, chaired by Warwick Wilkinson AM, reported to governments in February 2000.

The review considered that the objectives of pharmacy regulation are to protect the public by ensuring that pharmacy services are provided in a competent and accountable manner, and to ensure that all Australians have reasonable equality of access to competent and efficient pharmacy services. Taking these objectives into account, the review sought to set the boundaries of acceptable legislative restrictions on competition. It considered that 'where a jurisdiction's regulation does not extend as far as the Review's recommended line, that jurisdiction should not be compelled to extend that regulation' (Wilkinson 2000, p. 19).

The review made recommendations on the registration of pharmacists, restrictions on the location of pharmacies and restrictions on pharmacy ownership.

- It broadly endorsed the restrictions on who may practise pharmacy. It recommended removing requirements for pharmacists to have particular personal qualities (other than proficiency in English and good character) and introducing competency assurance requirements to the annual registration renewal process.

- It recommended clearly separating the role of governments in setting standards and the role of regulatory authorities in implementing and enforcing those standards. It proposed structuring regulatory boards so they are accountable to the community through government and they focus at all times on promoting and safeguarding the interests of the public.

- It found that the Commonwealth Government has a legitimate interest in ensuring pharmacy numbers provide satisfactory access and do not exceed a level capable of being sustained by taxpayers.

  – It concluded, however, that the most effective approach would be to use remuneration tools to deliver a manageable pharmacy network while promoting vigorous competition among pharmacies. It recommended considering a remuneration-based approach and phasing out new pharmacy location controls by 1 July 2001.

  – It recommended, if a remuneration-based approach is not practicable, revising the current new pharmacy location controls by making the 'definite community need' criterion for new pharmacy approvals more relevant to the needs of underserviced communities, and by exempting new pharmacies in eligible medical centres, private hospitals and aged care facilities from the distance criterion.

- It recommended phasing out restrictions on the relocation of existing pharmacies. It found that these restrictions place a higher priority on protecting pharmacies from competitors than on assuring communities of high quality and efficient services, and was not convinced that they provided a net benefit to the community.

- It considered that there is a net benefit to the community, on balance, from retaining pharmacist ownership of pharmacies.

  – It recommended retaining statutory prohibitions on nonpharmacists having direct proprietary interests in pharmacies (such as partnerships, shareholdings or directorships), but removing restrictions on pecuniary interests (such as joint ventures between pharmacists and supermarkets, preferred supplier arrangements and franchise agreements). It considered that pecuniary interests should be acceptable if the delivery of professional services remains under the control of a registered pharmacist (Wilkinson 2000, p. 62).

  – It recommended retaining exemptions from the ownership restrictions. It considered that friendly society pharmacies should be permitted to operate pharmacies where they currently do so, on the same basis as other permitted operators, and that permitted corporate-owned pharmacies should continue to be restricted under grandparenting arrangements.

  – It recommended removing restrictions on the number of pharmacies that an individual may own. It found that fair trading legislation provides a mechanism for addressing concerns about market dominance and market conduct, while modern information technology enables pharmacist proprietors to be involved with multiple pharmacies without compromising their supervision of their operation.

Review and reform activity

The Council considered the Wilkinson review recommendations in the 2001 NCP assessment but did not conclude an assessment because governments were still considering their responses to the review. It considered, however, that the review's conclusion that ownership restrictions provide a net benefit to the community is based on questionable evidence.

- The review argues that the community benefits from pharmacy owners having professional, as well as a commercial, interests in the safe and competent provision of pharmacy services by their businesses, but:

  – it noted that it is not in the commercial interests of nonpharmacist owners to expose themselves to loss of income/profit or litigation due to their pharmacies being unsafe or incompetently run;

  – it found that friendly society pharmacies and surviving corporate-owned pharmacies in Australia appear to work well, and are competently managed and professionally sensitive pharmacy businesses; and

  - it received evidence that the level of service received at pharmacies is often less than optimal, despite the current ownership controls in the six States.

- The review argued that, nonpharmacist proprietors could not be made readily accountable to regulatory authorities without a major and potentially costly re-adjustment of the regulatory infrastructure. It accepted, however, that it is feasible to hold nonpharmacist owners of pharmacies accountable to regulatory authorities. The review also noted that pharmacies owned by friendly societies are already held accountable to pharmacist registration boards.

- The review considered that promoting ownership by pharmacists encourages pharmacy proprietors to have a more direct relationship with a local community and promote the wise use of medicines, and ensures the maximum social and geographic reach of the community pharmacy network.

  - The review presented no evidence that pharmacies owned by other entities (such as friendly societies) are less likely to participate in public health promotions. The Council notes that corporate owners in other parts of the health sector participate in educational and public health campaigns.

  - The review did not offer any substantive evidence that restricting pharmacy ownership results in a distribution of pharmacies that maximises access to pharmacy services. The Council notes that pharmacists who own pharmacies are not immune to commercial pressures; like other business owners, they will generally seek to provide services in locations suitable to consumers. On the other hand, relaxing ownership controls would allow other entities to establish pharmacies, potentially including some in areas without access to a pharmacy.

- The review argues that the PBS is predicated on the stability of the distribution network, and that relaxing the ownership controls could result in costlier and less effective delivery of PBS medicines. On the other hand, the review notes that the ownership restrictions act as a barrier to greater efficiency in the pharmacy industry, with the result (under the current PBS arrangements) that consumers pay higher PBS dispensing costs than otherwise might be justifiable.

- The review found a significant cost saving from professional pharmacist services such as treating minor illnesses and providing advice on the safe use of pharmaceuticals. It concluded that pharmacist ownership, as well as management, of pharmacies reinforce this professional role and culture.

  - In this regard, the review (and many submissions to it) noted the high standard of care, professionalism and ethical behaviour demonstrated by most pharmacists, including those pharmacists who are employees rather than owners.

- The review appeared to find that ownership restrictions are not necessary to achieve governments' regulatory objectives. It commented that:

> *On balance, it is hard to agree with the argument that the whole operation of community pharmacy in Australia depends overwhelmingly on who may or not operate a pharmacy. Clearly, pharmacies run by friendly societies and grandparented for-profit corporations not only survive, but flourish … That nonpharmacist proprietors are capable of providing safe and competent pharmacy services suggests that allowing new nonpharmacist owners would not necessarily destroy the local pharmacy network and infrastructure to which Australians have become accustomed.* (Wilkinson 2000, p. 46).

CoAG referred the Wilkinson review report to a working group for advice. It asked the working group to consider the review recommendations, bearing in mind factors unique to the practice and regulation of pharmacy in Australia (Commonwealth of Australia 2002). [1]

As discussed in chapter 15, the Council is concerned by the delay in completing review and reform activity in some areas subject to national

[1] The Prime Minister released the working group's response to the review on 2 August 2002 (Howard 2002). The working group's conclusions on key issues are outlined below. The Council will consider the reforms implemented by jurisdictions, in conjunction with the working group response, in the 2003 NCP assessment.

- The working group found the Commonwealth's pharmacy location rules to have the most impact of all the restrictions on pharmacy businesses, and found these rules to be inherently anti-competitive in their operation and effects. It noted that the Commonwealth (while accepting that the review's proposals may well offer real alternatives) opted for an incremental easing of the location restrictions in the third Community Pharmacy Agreement, with an opportunity to review these arrangements in the lead up to the next agreement.

- The working group considered that the review, in coming to the conclusion that pharmacy ownership restrictions confer a net public benefit, was hampered by a lack of evidence and did not seem to consider the different treatment of business ownership in the context of other Australian professions, or overseas experience. Nonetheless, it considered that, given the other significant reforms proposed by the review, the impact of opening up pharmacy ownership could be too disruptive for the industry in the short term. It therefore suggested that CoAG accept the review's recommendation to retain pharmacist-only ownership of pharmacies.

- The working group suggested that CoAG support the review's recommendation to remove restrictions on the number of pharmacies that one person may own. It observed that the review's recognition that pharmacist-supervision requirements ensure safe and competent pharmacy services raises questions about the value of superimposing pharmacist-ownership requirements, let alone further rules limiting the numbers of pharmacies owned. It considered that, on balance, existing mechanisms would safeguard against the ill effects of market dominance, but noted that New South Wales (which remains concerned about the potential for monopolies to arise in regional areas) will further assess this issue as part of the implementation process.

reviews. The Council recognises that the need for effective intergovernmental consultation can slow the process of responding to reviews, but urges governments to demonstrate their commitment to their CPA obligations by implementing reforms to pharmacy legislation within a reasonable period.

Most jurisdictions were waiting for CoAG to respond to the Wilkinson review before they commence reforms to their pharmacy legislation. Four jurisdictions (the Commonwealth, Queensland, Tasmania and the ACT) implemented some reforms in advance, although they have yet to finalise their approach to pharmacy regulation. These jurisdictions' reforms are discussed in the following sections.

Commonwealth

The Commonwealth and the Pharmacy Guild of Australia signed a new Community Pharmacy Agreement in May 2000. This agreement, the third such agreement, operates from 1 July 2001 to 30 June 2005. The Commonwealth subsequently amended the National Health Act during 2000 to implement changes arising from the agreement. The amendments streamline the assessment criteria for new pharmacy location approvals and simplify the definition of community need.

The Commonwealth took into account the advice of the Wilkinson Review in negotiating the third Agreement with the Pharmacy Guild (Wooldridge 2000). The Agreement (and the amendments of the National Health Act) do not, however, phase out the restrictions on the relocation of existing pharmacies as recommended by the Wilkinson review. In addition, the Commonwealth rejected the Wilkinson review's proposal for a remuneration-based alternative to the location controls on new pharmacies.

The regulation impact statement relating to the amendments indicates that the Commonwealth rejected the review recommendation to replace location controls with a remuneration-based approach because it considered that:

- the reforms it implemented address shortcomings in the current location controls and provide a base for longer term deregulation;
- rapid and substantial deregulation would skew already imbalanced pharmacy distributions; and
- changes of this nature could be progressed only against the resistance of pharmacists and possibly the wider community (Wooldridge 2000, p. 28).

The Office of Regulation Review assessed the regulation impact statement, and considered that its analysis of the pharmacy location controls was adequate (PC 2000b, p. 24).

The arguments presented by the Commonwealth Government may justify phasing in reforms over time. They do not, however, provide convincing evidence that it is in the public interest to retain the location restrictions

indefinitely, particularly given the findings of the Wilkinson review. Governments, through CoAG, have yet to finalise their approach to pharmacy regulation (and therefore, to assess the restrictions in their legislation against NCP principles), so the Council will finalise its assessment of CPA compliance in 2003.

The Council notes that the terms of the Community Pharmacy Agreement will delay opportunities to reform the location restrictions until 2005. The Commonwealth, however, has some options for reducing the costs of the current restrictions.

- Clause 35 of the agreement provides for suspending restrictions on establishing pharmacies in aged care facilities following an examination by the parties to the agreement. This provisions allows scope to address one of the review recommendations.

- The Commonwealth could announce further reforms now, to take effect from July 2005. This approach would provide the pharmacy sector with a considerable period of time to adapt to the new environment, removing the need for further 'transitional' delays after 2005.

Queensland

Queensland passed a new *Pharmacists Registration Act 2001* in May 2001, as part of its reforms to all of its health practitioner legislation (see the section on chiropractors). The new Act contains entry and registration requirements, and reserves the title of 'pharmacist' to registered pharmacists. It also contains advertising restrictions that are common to other Queensland health practitioner legislation and that reflect the principles of the TPA. The Act preserves the practice and ownership restrictions from the *Pharmacy Act 1986*, pending the outcomes of the Wilkinson review process.

Queensland has indicated that it envisages further reform of its pharmacy legislation. Until CoAG decides its response to the Wilkinson review, however, Queensland cannot finalise its own response (Queensland Government 2002). The Council will finalise its assessment of CPA compliance in 2003.

Tasmania

Tasmania repealed the *Pharmacy Act 1908* and replaced it with the *Pharmacists Registration Act 2001*. The new Act retains stringent ownership controls from the previous Act, including (contrary to the Wilkinson review recommendations) restrictions on the number of pharmacies in which a registered pharmacist may have a direct or indirect interest.

Tasmania advised the Council that 'the final content of its pharmacy legislation will depend on its assessment of the eventual outcome of the

national review of this legislation, including CoAG's recommendations' (Government of Tasmania 2002). The Council will finalise its assessment of Tasmania's CPA clause 5 compliance in 2003.

The ACT

The Wilkinson review found that the ACT's pharmacy legislation did not rule out the ownership of pharmacies by persons other than pharmacists (although, as in other jurisdictions, the ACT legislation requires restricted pharmaceuticals to be dispensed by registered pharmacists). The review considered that the ACT's pharmacy ownership provisions, as they stood, fell within the boundary of acceptable regulation and that the ACT did not need to amend its Act (Wilkinson 2000, p. 48).

The ACT Legislative Assembly passed a private member's Bill to amend the *Pharmacy Act 1931* in August 2001. The second reading speech indicated that the amendments were intended to ensure pharmacies could be owned and operated only by registered pharmacists or companies controlled and managed by registered pharmacists (Tucker 2001).

The ACT Government has advised the Council that the legislative amendments do not impose any additional obligations with respect to the ownership of pharmacy property. Given the apparent discrepancies between the ACT Government advice, the second reading speech and the Wilkinson review finding, the Council asked the ACT Government to provide legal advice to clarify the effect of the amendments. The ACT has advised the Council that the ACT Government Solicitor's Office is preparing this advice.

The ACT Government is finalising a Bill to replace its existing health profession Acts, including the Pharmacy Act (see the section on chiropractors). The Government advised that this Bill is likely to address most of the Wilkinson review findings (Government of the ACT 2002, p. 33). The Council will complete its assessment in 2003.

Table 16.12: Legislation regulating the pharmacy profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth		PBS approvals (location of pharmacies).	National Review of Pharmacy Regulation (Wilkinson review) was completed in February 2000. The review recommended retaining registration, the protection of title, practice restrictions and disciplinary systems (although with minor changes to the registration systems for individual jurisdictions). Further, the review recommended removing controls on the relocation of existing pharmacies, considering remuneration-based alternatives to new pharmacy location controls, maintaining ownership restrictions and removing business licensing restrictions. CoAG referred the Wilkinson review to a senior officials' working party. The working party has completed it report. CoAG has yet to release its formal response.	The third Community Pharmacy Agreement between the Commonwealth and the Pharmacy Guild of Australia maintains location restrictions for new pharmacies and relocation restrictions for existing pharmacies (although with some simplification and amendment).	Council to finalise assessment in 2003.
New South Wales	*Pharmacy Act 1964*	Entry, registration, title, practice, discipline, advertising, business ownership, licensing			
Victoria	*Pharmacists Act 1974*	Entry, registration, title, practice, discipline, advertising, business ownership, licensing		Victoria commenced a further review in August 2001 (to examine implementation options for Wilkinson review recommendations and to assess other outstanding restrictions) but has been unable to proceed with the identification or implementation of reforms without a CoAG response to the Wilkinson review.	

(continued)

Table 16.12 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Pharmacy Act 1976*	Entry, registration, title, practice, discipline, advertising, business ownership	(see previous page)	Queensland passed a new *Pharmacists Registration Act 2001* in May 2001, but reserved ownership and practice restrictions pending the outcome of the CoAG working party process.	(see previous page)
Western Australia	*Pharmacy Act 1974*	Entry, registration, title, practice, discipline, advertising, business ownership, licensing, residence			
South Australia	*Pharmacy Act 1991*	Entry, registration, title, practice, discipline, advertising, business ownership, licensing			
Tasmania	*Pharmacy Act 1908*	Entry, registration, title, practice, discipline, advertising, business ownership		Act was repealed and replaced with *Pharmacists Registration Act 2001,* which retains ownership restrictions from the earlier Act pending the outcomes of the national review process.	
ACT	*Pharmacy Act 1931*	Entry, registration, title, practice, discipline		Act was amended by the *Pharmacy Amendment Act 2001.*	
Northern Territory	*Pharmacy Act 1996*	Entry, registration, title, practice, discipline			

Other health legislation

Commonwealth health legislation

Commonwealth legislation regulating therapeutic goods and the pharmaceutical benefits scheme is discussed in the section on pharmacy, drugs, poisons and controlled substances. In addition, the Commonwealth administers the Medicare health insurance system and regulates private health insurance through the *Health Insurance Act 1973* and the *National Health Act 1953*.

Review and reform activity

The Council has previously identified NCP questions relating to the Commonwealth's administration of the legislation regulating Medicare and private health insurance. These questions relate to:

- restrictions on access to Medicare provider numbers;
- the pathology licensed collection centre scheme;
- restrictions on the services covered by private health insurance; and
- community rating of private health insurance premiums.

Medicare provider numbers

The Commonwealth introduced legislation in 1996 that restricts access to Medicare provider numbers, with the aim of increasing the quality of general practice, restraining increasing Medicare costs induced by an increasing supply of general practitioners, and promoting a fairer distribution of medical practitioners in rural and remote areas. The *Health Insurance Amendment Act (No. 2) 1996* requires new medical graduates to complete additional training to gain access to Medicare provider numbers. This restricts entry to private medical practice, however, thereby restricting competition.

The CPA requires governments to have evidence to demonstrate that all new legislation that restricts competition complies with the CPA clause 5 guiding principle. In the 1997 NCP assessment, the Council found that the Commonwealth had not provided a robust case to show that the new restrictions on access to Medicare provider numbers are in the public interest. It also found that the Commonwealth appeared not to have examined

alternative, nonrestrictive, options for achieving the objectives of the legislation, as required by the CPA clause 5 guiding principle.

The Commonwealth's 1998 NCP annual report noted that the legislation, while not assessed under the new legislation 'gatekeeping' process, contained review mechanisms allowing public interest matters to be assessed. The Act included a sunset clause and established a Medical Training and Review Panel to report on employment opportunities for medical practitioners (Commonwealth of Australia 1999a, p. 138). In addition, the Commonwealth subjected the legislation to a mid-term review by an independent consultant (although this review did not specifically address NCP matters).

The Commonwealth amended the Health Insurance Act in 2001 to repeal the sunset clause. It prepared a regulation impact statement, which the Office of Regulation Reform approved. The regulation impact statement supported retaining the Medicare provider number restrictions, which were found to have improved access to general practitioners in rural areas and delivered substantial ongoing savings to the Government. It also found that removing the restrictions would not necessarily result in lower costs to individual consumers; medical practitioners who have not undergone the additional training attract lower Medicare rebates for their services, so patients could be asked to pay more than they would if they saw a practitioner with postgraduate qualifications.

The Council considers that the evidence provided by the regulation impact statement satisfies the Commonwealth's CPA obligation to have evidence demonstrating that the restrictions on access to Medicare provider numbers provide a net benefit to the community. The Commonwealth has not clearly demonstrated that its approach involves the least restriction of competition necessary to achieve its health care objectives. The Council notes, however, that the creation of an extra 50 postgraduate training places in the 2000 Federal Budget reduced the degree to which the requirement to undergo postgraduate training restricts competition.

Pathology collection centre licensing

The Commonwealth licenses pathology outlets under part IIA of the Health Insurance Act (the licensed collection centre scheme). Only licensed pathology outlets may provide services eligible for Medicare benefits. The Commonwealth limits the number of licenses that it issues. Regulations supporting the scheme also prevent entry by new service providers unless they meet conditions (including volume quotas), thus protecting licensees from competition. These barriers to entry have created a capital market for collection centre licences.

The Commonwealth added part IIA of the Health Insurance Act to its legislation review schedule in 1998-99. The Department of Health and Ageing commenced the review in 2000, releasing an issues paper early that year and receiving submissions until 30 June 2000. The department intends releasing the review report to stakeholders in July 2002, and finalising the review in

late 2002. Concurrent to the review, the Commonwealth introduced legislation to the Parliament in early 2000 that simplifies aspects of the licensed collection centre scheme while retaining licensing. Parliament passed this legislation in June 2001.

The Commonwealth will not complete the review and reform of its legislation regulating pathology by 30 June 2002. The Council acknowledges that the significant resource demands of the legislative review program mean that legislation reviews added to the schedule late may not be completed by the CoAG deadline. Given that the Commonwealth has introduced some reforms, and will soon complete the review, the Council will finalise its assessment of the Commonwealth's CPA compliance in the 2003 NCP assessment.

Restrictions on services covered by private health insurance

Private health insurance generally covers patients for some or all of the costs of hospital treatment as a private patient. In addition, people can purchase ancillary cover, which provides rebates for services out of hospital that are generally not provided under Medicare.

Commonwealth regulation limits the hospital services that private health funds may pay rebates for. Health funds may only pay rebates for hospital services provided by or on behalf of, medical practitioners, midwives and dental practitioners. This limitation restricts competition by preventing other health providers (such as podiatrists) negotiating with private health funds to attract a rebate for the substitute in-hospital services that they provide. The Council raised this matter with the Commonwealth in December 2000.

The Commonwealth Treasury has since advised the Council that the Department of Health and Ageing is establishing trials to assess the suitability of including 'podiatric surgery' within the definition of 'professional attention' under the Health Insurance Act. This would allow podiatrists to negotiate with private health funds to attract rebates for in-hospital podiatric surgery, as well as for podiatric treatments provided under ancillary insurance cover. Trials are underway in Western Australia and negotiations are continuing to establish a trial in Victoria. These trials will run for at least twelve months.

Given that the Commonwealth is investigating the merits extending the definition of 'professional attention' to include podiatric surgery, the Council will finalise its assessment of compliance with the CPA clause 5 guiding principle in 2003. The Council notes that the Department of Health and Ageing working party is investigating the regulation of the private health insurance industry (Patterson 2002). This may be a suitable vehicle for considering further extension of the definition of 'professional attention' to include other services provided by different health professions.

Community rating of private health insurance

Community rating requirements under the National Health Act prevent health funds setting different premiums for members on the basis of their health status, age and claims history. As a result, health funds are unable to quote differential premiums that reflect different levels of risk.

The Commonwealth referred the private health industry in Australia to the (then) Industry Commission for review in 1996. The Industry Commission reported in 1997. It found that major regulatory constraints on private health insurance funds — notably, community rating — make the market unattractive to enter and limit choice within the market (IC 1997, p. xxxiii). It found that the community rating system (together with the supporting 'reinsurance pool' arrangements) has:

- dulled the incentive for funds to reduce costs;
- lead to a proliferation of products designed to target particular groups while precluding development of some products that would otherwise be in demand; and
- heightened adverse selection (whereby low risk people have been leaving private health insurance funds while those expecting to make claims have been joining).

The Industry Commission inquiry recommended a series of incremental reforms to private health insurance regulation, including the adoption of 'lifetime community rating' to ameliorate adverse selection. The Government accepted most of the review recommendations and has implemented a series of legislative changes since 1998.

The inquiry's terms of reference prevented it examining the Government's policy of retaining community rating, however, so it did not consider the fundamental question of whether the community rating provisions comply with the CPA tests. Consequently, in the 1997 NCP assessment, the Council found that the Commonwealth had not met its CPA obligations in relation to the community rating provisions in its legislation regulating private health insurance. In the 2001 assessment, the Council stated that it would consider this matter further in 2002.

During the course of the 2002 assessment, the Commonwealth advised the Council that it considers that community rating provides a net community benefit by ensuring high-risk groups (such as the elderly and chronically ill) are able to afford private health insurance and do not rely entirely on the public health system. The Commonwealth also argued that the adverse impacts on competition of community rating are limited as it is a regulatory requirement that applies equally to all private health insurance funds and it does not prevent funds from competing on the basis of price or product type.

The Council acknowledges that the Commonwealth has implemented many of the reforms recommended by the Industry Commission inquiry. In addition,

the Minister for Health and Aged Care has announced the Government's intention to reform the regulation of the private health industry. The Minister has asked a Department of Health and Ageing working party to report by mid-2002 on whether the regulations are delivering the best outcomes for fund members and on ways of ensuring that health funds are as efficient and competitive as possible (Patterson 2002). This may result in further reforms to restrictions on competition in the legislation regulating private health insurance.

Given the Government's intention to reform private health insurance regulation, the Council will assess this matter again in 2003. Private health insurance, however, is one component of an interdependent health care system. The need for community rating of private health insurance, and its costs and benefits, ultimately depend on the nature and role of the public health system. The Industry Commission found, for example, that the equity grounds for community rating are stronger where there is no public system but are relatively weak where individuals can fall back on a free publicly funded health system for essential care (IC 1997, p.315). This means it may not be possible to demonstrate that community rating complies offers an overall net public benefit without examining the role of private health insurance within the health care system.

Table 6.13: Review and reform of Commonwealth health legislation

Legislation	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
National Health Act 1953 (part 6 and schedule 1) *Health Insurance Act 1973* (part 3)	Via community rating of private health insurance prevents insurers from setting different terms and conditions for insurance on the basis of sex, age or health status.	Productivity Commission completed a review of private health insurance in 1997. The review was specifically prevented from examining community rating.	Lifetime Health Cover was implemented in 2000, amending community rating to permit a premium surcharge for new entrants based on age at entry.	Council to finalise assessment in 2003.
National Health Act 1953 *Health Insurance Act 1973*	Limits the in-hospital services for which health funds may offer rebates to services provided by or on behalf of medical practitioners, midwives and dental practitioners.	The Department of Health is conducting trials to assess the suitability of including 'podiatric surgery' within the set of eligible in-hospital services. The Department is also conducting a review of private health insurance regulation.		Council to finalise assessment in 2003.
Human Services and Health Legislation Amendment Act (No. 2) 1995 *Health Insurance Amendment Act (No. 2) 1996*	Prevents new medical graduates from providing a service that attracts a Medicare rebate unless they hold postgraduate qualifications, are studying towards such qualifications or work in rural areas.	Mid-term review of provider number legislation completed in December 1999. It recommended removing the sunset clause on the legislation and addressing some training issues. The Medical Training Review Panel provides annual reports to Parliament on medical training and employment options.	The 2000 Federal Budget announced changes to general practice training, including more training positions. Act was amended in 2001 to remove the sunset clause.	Meets CPA obligations (June 2002).
Health Insurance Act 1973 (Part IIA)	Pathology collection centre licensing prevents entry to the market.	NCP review was commenced in 2000 and is due to be completed in mid-2002.	Legislation to modify the licensed collection centre scheme was introduced in June 2001.	Council to finalise assessment in 2003

Population health and public safety

States and Territories have a wide variety of population health legislation aimed at reducing the risks of infection. These laws include the licensing of facilities that provide health services and other activities that could pose a potential public health risk, and procedures for the use of potentially dangerous material and procedures.

The State and Territory legislation uses a variety of mechanisms to minimise the risk of harm to the community. To some extent, the different mechanisms reflect jurisdictions' different assessments of population health concerns; for example, Queensland has a number of laws relating to mosquitoes but Tasmania has none, reflecting the climatic differences between the two States.

Legislative restrictions on competition

Each jurisdiction has several legislative instruments scheduled for review that are concerned with maintaining of public health and safety. These include:

- licensing of occupational groups that undertake potentially dangerous activities, such as skin piercing;
- licensing of premises such as hospitals, aged care facilities and restaurants;
- prescriptive procedural legislation, such as legislated infection control procedures; and
- outcome measures with penalties for breaches, such as fines for serving contaminated food.

There is occasional overlap between the general objectives of public health legislation (to protect community health and safety) and environmental protection legislation. This overlap can require persons to meet standards set in two or more legislative instruments. The review and reform process has resulted in a number of governments discovering duplicated regulation either within their own jurisdiction or between levels of government. Governments subsequently repealed several laws to reduce this duplication and removed anticompetitive aspects of other public health legislation.

No significant concerns with population health legislation have been raised with the Council.

7 Legal services

Legal services have an important role in ensuring justice according to the law and in the daily operations of citizens and businesses. Legal practitioners provide services in areas such as finance, housing, wills, compensation for injury, and family law. The legal services sector has an annual turnover of more than $6 billion per year and employs more than 70 000 people (ABS 2000c).

Legislative restrictions on competition

A range of laws, regulations, professional rules and court responsibilities govern legal practitioners and how they operate. Each State and Territory has legislation to facilitate the administration of justice and to protect consumers by limiting who may practice as a lawyer and how legal practitioners may represent themselves.

Legal practitioner legislation requires practitioners to meet certain character, training and practice experience requirements before they can enter the legal profession, and to be licensed by a registration board while they continue to practice. It also reserves for registered legal practitioners the exclusive right to perform certain types of legal work. In addition, it regulates the business conduct of registered legal practitioners.

The National Competition Council released a staff paper in 2001 that sets out how these measures restrict competition and explores many of the issues raised by professional regulation (Deighton-Smith, Harris and Pearson 2001). The paper highlights the importance of clearly identifying regulatory objectives, linking any restrictions on competition to these objectives and then (by applying the best practice principles of transparency, consistency and accountability) ensuring that the restrictions represent the minimum necessary to achieve the objective.

The 2001 National Competition Policy (NCP) assessment reported that the Council considers there is a public benefit case to support, in principle, the licensing and registration of legal practitioners. Other restrictions may raise competition issues, however. These restrictions relate to:

- reserved areas of practice;
- restrictions on advertising;

- restrictions on legal practice ownership; and
- the monopoly provision of professional indemnity insurance for solicitors.

In assessing compliance with Competition Principles Agreement (CPA) clause 5 obligations, the Council looks for robust public interest justifications for these restrictions, and for regulatory outcomes that meet best practice principles outlined (as listed above).

Reservation of practice

State and Territory laws reserve certain legal work for registered legal practitioners by making it an offence for unqualified persons to supply such services. This reservation of practice helps to protect the public by ensuring legal work is carried out by qualified practitioners who are subject to a disciplinary system.

Practice reservations can increase costs to consumers, however, by limiting the number of people who can carry out legal work. Conveyancing fees in New South Wales fell 17% between 1994 and 1996, after the Government removed the legal profession's monopoly on conveyancing (and removed price scheduling and advertising restrictions). In addition, the absence of competition from nonlawyers may act as a disincentive to innovate in the delivery of legal services.

The work reserved for lawyers varies across jurisdictions, but generally includes the drawing up or preparation of wills or documents that affect rights between parties, affect real or personal property or relate to legal proceedings, and probate work. Reservation of broadly defined practices can raise competition issues by because it can mean that some lower risk services are inappropriately restricted. Broad practice reservations can prevent appropriately trained nonlawyers performing some work that they could undertake without undue risk to the community.

All jurisdictions except Queensland, Tasmania and the ACT permit conveyancers to settle real estate transactions. (Legislation regulating conveyancers is assessed in chapter 8). Most legal practitioner legislation, however, draws little if any distinction between other services (such as the drafting of simple wills) that appropriately trained nonlawyers could perform and complex technical matters that require legal training. Some legislation reviews have identified scope to open up additional areas of reserved legal work to competition from nonlawyers.

Advertising restrictions

Advertising allows lawyers to inform potential clients about the services they offer and their terms, thus assisting consumer choice. Advertising controls

restrict competition by making it harder for new entrants to make themselves known to potential clients, and harder for consumers to compare the services and prices being offered. They tend to hinder innovation, discourage price competition and reduce consumer choice.

Legal practitioner legislation and professional conduct rules traditionally contained stringent advertising controls to ensure that consumers were not misled by deceptive advertising and that the legal profession was not brought into disrepute. In the late 1980s and early 1990s, advertising controls were relaxed. Generally, the only remaining restriction on advertising by lawyers is that it should not be false, misleading or deceptive, in line with the requirements of the *Trade Practices Act 1974* (TPA) and equivalent State and Territory fair trading legislation. The Northern Territory also has rules dealing with advertised prices and Western Australia has advertising guidelines.

New South Wales and Queensland have recently introduced new restrictions on advertising personal injury legal services, in response to rising public liability insurance premiums. To comply with the CPA clause 5 guiding principle, government must support these restrictions on advertising with a public interest case that establishes a clear link between the regulatory restriction and the reduction of the identified harm.

Restrictions on business ownership and association

Most States and Territories restrict legal practitioners' ability to share profits with nonlegal partners. These restrictions make it difficult for legal practitioners to form multidisciplinary practices with other professionals such as accountants, conveyancers and management consultants. They may also create an entry barrier for new firms or limit expansion by existing firms, by limiting the source of potential funds available to them.

The legal profession historically used the need to preserve the confidentiality and trust of the lawyer/client relationship to justify controls over the ownership and organisation of legal practices. It argued that lawyers must be able to pursue their clients' interests to the exclusion of the interests of third parties involved in the practice. It also argued that nonlawyer owners or partners would not be bound by the legal practitioners' professional obligations, for example, to decline to act where there is an actual or potential conflict of interest.

Ownership restrictions potentially impose significant costs on legal practices and thus on consumers of legal services, however. They make decision-making complex, and may unnecessarily complicate management structures. They also limit legal firms' ability to raise capital for expansion or entry into other markets (Shaw 2000, p. 7624). Further, legislation reviews have found limited evidence that ownership restrictions help to maintain professional

ethics. Maintaining a clear focus on the accountability of individuals may be more effective than restricting ownership in achieving professional legal objectives.

Professional indemnity insurance

Professional indemnity insurance is designed to meet client or third party claims of civil liability that arise from practitioners' negligence or error. In all jurisdictions, registered legal practitioners are required to hold professional indemnity insurance. In some jurisdictions, barristers may obtain their professional indemnity insurance from a selection of approved providers. Solicitors are usually required to obtain this insurance from a single body on the terms and conditions set by that body.

Some jurisdictions exempt national law firms from the requirement to insure through the approved monopoly supplier if they can show that they have appropriate cover in place. These firms are effectively free to choose their insurer from the options provided by different States and Territories. Legal firms have demonstrated sensitivity to premiums by seeking to insure with low cost schemes. Last year, a number of prominent New South Wales firms insured with Victoria's professional indemnity insurance scheme because it offered lower premiums than those of the New South Wales scheme (Department of Treasury and Finance 2002). Chapter 9 examines the competition questions associated with statutory insurance monopolies.

Harmonising legislation regulating the legal profession

In March 2002, the Standing Committee of Attorneys-General agreed on the need for uniform rules to govern the legal profession. It has asked a working group to develop policy options for various aspects of legal profession regulation, including practice reservation, professional indemnity insurance requirements and business structures. The working group is due to submit the policy proposals to a meeting of the standing committee on 25 July 2002, with the aim of developing model provisions for Ministerial consideration by November 2002 and enacting legislation during 2003.

Consistent regulation would reduce barriers to competition across State and Territory boundaries, and significantly enhance competition in the legal services industry at a national level. Some jurisdictions have delayed part or all of their review and reform activity, given the national model laws project. They consider that the benefits of ensuring national consistency and avoiding double-handling of reform implementation outweigh the costs of delaying some reforms for a short period beyond the CoAG deadline of 30 June 2002.

The Council accepts that there is a benefit in this approach, provided that it does not result in unreasonable delays.

Review and reform activity

In most jurisdictions, review and reform of legislation regulating legal practitioners is still under way (table 7.1). The 2001 NCP assessment reported that Victoria had met its CPA clause 5 obligations in relation to legislation regulating legal practitioners, except for the statutory monopoly over professional indemnity insurance (where the Council was conducting further work with Victoria). Since that assessment, New South Wales has completed its review and implemented significant reforms; Queensland commenced assessing its legislation and proposed a reform package against the CPA clause 5 guiding principle; South Australia and Tasmania have completed reviews; and Western Australia and the Northern Territory are close to finalising their reviews.

As discussed in Chapter 9, the Council considers that the current uncertainty in the insurance environment, and the work governments are undertaking on insurance-related issues, warrants deferring to 2003 the final assessment of governments' compliance with their CPA clause 5 obligations in relation to legislative restrictions on insurance markets. This 2002 assessment therefore considers the restrictions on competition in legal practitioner legislation that do not relate to insurance. The Council will finalise its assessment of statutory legal professional indemnity insurance monopolies, and advertising restrictions aimed at maintaining affordable public liability insurance premiums, in 2003.

New South Wales

New South Wales completed a review of its *Legal Profession Act 1987* in 1998. The Attorney-General's department conducted the review, with advice from a reference group including representatives of consumers, practitioners, the insurance industry and the courts. The review recommended giving further consideration to removing the reservation of certain categories of legal work. It considered that the criteria for any reservation of work should be based on the potential harm to the public if a nonlawyer undertakes that work. It recommended reserving functions for lawyers where there is a genuine and necessary requirement for legal professional skills, but allowing appropriate competition among various professions in other areas.

The review recommended removing the rule requiring solicitors to have majority control of multidisciplinary practices, and allowing solicitors and barristers to form incorporated practices under the Corporations Law. In both cases, however, the review considered that the regulatory system should ensure that solicitors' professional and ethical obligations are maintained,

and that insurance and fidelity cover is at least as favourable to clients as in the case of other solicitors.

The review recommended deregulating the market for professional indemnity insurance for solicitors, subject to appropriate client protection through minimum standards for policies, run-off cover and indemnity. The review found general support for deregulation, but suggested using a levy on premiums to fund the Law Society and Bar Association to provide risk and practice management training, because this is also an important mechanism for containing the costs of legal services.

The review did not find justification for reintroducing controls on advertising. It noted that in some areas of practice, such as wills and conveyancing, advertising may have facilitated competition. It found limited evidence of harm to the public as a result of advertising restrictions being removed, and considered that the public benefit conferred by freedom to advertise outweighs any such harm.

Implementation of review recommendations

The New South Wales Government is progressively implementing reforms. It amended legislation in October 2000 to allow solicitors to incorporate. Its incorporation model requires individual solicitors (but not their incorporated practices) to hold practising certificates and requires incorporated legal practices to have at least one solicitor on their board of directors (New South Wales Government 2001).

In May 2002, the Parliament passed legislation to implement a range of further reforms, including:

- providing for voluntary membership of professional associations;
- allowing accreditation of training schemes not conducted by the professional associations;
- allowing solicitors to practise in multidisciplinary partnerships despite anything to the contrary in Law Society rules;
- requiring professional rules to be exposed for public comment before being made; and
- allowing lawyers from other States to practice in New South Wales even if their jurisdiction does not have complementary legislation.

The Government rejected the recommendation to deregulate professional indemnity insurance; instead, it is drafting legislation to establish a new mutual fund to cover all solicitors (except those with exemptions), which it anticipates would be administered by an insurer selected by an independent board (New South Wales Government 2002; see also chapter 9 on insurance and superannuation services).

New restrictions on advertising

Recent changes in New South Wales restrict the nature of advertising of personal injury services by legal practitioners. Regulations introduced in May 2001 restricted advertising of workers compensation services. In March 2002, the Legal Profession (Advertising) Regulation 2002 extended these restrictions to cover all personal injury services. The regulation states that lawyers must not advertise personal injury services except by means of a statement that:

- states only the name and contact details of the lawyer, together with information as to their area of practice or speciality; and
- is published only by certain allowable methods such as printed publications, and electronic databases and directories on the internet.

The regulation does not permit personal injury services advertisements in hospitals or on the radio or television. It also does not permit advertisements for personal injury services to include information about the availability of 'no-win no-fee' arrangements. Lawyers registered in New South Wales can be found guilty of professional misconduct if they contravene the advertising regulations, with penalties ranging from reprimands to deregistration.

Restrictions on advertising restrict competition by making it harder for newly qualified practitioners, and practitioners entering new markets, to inform potential clients of their services and terms. The Council recognises that, although Legal Profession (Advertising) Regulation restricts advertising of personal injury services, it does not prohibit it and nor does it constrain advertising of other legal services — which limits its adverse impacts on competition. The competition impacts that do arise may be justified if the restrictions are necessary to meet the Government's regulatory objectives.

The New South Wales Government acknowledges that the advertising restrictions raise competition issues, but considers that they provide a net public benefit by helping to keep public liability insurance premiums affordable. It cites evidence that that the increasing number of personal injury claims and the cost of these claims are contributing to an increase in public liability insurance premiums. This rise in premiums is adversely affecting nongovernment service delivery and small business.

The evidence provided by New South Wales regarding the link between restricting advertising and maintaining affordable public liability insurance is much less clear. New South Wales deregulated advertising in 1994. If there has since been a fundamental shift in community values and a lasting increase in the community's knowledge of their legal rights to compensation for personal injuries perhaps as a result of advertising by lawyers), then re-regulating advertising may not be effective in reducing the number of claims.

Even if restricting advertising does reduce the number of claims, it is not clear how effective this would be in reducing premium rises. Other drivers of recent premium increases include increases in the compensation awarded for

a given severity of injury, and the state of the insurance market cycle (Trowbridge Consulting 2002). These factors may be more significant than the number of claims per se.

Further, New South Wales has not shown that it is necessary to restrict advertising to achieve its objective of maintaining affordable public liability insurance. Governments are considering a range of reforms to ensure insurance is available at reasonable prices. Many of these reforms appear, in principle, less restrictive of competition than are restrictions on advertising by lawyers.

Finalising the assessment of compliance

New South Wales did not complete the review and reform of its legal practitioner legislation by CoAG's deadline of 30 June 2002. Given that it has made significant progress in implementing reforms, however, and that two potential compliance issues (the proposed monopoly mutual fund for professional indemnity insurance and the advertising restrictions) are both insurance related, the Council will finalise its assessment of CPA compliance in 2003. In that assessment, the Council will look for evidence from New South Wales that advertising restrictions are a necessary component of its package of reforms to address public liability insurance premium issues.

Queensland

The Queensland Government conducted a two-stage review of legal profession regulation. The first stage was broad ranging review of contemporary legal profession regulation issues, involving the release of a discussion paper in 1998, followed by a green paper in 1999.

The green paper recommendations included introducing a new complaints mechanism, allowing common admission of barristers and solicitors, removing the reservation of conveyancing practice, developing a framework for facilitating incorporation of legal practices and maintaining mandatory professional indemnity insurance requirements but providing competition in the insurance market.

The Government announced a series of proposed reforms to the legal profession in December 2000. It accepted the green paper recommendations to introduce a new complaints mechanism and allow common admission of barristers and solicitors. It also announced that it would:

- remove restrictions on professional indemnity insurance cover (subject to minimum standards), while allowing the current arrangements to continue for a further three years;
- further consider the incorporation of legal practices further through the Standing Committee of Attorneys-General in light of concerns regarding

the implications for national firms of the States adopting different approaches; and

- further consider the reservation of conveyancing work through a separate NCP review of legal profession legislation (see below).

The second stage of Queensland's review process involves an NCP review of competition-related issues in legal profession legislation (including the December 2000 proposals). This review began with the release of an issues paper in November 2001. It is examining a range of restrictions, including requirements for admission to the legal profession, qualifications for practice, ownership restrictions, practice reservation and the legislated arrangements for professional indemnity insurance.

Queensland expected to complete the NCP review in the first half of 2002, and to introduce a Bill to implement resulting reforms in mid-2002. Subject to the outcomes of the NCP review, Queensland anticipates that the Bill will also implement the reform proposals announced in December 2000 (Queensland Government 2002).

New restrictions on advertising

The Queensland Parliament passed the *Personal Injuries Proceedings Act 2002* in June 2002. The objective of the Act is to facilitate the ongoing affordability of insurance. In addition to reducing the costs of legal proceedings by introducing pre-court processes, the Act imposes restrictions on lawyer advertising so as to address the pressure on insurance premiums from increasing volumes of claims.

The advertising restrictions are similar to those implemented in New South Wales in March 2002. They prohibits lawyers from advertising personal injury services except by means of a statement that:

- includes only their name and contact details, together with information as to their area of practice or speciality; and

- is published only by certain allowable methods such as printed publications, and electronic databases and directories on the internet.

The Act does not permit advertising of 'no-win no-fee' personal injury services, or advertising in hospitals or on the radio or television. Queensland does, however, permit lawyers to advertise on the internet (although the advertisements are restricted to information about the law of negligence and a person's legal rights under that law, and the conditions under which the lawyer is prepared to provide personal injury services).

To demonstrate compliance with the CPA clause 5 guiding principle, Queensland needs to have evidence that restricting advertising will help to reduce the volume of personal injury claims and that reducing the volume of claims will reduce the pressure on insurance premiums. If community values

have fundamentally shifted, and community awareness of legal rights to compensation has increased, then restricting advertising may have little effect on the volume of claims. Further, the benefits of any reduction in claims volume will, in turn, depend on relative contribution of other factors (such the amount of compensation awarded for a given severity of injury and the state of the insurance market) in driving premium price increases.

Queensland also needs to demonstrate that it is necessary to restrict advertising to achieve its objective of maintaining affordable public liability insurance. As discussed in chapter 9, governments are considering a range of reforms to ensure insurance is available at reasonable prices. Many of these reforms appear, in principle, less restrictive of competition than are restrictions on advertising by lawyers.

Finalising the assessment of compliance

Queensland did not complete the review and reform of its legal profession legislation by the CoAG deadline of 30 June 2002. Given that it expects to implement legislative reforms in mid-2002, however, and that the advertising restrictions that potentially raise compliance issues are insurance-related, the Council will finalise its assessment of CPA compliance in 2003. In the 2003 NCP assessment, the Council will look for evidence from Queensland that advertising restrictions are a necessary part of its reform package.

Western Australia

Western Australia's review of the *Legal Practitioners Act 1893* is under way. The Government released an issues paper in June 2000, and the draft review report for public consultation in April 2002. The draft report's key recommendations included:

- reserving core areas of legal work (such as areas relating to appearances in court, the drawing up of wills and documents that create rights between parties, and probate work) for certified legal practitioners, but:
  - removing restrictions on the practice of tribunal-related work by nonlawyers;
  - prescribing arbitration services that can be undertaken by nonlawyers who satisfy prescribed competency standards; and
  - continuing to permit settlement agents to arrange or effect the settlement of real estate or business transactions for reward; and
- retaining compulsory professional indemnity insurance and the requirement to insure through the Law Society, but codifying in legislation the Law Society's practice of allowing practitioners to opt out of its scheme

where they give adequate notice and provide evidence of having made suitable alternative professional indemnity insurance arrangements; and

- removing restrictions on lawyers forming incorporated practices and multidisciplinary practices (Department of Justice 2002).

The draft report recommended implementing the review recommendations as a part of the national reform process under way under the auspices of the Standing Committee of Attorneys-General. It considered that there would be benefits in delaying its proposals, even though some could be implemented unilaterally, so they can be progressed as a single package with the national reforms.

The Government has decided to move ahead with implementing some of the draft review's recommendations, in advance of completing other aspects of the review. It is drafting an omnibus Bill to provide for:

- the incorporation of legal practices, which will enable lawyers to operate in multidisciplinary practices with other professions;

- the registration of foreign lawyers wishing to practise in Western Australia, which will reduce the barriers to entry by foreign lawyers into the local market; and

- national practice certificates, which will remove barriers to competition by providing automatic recognition of interstate lawyers' right to practice in Western Australia.

The Government will consider the review's final recommendations as soon as possible, and implement reforms either on a national level (through the national model laws project) or via the omnibus Bill (Department of Treasury and Finance 2002).

Western Australia will not complete the review and reform of the restrictions on competition in the Legal Practitioners Act by CoAG's deadline of 30 June 2002. Given that it is close to completing the review, however, and that it is proceeding with an initial set of reforms in the interim, the Council will finalise its assessment of CPA compliance in 2003.

South Australia

South Australia completed a review of the *Legal Practitioners Act 1981* in October 2000. The review recommendations included:

- removing Australian residency requirements for applicants for admission as a barrister or solicitor;

- giving further consideration to opening up further areas of reserved work to nonlawyers with appropriate alternative formal qualifications;

- continuing to monitor developments in relation to business structures, but giving consideration to permitting multidisciplinary practices once ethical and consumer protection issues are resolved; and

- maintaining the Law Society's monopoly over professional indemnity insurance for legal practitioners, provided premiums remain competitive.

In response to the review, the former South Australian Government invited submissions on areas of reserved work that could be opened up to nonlawyers, and announced that it would work with the Standing Committee of Attorneys-General to devise a national legislative model for incorporated legal practices (Government of South Australia 2001a). It introduced a Bill to implement other recommendations, but the Bill lapsed at the calling of the State election.

Although South Australia did not complete the reform of its legal practitioner legislation by the CoAG deadline of 30 June 2002, it has completed its review. Given that the national model laws process provides a mechanism for addressing several review recommendations, and that the uncertain insurance environment and work under way on insurance market regulation of warrants delaying the assessment of professional indemnity insurance issues, the Council will finalise its assessment of CPA compliance in 2003.

Tasmania

Tasmania established a team to review the *Legal Profession Act 1993* in February 2000. The review team released a discussion paper in May 2000 and sought public comments on a regulatory impact statement in April 2001. The review's preliminary recommendations, as reflected in the regulatory impact statement, included:

- removing the reservation of conveyancing work (but regulating conveyancers);

- removing restrictions on business structures for legal practices;

- allowing legal practitioners to arrange their own insurance (see chapter 9);

- removing restrictions on advertising; and

- improving the disciplinary system.

The review team provided its final report to the Attorney-General and the Treasurer in August 2001. The Government has indicated that it will shortly consider a proposal in relation to conveyancing. It is re-considering the review's remaining recommendations in the light of the March 2002 decision of the Standing Committee of Attorneys-General to prepare and adopt uniform national laws for the legal profession.

Tasmania did not complete the review and reform of its legislation governing the legal profession by the CoAG deadline of 30 June 2002. Given the preparation of uniform national laws, and Tasmania's commitment progressing reform of the reservation of conveyancing in the interim, the Council considers it appropriate to finalise the assessment of CPA compliance in 2003.

The ACT

The Department of Justice and Community Safety began a two-stage review of the *Legal Practitioners Act 1970* in 1999. The first stage involved the releasing an options paper in November 2001, canvassing reform of the admission and licensing of legal practitioners, and the complaints and disciplinary systems. The second stage was to involve releasing an options paper that canvassed reforms to business conduct restrictions, including restrictions on multidisciplinary practices, fee setting, insurance and the statutory interest account.

As an interim measure, the ACT Government amended the Legal Practitioners Act to introduce a second insurance provider (ACT Government 1999). The ACT has ceased the review, however, and instead will progress its review and reform activity through the national model laws project, to ensure a uniform and nationally consistent framework for the industry (ACT Government 2002, p. 35).

The ACT did not complete the review and reform of its legal practitioner legislation by the CoAG deadline of 30 June 2002. Given that it intends to progress its review and reform activity through the national model laws project, however, and that it introduced interim reforms to professional indemnity insurance arrangements, the Council will finalise its assessment of CPA compliance in 2003.

The Northern Territory

The Northern Territory commenced its reviews of the *Legal Practitioners Act* and the *Legal Practitioners (Incorporation) Act* with the release of an issues paper in 2000. It has completed the review of the Legal Practitioners Act, but Cabinet has yet to consider the review report. It completed the review of the Legal Practitioners (Incorporation) Act in November 2002.

The Legal Practitioners (Incorporation) Act review found a need to ensure business structures do not compromise lawyers adherence to their legal professional obligations, but considered that there are less restrictive ways of achieving this objective than restricting the ownership and business structures of legal firms. It recommended removing business structure and ownership restrictions, and replacing them with:

- a requirement for incorporated legal practices to nominate at least one solicitor director, who is responsible for ensuring the company delivers legal services in accordance with professional obligations and for dealing with unsatisfactory professional conduct by employees; and

- a negative licensing scheme, under which companies found guilty of crimes or with a history of employing people found guilty of unsatisfactory professional conduct can be prohibited from providing legal services.

The Government accepted the review recommendations and issued drafting instructions for the preparation of appropriate legislation. The Department of Justice advised the Council that, while the Government anticipated introducing this legislation before 30 June 2002, the legislation might be delayed to ensure uniformity with the model Bill being developed by the Standing Committee of Attorneys-General.

The reforms recommended by the review of the Legal Practitioners (Incorporation) Act appear consistent with CPA principles, but the Council cannot finalise the assessment of compliance until the Bill is introduced to, and passed by, Parliament. Given that the Northern Territory is preparing legislation, and is also continuing to progress its CPA clause 5 obligations in relation to the Legal Practitioners Act, the Council will finalise its assessment of CPA compliance in 2003.

Table 7.1: Review and reform of legislation regulating legal services

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Legal Profession Act 1987*	Licensing, registration, the reservation of title and practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance, advertising — which must not be false, misleading or deceptive — and mandatory continuing legal education)	Review was completed in 1998. Recommendations included allowing the incorporation of legal practices and allowing competition in professional indemnity insurance.	Reform implementation is under way. Restrictions on incorporation and multidisciplinary practices have been removed. Legislation providing for voluntary membership of professional associations, accreditation of training schemes and automatic recognition of interstate lawyers was passed in May 2002. The Government rejected the professional indemnity insurance recommendation and will establish a monopoly mutual fund under the administration of an independent board. New advertising restrictions for workers compensation services were introduced in May 2001 and extended in March 2002 to cover all personal injury services.	Council to finalise assessment in 2003.
Victoria	*Legal Practice Act 1996*	Licensing, registration, entry requirements, the reservation of title and practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance)	Review of was completed in 1996. Victoria subsequently conducted two reviews of professional indemnity insurance arrangements. The first (by KPMG) recommended removing the monopoly. The second (by the Legal Practice Board) recommended retaining it. The Government released its response to the second review for comment in November 2000. In addition, the Government commissioned a general review of legal profession regulation. The report, released in November 2001, recommended changes to the regulatory structure, focusing on the complaints and disciplinary system.	The *Legal Practice Act 1996* implemented a range of reforms arising from the 1996 review. The Government accepted the Legal Practice Board review recommendation to retain the Legal Practice Liability Committee's monopoly over provision of professional indemnity insurance for solicitors. It is awaiting community input before acting on the November 2001 general review.	Professional indemnity insurance — Council to finalise assessment in 2003. Other areas — meets CPA obligations (June 1999).

(continued)

Table 7.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Legal Practitioners Act 1995* *Queensland Law Society Act 1952*	Licensing, registration, entry requirements, the reservation of practice (including conveyancing), disciplinary processes, business conduct (including professional indemnity insurance and advertising)	Queensland has completed a general review of legal practitioner regulation, and announced proposed reforms in December 2000. Subsequently, it commenced an NCP review in the fourth quarter of 2001, releasing an Issues Paper in November 2001.	Queensland expects to introduce a Bill in mid-2002 to implement the reforms emanating from the NCP review, and (subject to the outcomes of the NCP review) the proposals arising from its previous general review of legal profession regulation.	Council to finalise assessment in 2003.
Western Australia	*Legal Practitioners Act 1893*	Licensing, registration, entry requirements, the reservation of title and practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance, trust accounts, fees, advertising)	The review is under way. Issues paper was released in June 2000. Draft report was released in April 2002, recommending reserving core areas of legal work; allowing practitioners who have made suitable alternative arrangements to opt out of the Law Society's professional indemnity insurance scheme; and removing restrictions on incorporated practices and multidisciplinary practices.	Western Australia is drafting an omnibus Bill to provide for the incorporation of legal practices, the regulation of foreign lawyers wishing to practice in the State, and national practising certificates. The Government will consider the review's final recommendations shortly, and implement reforms through either the national model laws project or the omnibus Bill.	Council to finalise assessment in 2003.
South Australia	*Legal Practitioners Act 1981*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, business conduct (including monopoly professional indemnity insurance)	Review was completed in October 2000. It recommended considering opening up further areas of legal work to competition with nonlawyers, monitoring national developments in relation to business structures and retaining the professional indemnity insurance monopoly.	The former Government indicated that it would monitor developments regarding multidisciplinary practices over the next two years, and retain the professional indemnity insurance monopoly. Bill to implement other reforms lapsed at the State election.	Council to finalise assessment in 2003.

(continued)

Table 7.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Legal Profession Act 1993*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, business conduct (including monopoly professional indemnity insurance, the operation of mandatory trust accounts and the power for Law Society to make rules on advertising)	Regulatory impact statement, released in April 2001, made preliminary recommendations to: remove the reservation of conveyancing; remove advertising and ownership restrictions; retain civil fee scales; improve the disciplinary system; and allow legal practitioners to arrange their own insurance. Review was completed in August 2001.	The Government will soon consider a proposal in relation to conveyancing. It is reconsidering the remaining review recommendations in light of the March 2002 agreement by Attorneys-General to prepare and adopt uniform national laws for the legal profession.	Council to finalise assessment in 2003.
ACT	*Legal Practitioners Act 1970*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, business conduct (including professional indemnity insurance, ownership, advertising by locally-registered foreign lawyers)	Two-stage review by the Department of Justice and Community Safety commenced in 1999, but has now ceased in view of the decision of the Standing Committee of Attorneys-General to prepare uniform national laws for the legal profession.	The Government amended the Act to introduce a second approved insurance provider in 1999, as an interim measure pending the full NCP review. The SCAP process is expected to develop model legislation before the end of 2002.	Council to finalise assessment in 2003.

(continued)

Table 7.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Legal Practitioners Act*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance and advertising)	Review is under way. Issues paper dealing with this Act and the Legal Practitioners (Incorporation) Act was released in 2000.	The Government anticipated introducing legislation into the June 2002 sittings of the Northern Territory Legislative Assembly.	Council to finalise assessment in 2003.
	Legal Practitioners (Incorporation) Act	Business structure and ownership	Issues paper was released in 2000, dealing with this Act and the Legal Practitioners Act. Review was completed in November 2001. It recommended allowing multidisciplinary practices, but providing for the disqualification of corporations found guilty of serious offences or with a history of employing persons found guilty of unsatisfactory professional conduct.	The Government has accepted the recommendations and issued drafting instructions for the preparation of legislation.	Meets CPA obligations (June 2003).

8 Other professions and occupations

States and Territories are reviewing a range of professional and occupational licensing instruments under the National Competition Policy (NCP). The regulation of some professions is discussed in other chapters (veterinary surgeons in chapter 4 on primary industries, health professions in chapter 6, the legal profession in chapter 7, teachers in chapter 12 and building-related professions and occupations in chapter 13). This chapter covers other significant professional and occupational regulation, including the regulation of motor vehicle dealers, real estate agents, second-hand dealers and travel agents.

Legislative restrictions on competition

Governments' regulation of professions and occupations restricts competition in several ways, including through licensing requirements, entry requirements (rules or standards governing who may provide services), the reservation of practice (where only certified practitioners are allowed to perform certain areas of practice) constraints on ownership and other commercial restrictions.

Licensing requirements vary. Some licensing schemes require complex tests of practitioners' qualifications and character. Others involve a 'negative licensing' approach whereby practitioners are not required to register but must hold prescribed qualifications. In some cases, licensing requirements are applied to individual practitioners; in others, licensing arrangements apply to the business rather than the practitioner.

For a number of professions and occupations, legislation specifies service standards and/or establishes mechanisms for consumer protection. For motor vehicle dealers, legislation typically sets standards for disclosure of information, minimum warranties and behaviour standards. For real estate agents, legislation sets requirements for fidelity funds, trust accounts and maximum permissible fees. Similarly, for travel agents, a licensing process aims to ensure service and quality standards, and a compulsory consumer compensation scheme to protect consumers from financial loss if a travel agent defaults (the Travel Compensation Fund). In addition, general consumer protection mechanisms in fair trading laws in each State and Territory provide avenues for redress of complaints about service provision.

Regulating in the public interest

Most regulation of professions and occupations aims to protect consumers of professional services and the broader community. Market failures, such as information asymmetries and externalities, create an ongoing need for some regulation of a range of occupations; regulation, however, can impose costs as well as benefits. Regulatory restrictions are most likely to provide a net benefit to the public where they relate directly to the objective of protecting the public, and are the least restrictive means available of achieving this objective (Deighton-Smith, Harris and Pearson 2001).

There are some occupations to which every jurisdiction applies a licensing or registration scheme. For other occupations, licensing is a requirement in some but not all jurisdictions. In the 2001 NCP assessment, the National Competition Council noted that cases of partial licensing warranted close examination; in particular, the decision of some governments not to require licensing or registration of particular occupations raised questions about the public interest case supporting licensing elsewhere (NCC 2001, p.18.3). The Council has considered cases of partial licensing/registration in this assessment.

Review and reform activity

Licensing in all jurisdictions

All jurisdictions license or register commercial agents, inquiry agents, security providers, driving instructors, motor vehicle dealers, pawnbrokers and second-hand dealers, real estate agents and travel agents.

Commercial agents, inquiry agents and security providers

Generally, all jurisdictions require commercial agents (debt collectors), private inquiry agents (private investigators or detectives), various security services providers (such as security guards and other patrol services, crowd controllers, security firms, body guards and the cash transit industry), process servers and private bailiffs to be licensed and/or registered. In the course of their work, agents may collect confidential information about people and their businesses, may have large sums of other people's money entrusted to them, and may have to use force against people. Governments require agents to be licensed to protect consumers and clients.

The 2001 NCP assessment determined that Queensland had complied with its Competition Principles Agreement (CPA) obligations in relation to commercial agents, Western Australia had complied in relation to private inquiry agents, security guards and crowd controllers, and the Northern Territory had complied in relation to commercial and private agents. This assessment considers whether the other jurisdictions have now met their CPA obligations in these areas.

New South Wales

New South Wales has separate legislation governing the security industry and the private investigation and debt collection industry.

New South Wales reviewed security industry licences under its Licence Reduction Program. This review recommended the repeal of four security industry licences. Following a comprehensive inquiry by Mr Justice Peterson into the regulation of the security industry and firearms, the Government decided not to proceed with the repeal of the four security industry licences.

Instead, the Government introduced of the *Security Industry Act 1997*, which repealed and replaced the *Security (Protection) Industry Act 1985*. The new Act established a revised licensing system in accordance with the recommendations of the Peterson Inquiry and taking into account the findings of the Royal Commission into the New South Wales Police Service.

New South Wales assessed the Security Industry Act generally, and the retention of the licences specifically, against the tests for new legislation that restricts competition under clause 5(5) of the CPA (New South Wales Government 1998). It has met the CPA new legislation obligations in relation to the Security Industry Act.

New South Wales established a working party in late 1997 to examine legislation governing the private investigation industry. The working party recommended replacing the *Commercial Agents and Private Inquiry Agents Act 1963* with new legislation, adopting a business licensing (rather than an occupational licensing) approach, and removing licensing requirements for repossession agents and process servers. New South Wales commenced a formal NCP review of the Act in November 2001, and completed the final report in April 2002. The Government anticipates introducing any legislative reforms arising from the NCP review during 2002 (New South Wales Government 2002).

New South Wales did not complete review and reform activity by the CoAG deadline of 30 June 2002, but its review and reform activity is considerably advanced. Given that the Government anticipates completing the review and making any legislative reforms required during 2002, the Council will finalise the assessment of CPA compliance in 2003.

Victoria

Freehills Regulatory Group completed an NCP review of the *Private Agents Act 1966* in 1999. The review recommended retaining occupational licensing for security providers and making further efforts to develop a national regulatory model for the industry. It recommended replacing licensing requirements for commercial agents with a 'light-handed' registration scheme (combined with greater use of trade practices/fair trading legislation to deal with problem operators) and reforms to the commercial agents surety scheme. The review also recommended reviewing whether the exemptions provided to certain occupational groups are still appropriate.

The Government delayed responding to the NCP review while it conducted a broader policy review of the Act. It subsequently advised the Council that it needs to undertake further targeted consultation before considering legislative amendments (Department of Treasury and Finance 2002). Victoria consequently did not complete the reform of the Private Agents Act by the CoAG deadline of 30 June 2002. Given that Victoria is continuing to progress this matter, the Council will finalise the assessment of CPA compliance in 2003.

Queensland

The *Security Providers Act 1992* requires licensing of private investigators, crowd controllers, security guards and security firms. The Office of Fair Trading is reviewing the Act, and released a draft public benefit test report in early 2002 for consultation. The draft report concludes that licensing of private investigators, crowd controllers, security officers and security firms is necessary to protect the consumers and the public, and that the existing entry requirements provide a net benefit to the community and should be retained.

Queensland expected to complete the legislation review in the first half of 2002. Given the State's continuing progress in this matter, the Council will finalise the assessment of compliance in 2003.

The draft public benefit test report also recommends that the Office of Fair Trading assess some new requirements proposed during the review. These include requiring insurance agents and loss adjusters who are not members of the Australasian Institute of Chartered Loss Adjusters to hold private investigator licences, and requiring alarm installers, lock smiths, security consultants and closed-circuit television monitoring staff to hold security officer licenses. If Queensland introduces new restrictions on competition, then it will need to demonstrate that they are in the public interest.

Tasmania

The Government has introduced the Security and Investigations Agents Bill 2002, to replace the *Commercial and Inquiry Agents Act 1974*. The Bill streamlines the licence application process by transferring responsibility for

licence approval from the courts to the Commissioner for Corporate Affairs. It removes requirements for process servers to hold licences and for commercial agents to lodge fidelity bonds. It also introduces a new provision that automatically disqualifies people from holding a licence for a period of five years if they have been convicted of an indictable offence and sentenced to three or more years imprisonment (Patmore 2002).

Tasmania assessed the Bill under its legislation gatekeeper process It has met its CPA obligations in relation to the assessment of new legislation.

The ACT

The ACT security industry is governed by five mandatory codes of practice issued under section 34 of the *Fair Trading Act 1992*. Each code covers a different sector: access control, bodyguards, cash transit, crowd control, and guard and patrol services. The Department of Justice and Community Safety commissioned an independent review of the codes in 2001.

The review identified the registration requirements as the code's primary restrictions on competition: principals and employees of security firms may be excluded from registration if a criminal history check reveals that they have been convicted of certain offences. The review found that these requirements provide a significant net benefit to the community by minimising public risk.

The codes also set standards of conducts for security firms. The conduct standards do not discriminate against potential new entrants, so their impacts on competition are minor and outweighed by the benefits to the public of maintaining appropriate standards by those engaged in security activities.

The ACT has met its CPA obligations in relation to the review and reform of the security codes.

Other jurisdictions

Western Australia has a review of the *Debt Collectors Licensing Act 1964* under way. South Australia advises that the review of its *Security and Investigation Agents Act 1995* is being finalised (Government of South Australia 2002). Neither jurisdiction has met its obligation to complete the review and reform of this legislation by 30 June 2002. Given the progress by each jurisdiction, however, the Council will finalise the assessment of compliance in 2003.

Table 8.1: Review and reform of legislation regulating commercial agents, inquiry agents and security providers

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Commercial Agents and Private Inquiry Agents Act 1963*	Licensing, registration, entry requirements (qualifications, experience, character, age, not convicted of offence), the reservation of practice, disciplinary processes, business conduct (advertising must specify agent's name and place of business, maintenance of records, trust account, fidelity bonds)	Commercial agents, private inquiry agents and their subagents	The Government established a Working Party established in 1997 to consider the legislation governing the private investigation industry in the context of reforms made to security industry regulation. The working party recommended replacing the Act with new legislation, adopting a business licensing rather than an occupational licensing approach for commercial agents, and removing licensing for repossession agents and process servers. The formal NCP review commenced in November 2001; an issues paper was released in January 2002 and the final report was submitted to the Minister for Police in April 2002.	The Government anticipates that any legislative reforms arising from the NCP review will be addressed during 2002.	Council to finalise assessment in 2003.
	Security (Protection) Industry Act 1985	Licensing and regulation	Security providers		Act was repealed and replaced by the *Security Industry Act 1997*.	Meets CPA obligations (June 2001).
	Security Industry Act 1997	Licensing, registration, entry requirements (qualifications, experience, competency, fit and proper person, age, not convicted of relevant offence), reservation of practice, disciplinary processes, business conduct, (advertising must contain licence number)	Security providers	Act was assessed under new legislation gatekeeper process.	New legislation.	Meets CPA obligations (June 2002).

(continued)

Table 8.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Private Agents Act 1966*	Licensing, registration, entry requirements (all good character, others vary), reservation of practice, disciplinary processes, business conduct (no misleading or deceptive conduct, financial sureties for commercial agents)	Security guards, crowd controllers, security firms, private inquiry agents, commercial agents, subagents	Freehills Regulatory Group completed an NCP review in October 1999. It recommended: retaining occupational licensing for security providers and making efforts to develop a national regulatory model for the industry; replacing licensing requirements for commercial agents with a 'light-handed' registration requirement; reforming the surety scheme; and considering establishing an appropriate compensation fund or minimum insurance requirement. General review is now underway: a discussion paper was released in 2000.		Council to finalise assessment in 2003.
Queensland	*Auctioneers and Agents Act 1971*	Licensing, registration, entry requirements (residency, over minimum age, of good character, written exam [not required for commercial sub-agents]), the reservation of practice, business conduct (suitable premises, trust account receipts, audits, no misleading or deceptive, no unlawful entry)	Commercial agents, managers, commercial subagents	Review by PricewaterhouseCoopers was completed in 2000. It recommended reforms to entry requirements (removing age and residency tests, replacing character tests with suitability assessments, introducing competence assessment), relaxing business premises standards, rationalising the number of licence types, and introducing a requirement that agents only act for one party.	Act repealed and replaced with *Property Agents and Motor Dealers Act 2000.*	Meets CPA obligations for commercial agents (June 2001).
	Security Providers Act 1992	Licensing, entry requirements, the reservation of practice	Security officers, private investigators, crowd controllers (not in-house security officers)	Minor departmental review is under way. Issues paper and draft public benefit test report were released. Draft report concluded that the restrictions are in the public interest and should be retained.		Council to finalise assessment in 2003.

(continued)

Table 8.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Debt Collectors Licensing Act 1964*	Licensing, entry requirements (age, fit and proper person), the reservation of practice, business conduct (trust accounts, fidelity bonds)	Debt collectors (commercial agents)	Department review is underway. Issues paper was released July 2000.		Council to finalise assessment in 2003.
	Inquiry Agents Licensing Act 1954 *Securities Agents Act 1976*	Licensing			Acts were repealed and replaced by *Security and Related Activities (Control) Act 1996*.	Meets CPA obligations (June 2001).
	Security and Related Activities (Control) Act 1996	Licensing, registration, entry requirements (training, character, possible medical exam for security officers), the reservation of practice, business conduct (operating restrictions, no advertising unless licensed), business licensing	Providers of security and inquiry activities	WA Police Service has completed a review, which did not involve consultation. The review concluded the security and related industries need statutory control to ensure high standards and to instil public confidence, especially in the area of crowd control. It also concluded that the legislation is effective and provides the necessary controls to maintain and improve the industry.	The Government endorsed the review recommendation in 2000.	Meets CPA obligations (June 2001).
South Australia	*Security and Investigation Agents Act 1995*	Barrier to market entry, market conduct	Private inquiry agents, security providers	Final report in preparation.		Council to finalise assessment in 2003.

(continued)

Table 8.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Commercial and Inquiry Agents Act 1974*	Licensing, entry requirements (suitable person, not convicted of an offence of dishonesty, financial reputation), the reservation of practice, disciplinary processes, business conduct (trust accounts, maintain records, audits)	Commercial agents, commercial sub-agents, inquiry agents, process servers, security agents, security guards	Review complete. Public consultation involved issues paper, draft report and submissions. Draft report recommended maintaining most restrictions, but removing licensing requirements for process servers, making minor changes to entry requirements, retaining option of imposing education requirements, and moving responsibility for licence approval t from the courts to the Commissioner for Corporate Affairs.	The Government introduced the *Security and Investigations Agents Bill 2002* to repeal and replace the Act.	Meets CPA obligations (June 2002).
ACT	*Fair Trading Act 1992*	Registration, entry requirements (competency, character — criminal record check), the reservation of practice, disciplinary processes, business licensing.	Bodyguards, security guards, cash transit industry, crowd marshals, and guard and patrol services. (No licensing of debt collectors, but ban on undue harassment).	Independent review was completed in 2001. The review found that the restrictions provided significant benefits (by minimising public risk) that outweigh their costs.	No reforms are required.	Meets CPA obligations (June 2002).

(continued)

Table 8.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Commercial and Private Agents Licensing Act*	Licensing, registration, entry requirements (age, residency, fit and proper person, not found guilty of offence that warrants refusal of licence, no objection by any person to issuing of licence), the reservation of practice, disciplinary processes, business conduct (bond provision, trust account, prescribed records, requirement for local [but not interstate] licensed agents to have a nominee and branch manager resident in the Territory), business licensing.	Commercial agents, process servers, inquiry agents, private bailiffs	Review was completed in November 1999. It recommended: introducing negative licensing for all persons of particular occupations who perform agent roles incidental to their occupation; continuing licensing of employees and subagents; issuing licenses for a fixed rather than an indefinite period; transferring responsibility for licensing from the courts to the Industries and Business portfolio; making various changes to business conduct requirements (requirement to issue receipts, change to trust account arrangements; reconsideration of bonds and indemnity insurance in late 2000); and undertaking a further review to implement best practice licensing processes.	The Government approved the recommendations and enacted legislation in 2000 to transfer the licensing to the Commissioner for Consumer Affairs and introduce fixed three-year licence terms. Legislation commenced in December 2001.	Meets CPA obligations (June 2001).

Driving instructors

Governments regulate driving instructors to protect consumers and ensure the safety of learner drivers. Generally, driving instructor legislation reserves the practice of teaching learners to drive for fee or reward to registered or accredited instructors. Usually, instructors must demonstrate their competency (which may involve attending a training course or passing as test), be of good character, and have held a drivers licence for three years before they can register. These requirements potentially restrict entry to the market for driving instruction.

The 2001 NCP assessment found that Victoria had met its CPA new legislation obligations in relation to the *Road Safety (Driving Instructors) Act 1998* and the Northern Territory had met its CPA obligations in relation to the review and reform of the driving instructor provisions of the *Motor Vehicles Act*. Queensland repealed the *Motor Vehicle Driving Instruction Schools Act 1969* in 1995, replacing it with a self-accreditation and self-regulation scheme implemented through amendments to the *Transport Operations (Road User Management) Act 1995*. Queensland's actions meet CPA obligations.

New South Wales

New South Wales completed the review its driving instructor legislation in September 2001. The Government anticipated responding to the final review report by 30 June 2002 (New South Wales Government 2002). Given that New South Wales is progressing this matter, the Council will finalise the assessment of compliance in the 2003 NCP assessment.

Tasmania

As part of the progressive review and reform of the *Traffic Act 1925*, Tasmania repealed the vehicle registration and driver licensing provisions (including those relating to driving instructors) of the Act and replaced them with the *Vehicle and Traffic Act 1999*. As in other jurisdictions, Tasmania requires driving instructors to demonstrate competency and be of good character. Private individuals may teach learners to drive provided they do not seek fee or reward. Tasmania has met its CPA obligations for the review and reform of the driving instructor provisions of the Traffic Act.

The ACT

The ACT introduced the *Road Transport (Driver Licensing) Act 1999* in 1999, in accordance with the national transport reform requirements. In addition to licensing drivers, the Act establishes an accreditation system for driving instructors. Unlike some jurisdictions, the ACT does not reserve the practice

of 'driving instruction for reward'; although accredited instructors must display their accreditation when using a motor vehicle for instruction. The ACT has met its CPA obligations for the review and reform of its legislation governing driving instructors.

Other jurisdictions

The 2001 NCP assessment reported advice from Western Australia that the Government would add the *Motor Vehicle Drivers Instructors Act 1963* to the legislation review program and schedule a review before June 2002 (NCC 2001, p 18.28). The Council acknowledges that the significant resource demands of the legislative review program mean that legislation reviews scheduled late in the program may not be completed by the Council of Australian Governments (CoAG) deadline. The Council will finalise the assessment of compliance in the 2003 NCP assessment.

South Australia has completed a review of the tow truck operator and driving instructor provisions of the *Motor Vehicles Act 1958*. It did not complete its reform activity by the CoAG deadline of 30 June 2002, however, and so has not met its CPA obligations in relation to legislation regulating driving instructors. South Australia is nevertheless making progress, with the Government considering the review recommendations (Government of South Australia 2002). The Council will finalise its assessment of compliance in the 2003 NCP assessment.

Table 8.2: Review and reform of legislation regulating driving instructors

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Driving Instructors Act 1992*	Licensing, entry requirements (completed course, aged at least 21 years, possible test, medical exam, character), reservation of practice (teaching for monetary or other reward), business conduct (maintenance of records, regulations may make provisions for displaying identification and advertising)	Final report was completed in September 2001.	The Government anticipated making a decision on the final report by 30 June 2002.	Council to finalise assessment in 2003.
Victoria	*Road Safety (Driving Instructors) Act 1998*	Licensing, entry requirements (must pass a training course, be a fit and proper person, have held licence for at least three years and pass criminal and driving record checks), reservation of practice (teaching someone without a licence on a highway for financial gain), business conduct (must display photograph and have zero blood alcohol level)	Act was examined under Victoria's new legislation gatekeeping arrangements.		Meets CPA obligations (June 2001).
Queensland	*Motor Vehicle Driving Instruction School Act 1969*		Not for review.	Act repealed and replaced with an accreditation scheme under the *Transport Operations (Road Use Management) Act 1995*.	Meets CPA obligations (June 2002).
Western Australia	*Motor Vehicle Drivers Instructors Act 1963*	Licensing, entry requirements (competency, aged at least 21 years, fit and proper person, may require test or course), the reservation of practice (teaching for reward), business conduct (dual control vehicle, regulations may make provisions for displaying identification)	Review is to be scheduled before June 2002.		Council to finalise assessment in 2003.

(continued)

Table 8.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Motor Vehicles Act 1958 (*Part 3A)	Licensing, entry requirements (must be proficient as instructor [possible test], be fit and proper person and have held licence for at least three years), practice reservation (teaching for reward), business conduct (must display licence)	Review of tow truck operators, motor driving instructors and compulsory third party insurance is complete.	The Government is considering the review recommendations.	Council to finalise assessment in 2003.
Tasmania	*Traffic Act 1925*	Licensing, entry requirements (must have appropriate knowledge and experience [possible test and/or course], be at least 21 years old, be of good character, be a suitable person and have held a licence for at least three years), practice reservation (teaching for reward), business conduct (dual-control vehicle, unless vehicle is provided by person under instruction)	Act is being progressively reviewed.	Relevant provisions were repealed and replaced by *Vehicle and Traffic Act 1999.*	Meets CPA obligations for driving instructors (June 2002).
ACT	*Road Transport (Driver Licensing) Act 1999*	Licensing, entry requirements (accreditation: skills, completed training course, aged at least 21 years, suitable person, medically fit), practice reservation, business conduct (vehicle requirements unless vehicle provided by person under instruction, must display certificate)	Assessed under new legislation gatekeeper process.		Meets CPA obligations for driving instructors (June 2002).
Northern Territory	*Motor Vehicles Act*	Licensing, entry requirements (must be proficient as driving instructor [possible test], of good character and have held a licence for at least three years), reservation of practice (teaching for reward)	Review was completed in 1999. It concluded that the overall public benefits of the Act — lower accident and injury rates, and reduction in road damage from overloaded or unsafe vehicles — justify the restrictions imposed.	The Government endorsed the review recommendation.	Meets CPA obligations for driving instructors (June 2001).

Motor vehicle dealers

All governments except Tasmania license motor vehicle dealers (or traders). Tasmania's *Fair Trading (Code of Practice for Motor Vehicle Traders) Regulations 1996* imposes business conduct requirements on motor vehicle traders.

Motor vehicle dealers are regulated to protect consumers. Consumers may be unable to assess the quality of used cars, may not be familiar with prices and the process of vehicle transfers, and may incur costs to get information on price and quality. Motor dealer legislation in some States and Territories also aims to reduce the avenues for the disposal of stolen vehicles (Department of Treasury and Finance 2001; CIE 2000b).

The review of Queensland's legislation observed that the number of complaints about motor vehicle dealers has risen in recent years and is high relative to the number of complaints in the real estate industry. Complaints tend to relate to mechanical and structural defects in vehicles, false warranties, false representation of the age of vehicles, and misleading advertising and unfair sales techniques (PricewaterhouseCoopers 2000a).

The 2001 NCP assessment reported that Victoria, Queensland and Tasmania had met their CPA obligations in relation to legislation regulating motor dealers in June 2001. The following section assesses the remaining governments' compliance with their CPA obligations in this area.

New South Wales

New South Wales completed the review of the *Motor Dealers Act 1974* and the *Motor Vehicle Repair Act 1980* in 2000. The review recommended allowing licensees to operate from more than one place of business. It also recommended that licensees who operate from multiple locations should be required to keep registers of stock and prescribed parts at only one place of business.

New South Wales introduced amending legislation, the *Motor Trades Amendment Act 2001,* to implement the review recommendations. New South Wales has met its CPA obligations for the review and reform of legislation governing motor dealers.

Western Australia

The Ministry of Fair Trading undertook a general review of the *Motor Vehicle Dealers Act 1973* in 1996. It established the Motor Vehicle Sales Industry Reference Group to recommend changes to the Act. During the review, Western Australia also conducted a separate NCP assessment of the Act. The reference group recommendations incorporated the findings of the NCP assessment.

The reference group recommended retaining licensing for motor vehicle dealers, retaining statutory warranties for used vehicles, repealing licensing requirements for car market operators and removing the Motor Vehicle Licensing Board's power to set standards for dealer premises.

The Western Australian Parliament passed amending legislation that implements the review recommendations. Western Australia has met its CPA obligations to review and reform the Motor Vehicle Dealers Act.

South Australia

South Australia completed the review of the *Second-hand Vehicle Dealers Act 1995* in March 2001. The review panel found that continued regulation of second-hand vehicle dealers is in the public interest because the significance of vehicle transactions, combined with the increasing complexity and technological sophistication of second-hand vehicles, render consumers vulnerable to the risk of significant financial loss in this market.

The review panel concluded that the current legislation is the least restrictive and most effective means of achieving the objective of consumer protection. The only recommended change is to the provisions regarding people who have been convicted of an offence of dishonesty. The panel recommended that convictions for summary offences of dishonesty should exclude someone from obtaining or holding a licence for 10 years, while offences of a more serious nature should continue to incur a permanent prohibition.

South Australia met its CPA obligations to review and reform the Second-Hand Vehicle Dealers Act when the Parliament passed amendments to implement the review recommendation in October 2001.

The ACT

The *Sale of Motor Vehicles Act 1977* requires motor vehicle dealers, wholesalers and car market operators to hold a licence. Applicants for licences must be at least 18 years old, a suitable person, not bankrupt and have sufficient financial resources to carry on their proposed scope of business. In addition, applicants must be likely to comply with their licence obligations, as determined by their understanding of the obligations, previous business experience and employment, level of education and personal capacity.

The ACT completed an interdepartmental review of Sale of Motor Vehicles Act in 2001. The review found a strong public interest case for retaining the regulatory regime, but recommended amending the Act to remove archaic provisions. The Government implemented the review recommendations through the *Justice and Community Safety Legislation Amendment Act 2001.* The ACT has met its CPA legislation review and reform obligations for this Act.

The Northern Territory

The Centre for International Economics completed a review of the Northern Territory *Consumer Affairs and Fair Trading Act* in 2000. The review covered arrangements affecting motor vehicle dealers, pawnbrokers and second-hand dealers, tow truck operators, and door-to-door sales and credit providers.

The review concluded that the regulation of motor vehicle dealers delivers net benefits to the community. To reduce the costs of meeting the regulatory objectives, however, the review recommended:

- removing the requirement that licensees submit annual financial returns;
- formalising the financial test applied for new licences, to make requirements clearer;
- removing the powers to require a banker's guarantee; and
- removing requirements for approval of dealer managers (CIE 2000b).

The Government introduced legislative amendments to implement most of the review recommendations in June 2002. It rejected one recommendation: the recommendation to remove the requirement for the approval of dealer managers.

The Northern Territory has advised the Council that it considers that the costs of this restriction are low, whereas the costs to consumers of not having an approved dealer manager on site could be significant. Licensing of motor vehicle dealer managers also allows for the screening of motor vehicle dealers and helps provide confidence that dealers are reputable.

The Northern Territory's public interest justification for retaining the requirement for dealer management approval meets the CPA clause 5 tests. The Council notes that the Government intends to reconsider this issue as part of a more general review of motor dealer regulation being undertaken by the Department of Justice (Toyne 2002). It considers, however, that the Northern Territory will met its CPA obligations in relation legislation regulating motor vehicle dealers when the Legislative Assembly passes the Consumer Affairs and Fair Trading Bill.

Table 8.3 Review and reform of legislation regulating motor vehicle dealers

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Motor Dealers Act 1974*	Licensing (motor dealer, wrecker, wholesaler, motor vehicle parts reconstruction, car market operator, motor vehicle consultant), entry requirements (fit and proper person, sufficient financial resources, dealer qualifications and expertise or experience), the reservation of practice, disciplinary processes, business conduct (record-keeping, compensation fund)	Review complete. Act was reviewed in conjunction with review of *Motor Vehicles Repair Act 1980*. Recommendations included: allowing licensees to operate from more than one place of business; and keeping registers of stock and parts only at one place of business where multiple locations are operated by one licensee.	The Government accepted the review recommendations, with amendments made by the *Motor Trades Amendment Act 2001*. The first stage of the Act commenced on 1 March 2002.	Meets CPA obligations (June 2002).
Victoria	*Motor Car Traders Act 1986*	Licensing, registration, entry requirements (must be at least 18 years old, possess sufficient financial resources, must not be insolvent, must be 'likely to carry on such a business honestly and fairly', and must not have been convicted of serious offence in past 10 years), practice reservation, disciplinary processes, business conduct (statutory warranties, requirement for authority to conduct public auction, maintenance of records, no tampering with odometers, cooling-off period, fees and penalties paid into Motor Car Traders Guarantee Fund for losses from licensed traders not complying with Act, no consignment selling, suitable premises, advertising)	Internal departmental review complete. It recommended: replacing the 'suitable premises' requirement with a requirement to have all relevant planning approvals for any premises at which the trader conducts business, or proposes to carry on business, as a motor car trader; removing the eligibility criterion for a trader conducting a business 'efficiently'; and reducing the potential for unwarranted claims on the Guarantee Fund.	Government accepted review recommendations, with amendments made by *Tribunals and Licensing Authorities (Miscellaneous Amendment) Act 1998*.	Meets CPA obligations (June 2001).

(continued)

Table 8.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Auctioneers and Agents Act 1971*	For motor dealers, licensing, registration, entry requirements (dealer and manager: residency, age at least 21 years, fit and proper, three of past five years as licensed manager or salesperson [or employ someone who has that experience], written test), the reservation of practice, business conduct (appropriate business premises, maintenance of register, no bogus advertising, no tampering with odometers, maximum commission for sales on consignment)	Review by PricewaterhouseCoopers completed 2000. It recommended: reforms to entry requirements; removing requirement that business premises have enclosed office accommodation and an enclosed display area facing the road; removing maximum commission for sales on consignment; introducing statutory warranties and introducing a cooling off period for used-car transactions.	Act repealed and replaced with *Property Agents and Motor Dealers Act 2000.* The new Act implements all of the review recommendations in relation to motor dealers.	Meets CPA obligations for motor dealers (June 2001).
Western Australia	*Motor Vehicle Dealers Act 1973*	Licensing (motor vehicle dealers, yard managers, car market operators, sales persons), entry requirements (dealers: solvency, understanding of obligations under the ACT; yard managers: completion of four-day course), business conduct (statutory warranties on used vehicles), power to the Motor Vehicle Licensing Board to set standards for premises	Review was completed in 1997. It recommended: retaining restrictions on licensing for motor vehicle dealers and yard managers; retaining statutory warranties for used vehicles; repealing restrictions on licensing for car market operators and salespersons; and repealing the power of the Motor Vehicle Licensing Board to set standards for premises.	The Government endorsed the review recommendations. Amending legislation was passed in May 2002.	Meets CPA obligations (June 2002).
South Australia	*Second-Hand Vehicle Dealers Act 1995*	Barrier to market entry, business conduct	Review complete. It recommended a distinction between summary and indictable offences for dishonesty.	Amendments were passed by Parliament in October 2001.	Meets CPA obligations (June 2002) .

(continued)

Table 8.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Fair Trading Act 1990* *Fair Trading (Code of Practice for Motor Vehicle Traders) Regulations 1996*	Mandatory code of practice covering business conduct (written contracts, warranty, complaints system, no deception, no false representation, no misleading advertising)	Minor review complete. It found that the restrictive provisions requiring manufacturers to provide warranties for motor vehicles and establishing a system for dealing with customer complaints are in the public interest.	The Government endorsed the review conclusion.	Meets CPA obligations (June 2001).
ACT	*Sale of Motor Vehicles Act 1977*	Registration and business conduct of motor vehicle dealers	Intradepartmental review was completed in 2001. It found a strong public interest case for retaining the regulatory regime, but recommended amending the Act to remove archaic provisions.	Review recommendations implemented by the Justice and Community Safety Legislation Amendment Act 2001.	Meets CPA obligations (June 2002).
Northern Territory	*Consumer Affairs and Fair Trading Act*	Licensing, entry requirements (fit and proper person, sufficient financial and material resources), business conduct (maintenance of records, prescribed forms of contract, submission of annual returns, prohibition on sale of certain vehicles [such as those registered interstate], warranties)	Review by Centre for International Economics was completed in 2000. It recommended: removing requirements for licensee to submit annual financial returns; removing requirements for approval of dealer managers; removing power to require banker's guarantee; and formalising the financial test applied for new licences.	Consumer Affairs and Fair Trading Amendment Bill, introduced into the Legislative Assembly in June 2002, implements the review recommendations with the exception of the recommendation to remove requirements for approval of dealer managers.	Meets CPA obligations (June 2002).

Pawnbrokers and second-hand dealers

Governments are concerned that the businesses of pawnbrokers and second-hand dealers are potential avenues for the disposal of stolen property. Regulation of pawnbrokers aims to reduce the incidence of property-related crime by screening potential operators. It seeks to make this route for disposing of stolen property less attractive, generally by ensuring that potential operators are fit and proper persons, requiring sellers of goods to produce identification and providing the police with access to information on the trade of second-hand goods. Regulation also aims to protect consumers by increasing transparency and clarifying consumers rights in dealing with pawnbrokers (CIE 2000a).

Governments have similar competition restrictions in their legislation regulating pawnbrokers and second-hand dealers (table 8.4). Most require pawnbrokers and second-hand dealers to obtain a formal licence. South Australia and Tasmania have negative licensing systems in conjunction with a requirement for pawnbrokers to notify (or register with) the police.

The 2001 NCP assessment reported that Victoria, Western Australia, South Australia, Tasmania and the Northern Territory had met their CPA obligations for legislation governing pawnbrokers and second-hand dealers. The following section assesses the remaining governments' compliance with their CPA obligations.

New South Wales

The Department of Fair Trading completed an NCP review of the *Pawnbrokers and Second-hand Dealers Act 1996*. The review found that regulation of the pawnbroking and second-hand dealing industries is necessary to prevent the socially undesirable activity of property crime within these industries, and to address information imbalances between pawnbrokers and their customers regarding their rights and obligations under a pawn agreement.

The review concluded that the current licensing regime, although it restricts competition, is the regulatory option that best achieves the objectives of the Act and provides the greatest net public benefit. The review also identified reforms that would enhance the efficiency and effectiveness of the licensing system and reduce the regulatory burden for licensees. These reforms include measures to clarify and update existing legislation in regard to record keeping and proof of identity requirements and to allow pawnbrokers to sell unredeemed goods either at their business premises or at auction.

The Government is conducting public consultations on the review recommendations, so is yet to meet its CPA obligations in respect of the reform of the Pawnbrokers and Second-hand Dealers Act. The Council will

finalise the assessment of compliance with CPA obligations in the 2003 NCP assessment.

Queensland

Queensland is jointly reviewing the *Pawnbrokers Act 1984* and the *Second-hand Dealers and Collectors Act 1984*. It expected to complete the review before 30 June 2002, but anticipated that implementation of any reforms would extend beyond this date (Queensland Government 2002). Given that Queensland is continuing to advance its responsibilities in this area, the Council will finalise the assessment of CPA compliance in 2003.

The ACT

The ACT has separate legislation governing pawnbrokers and second-hand dealers.

The Department of Justice and Community Safety completed a review of the application of the *Second-hand Dealers and Collectors Act 1906* (New South Wales) to the ACT in 2000. The review found significant benefits in retaining licensing and record keeping requirements and police powers of inspection, given the risk of dealers being used to pass on stolen goods. The review recommended revising the definition of second-hand goods (and moving it to the regulations), altering business conduct requirements to take into account new technology, repealing a number of the business rules in the legislation and repealing provisions regarding the licensing of collectors. The Government accepted the review recommendations and implemented them through the *Justice and Community Safety Legislation Amendment Act (No. 1) 2001*.

The Department of Justice and Community Safety completed a review of the *Pawnbrokers Act 1902* in September 2001. As for second-hand dealers, the review recommended retaining the Act but restructuring and modernising the regulations. The Government introduced legislative amendments into the Legislative Assembly in June 2002 which implement the review recommendations.

The ACT has met its CPA obligations in relation to second-hand dealers. It will meet its CPA obligations in relation to pawnbrokers when the Justice and Community Safety Legislation Amendment Bill 2002 is passed by the Legislative Assembly.

Table 8.4: Review and reform of legislation governing pawnbrokers and second-hand dealers

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Pawnbrokers and Second-Hand Dealers Act 1996*	Licensing (pawnbrokers, second-hand dealers for prescribed goods), registration, entry requirements (age, not mentally incapacitated, not undischarged bankrupt, no conviction of dishonesty offence in past 10 years), practice reservation, disciplinary processes, business conduct (pawnbrokers: prescribed records, computer records, public auction of unredeemed goods over $50, minimum redemption period, operation from fixed premises; second-hand dealers: prescribed records, computer records, prescribed minimum period for holding goods, must require seller to provide identification, cooperation with police)	Issues paper released in 2000. Final report completed in 2001, and released for public consultation May 2002.	New South Wales anticipates that any legislative amendments will be introduced into Parliament during 2002.	Council to finalise assessment in 2003.
Victoria	*Second-hand Dealers and Pawnbrokers Act 1989*	Licensing (pawnbrokers, second-hand dealers for non-exempt goods), registration, entry requirements (not convicted of disqualifying offence in past five years, not insolvent), practice reservation, disciplinary processes, business conduct (pawnbrokers: prescribed records, auction of unredeemed goods over $40; second-hand dealers: prescribed records, prescribed minimum period for holding goods, requirement that seller provide identification, interest rates, cooperation with police)	Departmental review (completed 1996) recommended: replacing 'fit and proper' with 'no serious offences'; removing the obligation to retain metals for seven days after acquisition (with some exceptions); removing the requirement to conduct certain transactions at registered business premises or a market (instead requiring registration of habitually used places); and removing interest rate restrictions.	The Government accepted all the review recommendations. Amendments were made by the *Law and Justice Legislation Amendment Act 1997.*	Meets CPA obligations (June 2001).
Queensland	*Pawnbrokers Act 1984*	Licensing, entry (must be at least 18 years old, not mentally incapacitated, fit and proper person, not a collector, not convicted of fraud or dishonesty offence in past five years), practice reservation, disciplinary processes, business conduct (prescribed records, public auction of unredeemed goods over $40, cooperation with police)	Review (combined with review of second-hand dealers legislation) is underway and was due to be completed by 30 June 2002.		Council to finalise assessment in 2003.

(continued)

Table 8.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Second-hand Dealers and Collectors Act 1984*	Licensing (second-hand dealers for non-exempt goods), registration, entry (age, not mentally incapacitated, fit and proper person, not convicted of fraud or dishonesty offence in past five years), practice reservation, disciplinary processes, business conduct (prescribed records, prescribed period for holding goods, must require sellers to provide identification, cooperation with police)	Review (combined with review of the pawnbroker legislation) is underway.		Council to finalise assessment in 2003.
Western Australia	*Pawnbrokers and Second-hand Dealers Act 1994*	Licensing (pawnbrokers, second-hand dealers for non-exempt goods), registration, entry requirements (good character, adequate management, supervision and control of business operations, not convicted of dishonesty, fraud or stealing offence in past five years), practice reservation, disciplinary processes, business conduct (pawnbrokers: prescribed records, computer records, notify pawner of surplus of proceeds of sale; second-hand dealers: prescribed records, must hold goods for prescribed period, requirement that seller provide identification, cooperation with police)	Review (by Police Service) complete. It recommended: retaining the current licensing provisions on the understanding that they may be modified following future review; conducting a further review after the current legislation had been in operation for an additional three years; and examining alternative approaches, including those likely to be introduced in other States.	The Government endorsed the review recommendations.	Meets CPA obligations (June 2001).
South Australia	*Second-Hand Dealers and Pawnbrokers Act 1996*	Negative licensing (pawnbrokers, second-hand dealers for all goods except cars), registration (that is, notification to police), entry (not convicted of dishonesty offence in past five years, not undischarged bankrupt/insolvent), practice reservation, disciplinary processes, business conduct (pawnbrokers: prescribed records, selling of unredeemed goods; second-hand dealers: prescribed records, prescribed period for holding goods, must require seller to provide identification [unless sale by phone], cooperation with police)	Review complete. It recommended no reforms.	The Government endorsed the review recommendation.	Meets CPA obligations (June 2001).

(continued)

Table 8.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Pawnbrokers Act 1857* *Second-hand Dealers Act 1905*	Licensing, business conduct	Not for review.	Repealed in 1996 by *Second-Hand Dealers and Pawnbrokers Act 1994*.	Meets CPA obligations (June 2001).
	Second-Hand Dealers and Pawnbrokers Act 1994	Negative licensing (pawnbrokers, second-hand dealers, registration (notification at nearest police station), entry requirements (fit and proper person, no conviction of offence against the Act or offence of dishonesty), the reservation of practice, disciplinary processes, business conduct (pawnbrokers: prescribed records, redemption period of six months, auction of forfeited goods; second-hand dealers: prescribed records, holding of goods for prescribed period, requirement that seller provide identification, cooperation with police)	Minor review complete. Review found restrictive provisions were justified in the public benefit.	The Government endorsed the review recommendation.	Meets CPA obligations (June 2001).
ACT	*Pawnbrokers Act 1902* (NSW) in application to ACT	Licensing, registration, entry requirements (aged over 18 years, fit and proper person), the reservation of practice, business conduct (prescribed records, public auction unredeemed goods over $10, cooperation with police)	Intradepartmental review completed in 2001. It recommended the restructuring and modernisation of existing regulations.	Government introduced legislative amendments to implement the recommendations in June 2002.	Meets CPA obligations (June 2002).
	Second-hand Dealers and Collectors Act 1906 (NSW) in application to ACT	Licensing, registration, entry requirements (aged over 18 years, fit and proper person), the reservation of practice (persons who deal in certain second-hand goods), business conduct (prescribed records, holding of goods for prescribed period, cooperation with police)	Department review was completed in 2000. It recommended: updating the definition of second-hand goods; altering business conduct requirements to take new technology into account; repealing some business rules; and repealing provisions relating to collectors.	Recommendations were implemented by the *Justice and Community Safety Legislation Amendment Act (No. 2) 2001*.	Meets CPA obligations (June 2001).

(continued)

Table 8.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Pawnbrokers Act*	Licensing		Act repealed 1998.	Meets CPA obligations (June 2001).
	Consumer Affairs and Fair Trading Act	Licensing (pawnbrokers, second-hand dealers for not exempt goods), registration, entry requirements (minimum age, not undischarged bankrupt, not convicted of dishonesty offence in past 10 years), practice reservation, disciplinary processes, business conduct (pawnbrokers: prescribed records, sale of unredeemed goods; second-hand dealers: prescribed records, prescribed period for holding goods, requirement that seller provide identification, cooperation with police)	Review by Centre for International Economics was completed in 2000, recommending provisions be retained with no amendment.	The Government approved the review recommendations in relation to pawnbrokers and second-hand dealers in November 2000.	Meets CPA obligations for pawnbrokers and second-hand dealers (June 2001).

Real estate agents

In all States and Territories, a person cannot provide real estate services for payment on behalf of an owner or purchaser unless they are licensed. Real estate services generally include buying and selling (by auction or private treaty) residential property, commercial property or businesses and managing or renting residential or commercial property. Real estate agents conduct most sales and letting of residential property in Australia; the Real Estate Institute of Victoria estimates, for example, that around 96 per cent of Victorian home owners use real estate agents to sell their homes (KPMG Consulting 2000).

Real estate services are regulated to protect consumers from problems due to information imbalances between agents and their clients, and from the risk of financial loss caused by agents' criminal or fraudulent conduct ('defalcation'). Consumers, particularly residential homeowners, often lack experience in purchasing real estate services, because generally they are infrequent participants in the real estate market. Residential home transactions are one of the largest investments for many people, so there is potential for significant loss if they receive poor marketing and advice. As well, the sale of a property has legal implications. Financial loss may arise from the misappropriation of funds (such as deposits on transactions and rent) held in trust.

New South Wales

The review of the *Property, Stock and Business Acts Act 1941* commenced in 1997 and was completed in 2001. The review recommended including competency standards (as a component of entry requirements), compulsory professional indemnity insurance and annual licence renewal. It also recommended developing a single property agents licence to replace the current system of separate licences for real estate agents, stock and station agents, business agents, strata management agents and on-site residential property agents.

In June 2002, the Parliament passed the Property, Stock and Business Agents Act to repeal and replace the 1941 Act. The new Act implements the review recommendations with one exception: the Government decided not to adopt a single licence regime because this could decrease the competency of agents and erode consumer protection (New South Wales Government 2002, p. 39). The multi-licensing approach enables experience and education requirements to be tailored to different competencies relevant to each industry sector (Aquilina 2001).

The requirement to obtain a separate licence could deter some property agents from expanding the range of real estate services that they offer, but the restriction on competition is minor. The Council accepts that the costs of this restriction may be outweighed by the benefits of having greater flexibility

to tailor entry requirements to the minimum necessary for each industry sector. The Council considers that New South Wales has met its CPA obligations in relation to legislation regulating real estate agents.

Victoria

Victoria completed a review of the *Estate Agents Act 1980* in 2000. The review recommended:

- retaining full licensing for residential property sales, but making the experience and education requirements less restrictive;
- applying a less restrictive form of licensing to agents who sell commercial property and business, and agents who manage property; and
- retaining regulation to protect against defalcation.

The Government released the report in December 2000 for consultation in formulating its response. It released an exposure draft of a Bill to amend the Estate Agents Act for consultation in June 2002. The Government is likely to introduce amending legislation in the spring 2002 parliamentary session (Department of Treasury and Finance 2002).

Although Victoria did not complete the review and reform of the Estate Agents Act by the CoAG deadline of 30 June 2002, it has made substantial progress. The Council will finalise the assessment of compliance in 2003.

Queensland

As discussed previously, PricewaterhouseCoopers completed a review of the Auctioneers and Agents Act in 2000. In relation to real estate agents, the PricewaterhouseCoopers recommended:

- reforming the entry requirements (removing age and residency requirements; substituting suitability assessment for the character and fitness tests; introducing competency assessment; and recognising prior learning);
- relaxing business premises standards to include any registered office;
- maintaining the requirement for a licence holder to operate at a principal office;
- introducing a 60-day time limit for exclusive real estate agent arrangements;
- removing requirements for real estate managers to be licensed;
- including developers and real estate marketers within the scope of the legislation; and

- removing maximum commission from sales and rentals, subject to monitoring and transitional arrangements, including disclosure, information and education campaigns (PricewaterhouseCoopers 2000a).

PricewaterhouseCoopers proposed transitional arrangements to support the smooth implementation of these reforms. It recommended conducting a public education campaign to make market participants aware of the changes to their rights and responsibilities. It suggested that 'the campaign should be commenced in a timeframe to allow it to take impact prior to the removal of regulated maximum commissions' (PricewaterhouseCoopers 2000a).

The committee that oversaw the review accepted and endorsed the consultant's report (Auctioneers and Agents National Competition Policy Review Committee 2000). Queensland repealed the Auctioneers and Agents Act and replaced it with the *Property Agents and Motor Dealers Act 2000*. In line with the transitional arrangements recommended by the consultants and the review committee, the new Act retains maximum commissions. The Government began an ongoing community education campaign when the Act commenced, and expects to complete a review of restrictions on commissions during 2002.

The Council accepts that there may be a net community benefit in temporarily retaining maximum commissions while market participants are educated about their rights and responsibilities. Given that Queensland intends to review commissions during 2002, the Council will finalise the assessment of compliance with CPA obligations in 2003.

Western Australia

Western Australia expects to complete the review of the *Real Estate and Business Agents Act 1978* (which has been underway for three years) in July 2002 (Department of Treasury and Finance 2002). The findings of other jurisdictions' reviews of legislation in this area suggest that the Western Australian review will identify scope for improvements to the regulation of real estate agents but that these will not greatly affect competition. The Council considers it appropriate to leave the final assessment of compliance to 2003 (despite the delay in completing the review).

South Australia

In South Australia, an interdepartmental review panel conducted a review of the *Land Agents Act 1994* and the Land Agents Regulations during 1999. The review recommended that the Land Agents Act be retained (because regulation provides a net public benefit) and made several recommendations relating to the qualifications of land agents and sales representatives, and to conduct restrictions.

- The review recommended that the qualifications held by legal practitioners be prescribed as sufficient for registration as a land agent, subject to legal practitioners demonstrating competence in appraisal.

- The review found that requiring land agents to hold qualifications provides a net benefit, but that the qualifications required for registration are excessive. It recommended, when National Competency Standards have been agreed, mandating for registration only those competencies necessary to combat consumer risk.

- The review found that the qualification requirements for sales representatives are appropriate but that the requirements of the TAFE course are inappropriately high. It recommended reviewing current competencies when National Competency Standards are agreed, then mandating only measures necessary to combat consumer risk be mandated (Office of Consumer and Business Affairs 1999b).

Subsequently, South Australia conducted a supplementary review to further consider the recommendation that legal qualifications, in combination with demonstrated competency in appraisal, should be sufficient to satisfy the qualifications criterion for registration as a land agent. This supplementary review was completed in March 2001 and upheld the recommendation of the original review (Government of South Australia 2001b).

The Government endorsed the review recommendations. The Commissioner for Consumer Affairs implemented the recommendations administratively, because they are within his discretion (Government of South Australia 2002). South Australia has met its CPA obligations in relation to the review and reform of the Land Agents Act.

Tasmania

Tasmania intends to replace the *Auctioneers and Real Estate Agents Act 1991* with new legislation in the 2002 spring session of Parliament (Government of Tasmania 2002). The Council considers it appropriate to leave the final assessment of CPA compliance to the 2003 NCP assessment.

The ACT

The ACT *Agents Act 1968* regulates real estate, stock and station, business, employment and travel agents. The Department of Justice and Community Safety completed an NCP review of the Act in April 2001. At the same time, in response to the significant shortcomings and age of the legislation, the department conducted a general review of the Act.

The NCP review concluded that there are no competition policy issues requiring legislative reform within the real estate, stock and station, and business agents' markets (ACT Government 2002b). The Government is considering the review findings.

Although the ACT has yet to announce its response to the review, it has made significant progress towards fulfilling its obligation to review and reform the Agents Act. Therefore, the Council will finalise its assessment of CPA compliance in the 2003 NCP assessment.

The Northern Territory

The Centre for International Economics completed a review of the Northern Territory *Agents Licensing Act* in October 2000. The review recommended changes to entry requirements, the reservation of practice and business conduct. The Government anticipated releasing its response to the review report during May 2002 (Northern Territory Government 2002a).

The Northern Territory did not complete its reform activity by the CoAG deadline of 30 June 2002, the Government is considering the report and proposed legislation. Therefore, the Council considers it appropriate to leave the final assessment of CPA compliance to the 2003 NCP assessment.

Table 8.5: Review and reform of legislation regulating real estate agents

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Property, Stock and Business Agents Act 1941*	Licensing (real estate, stock and station, business and managing agents), registration, entry requirements (qualifications, sufficient experience, fit and proper person), the reservation of practice, disciplinary processes, business conduct (auctions, trust accounts)	Review complete. It recommended introducing competency standards as a component of entry requirements, compulsory professional indemnity insurance, annual licence renewal, and replacing the current multi-licensing system with a single licence.	Parliament passed the *Property, Stock and Business Agents Act 2002* in June 2002. The Act implements the review recommendations with one exception: the Government decided not to adopt the review's proposal to adopt a single licensing system.	Meets CPA obligations (June 2003).
Victoria	*Estate Agents Act 1980*	Licensing (real estate agents — not their representatives who are negatively licensed), registration, entry requirements (agents: licensed in past five years or qualifications and experience, at least 18 years of age, fit and proper person (not insolvent, no conviction for prescribed offence, not disqualified under Act); agent's representative: similar but no experience and lower level training), practice reservation (includes auctions of real estate or property), disciplinary processes, business conduct (ownership, name of business and address in advertising, no commission sharing, professional conduct, trust accounts, Estate Agents Guarantee Fund [funded from interest on trust accounts] to pay for administration and defalcation), business licensing	Review was completed in 2000. It recommended: retaining full licensing for residential property sales, but making experience and education requirements less restrictive; applying a less restrictive form of licensing to agents who sell commercial property and business and agents who manage property; and retaining regulation to protect against defalcation.	The Government released the report for consultation in formulating its response. Amending legislation is likely to be introduced in the autumn 2002 Parliamentary session.	Council to finalise assessment in 2003.

(continued)

Table 8.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Auctioneers and Agents Act 1971 Property Agents and Motor Dealers Act 2000*	Licensing (real estate agents, managers, salespersons), registration, entry requirements (residency, age, good character, fit and proper person, training and/or experience; for agent, one year experience in past five years), practice reservation, disciplinary processes, business conduct (suitable business premises, maximum commission, licence holder at business)	See summary in table 8.1 on commercial agents, inquiry agents and security providers.	See summary in table 8.1 on commercial agents, inquiry agents and security providers. An ongoing community education program regarding agents commissions began in 2001 and is being reviewed.	Council to finalise assessment in 2003.
Western Australia	*Real Estate and Business Agents Act 1978*	Licensing (agent's licence, sales representative's certificate), registration, entry requirements (age over 18 years, good character, fit and proper person [including completion of prescribed courses], understanding of duties and obligations under Act; for agent: sufficient material and financial resources), practice reservation, disciplinary processes, business conduct (managers for branch offices, supervision and control, records, trust accounts, audit, code of conduct, advertising, fidelity fund), business licensing	Department review is underway. Discussion paper was released in April 1999. Draft report is being finalised.	Maximum fees removed in 1998.	Council to finalise assessment in 2003.

(continued)

Table 8.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Land Agents Act 1994*	Licensing (agents, not sales representatives who are negatively licensed), registration, entry requirements (qualifications, no conviction for an offence of dishonesty, no undischarged bankruptcy or suspension/disqualification from practising an occupation, trade or business), practice reservation, disciplinary processes, business conduct (provisions for maximum fees in regulations [but not used currently], indemnity fund, trust account), business licensing	Review (involving public consultation) complete. It recommended that legal practitioner qualifications be sufficient for registration as a land agent (subject to legal practitioners demonstrating competence in appraisal), and adopting national competency standards for agents and sales representatives (when agreed).	The Government endorsed the review recommendation, which has been implemented administratively.	Meets CPA obligations (June 2002).
Tasmania	*Auctioneers and Real Estate Agents Act 1991*	Licensing (real estate agents, managers and sales consultants), registration, entry requirements (education, experience, fit and proper person), the reservation of practice, disciplinary processes, business conduct	Review is complete.	Act will be repealed and replaced by new legislation in the spring 2002 session of Parliament.	Council to finalise assessment in 2003.
ACT	*Agents Act 1968*	Licensing (real estate agents, travel agents, business agents, stock and station agents), registration, entry requirements, the reservation of practice, disciplinary processes, business conduct	Intradepartmental review was completed in 2001. The review concluded that there are no competition policy issues requiring legislative reform within the real estate, stock and station and business agents markets	The Government is considering the review findings.	Council to finalise assessment in 2003.
Northern Territory	*Agent's Licensing Act*	Licensing (real estate agents, agents representatives, conveyancing agents), registration, entry requirements (fit and proper person, age at least 18 years, education or experience, competency), the reservation of practice, disciplinary processes, business conduct (maintenance of office in Northern Territory, professional indemnity insurance, fidelity fund, trust monies)	See summary in table 8.1 on commercial agents, inquiry agents and security providers.	See summary in table 8.1 on commercial agents, inquiry agents and security providers.	Council to finalise assessment in 2003.

Travel agents

Travel agents legislation aims to protect consumers from financial loss when a travel agent defaults and ensure a minimum standard of service delivery. Regulation of travel agents involves a licensing process and a compulsory consumer compensation scheme (CIE 2000g). All jurisdictions have similar eligibility requirements for travel agents licences: agents must be 18 years or older, be a fit and proper person, and have experience and/or qualifications to operate a travel agency (or have a manager with the relevant experience and/or qualifications) (CIE 2000g).

Governments are taking a national approach to reviewing their travel agent legislation (see also chapter 15). The Ministerial Council on Consumer Affairs commissioned the Centre for International Economics (CIE) to review legislation regulating travel agents, and released the review report for public comment in August 2000. The review report recommended removing entry qualifications for travel agents. It also recommended maintaining the requirement for travel agents to hold insurance, but dropping the requirement for agents to be members of the Travel Compensation Fund (the compulsory insurance scheme). Instead, the report considered that a competitive insurance system, where private insurers compete with the Travel Compensation Fund, would be a better approach (CIE 2000g). The Western Australian Department of Consumer and Employment Protection is preparing a draft response to the review report, in liaison with the CoAG Committee on Regulatory Reform.

The States and Territories did not complete their review and reform activity by the CoAG deadline of 30 June 2002. As discussed in chapter 15, the Council is concerned by the delay in finalising some national reviews. The Council recognises that the requirement for intergovernmental consultation slows the review process; it urges jurisdictions, however, to demonstrate their commitment to fulfilling their CPA obligations by completing the review and implementing reforms within a reasonable period.

Licensing in some jurisdictions

This section discusses the review and reform of legislation regulating professions and occupations that are licensed in some (but not all) jurisdictions, including auctioneers, conveyancers, employment agents, hairdressers and hawkers.

Auctioneers

Victoria, Queensland, Western Australia, Tasmania, the ACT and the Northern Territory have separate legislation for licensing auctioneers (which generally also includes business conduct requirements). Governments'

objectives for licensing auctioneers include increasing consumer confidence in the auction system, protecting vendors and purchasers against specific unfair and anticompetitive conduct at auctions, and preventing and tracing the sale of stolen or diseased livestock at auctions (Ministry of Fair Trading 2000; Victoria University Public Sector Research Unit 1999).

Licensing of particular auctioneers and business conduct requirements are also contained in other legislation, as discussed elsewhere in this chapter. In South Australia, for example, auctioneers are not licensed, but the Land Agents Act requires land agents who sell by auction to be registered and the *Land and Business (Sale and Conveyancing) Act 1994* requires auctioneers selling land or a small business by auction to make the vendor's statement available.

The 2001 NCP assessment reported that South Australia had met its CPA obligations in relation to the review and reform of legislation governing auctioneers. The following section discusses the remaining jurisdictions' progress towards compliance with their CPA obligations.

Victoria

Victoria University completed a review of Victoria's *Auction Sales Act 1958* in November 1999. The review recommended discontinuing auctioneer licensing, but introducing a minimal registration scheme for livestock auctioneers in the interests of livestock disease control.

The Government accepted the review recommendation to discontinue licensing, but rejected the registration proposal as unnecessary (Department of Treasury and Finance 2001a). It passed the *Auction Sales (Repeal) Act 2001*, which takes effect no later than 1 January 2003, and so has met its CPA obligations for the review and reform of the Auction Sales Act.

Queensland

As discussed previously, PricewaterhouseCoopers completed a review of the Queensland Auctioneers and Agents Act in 2000. The review recommended reforms to the restrictions on market entry. These included removing age, residency and minimum experience requirements, substituting suitability assessment for character and fitness tests, introducing competency assessment, and replacing the requirement for suitable premises with a requirement to maintain a registered office.

The review also recommended reforms to restrictions on business conduct. It recommended deregulating maximum commissions and removing the maximum cap on buyers' premium commissions. It also recommended exempting auctioneers who are acting as *del credere* agents (that is, selling goods on credit and, for an additional premium or commission, guaranteeing the buyer's solvency to their principal) from trust accounting provisions.

PricewaterhouseCoopers proposed transitional arrangements to support the implementation of these reforms. It recommended a public education campaign to make market participants aware of the changes to their rights and responsibilities. The report suggests that 'the campaign should be commenced in a timeframe to allow it to take impact prior to the removal of regulated maximum commissions' (PricewaterhouseCoopers 2000a).

The committee that oversaw the review accepted and endorsed the consultant's report (Auctioneers and Agents National Competition Policy Review Committee 2000). The Queensland Government repealed the Auctioneers and Agents Act and replaced it with the Property Agents and Motor Dealers Act. In line with the transitional arrangements recommended by the consultants and the review committee, the Government retained the controls on maximum commissions but began an ongoing community education campaign when the Act commenced. The Government expects to complete a review of restrictions on commissions during 2002.

The Council accepts that there may be a net community benefit in temporarily retaining maximum commissions while market participants are educated about their rights and responsibilities. Given that Queensland expects to complete a review of restrictions on commissions during 2002, the Council will finalise the assessment of compliance in 2003.

Western Australia

The Ministry of Fair Trading completed an NCP review of the *Auction Sales Act 1973* in 2001. The review recommended retaining the current licensing system while the Ministry conducted a full legislative review of the Act, and then repealing the licensing system unless the full legislative review reveals new reasons to justify retaining it. The Department of Consumer Protection anticipated completing the general review of the Act in June or July 2002.

The Council acknowledges that implementing the recommendation to conduct a general review of the Act has made it difficult for Western Australia to complete reform implementation by 30 June 2002. Western Australia has, however, demonstrated its commitment to meeting its CPA obligations by its efforts to complete the general review within a reasonable timeframe. Therefore, the Council will finalise its assessment of compliance with CPA obligations in the 2003 NCP assessment.

Tasmania

Tasmania released the draft report of the review of the *Auctioneers and Real Estate Agents Act 1991* for public comment. The draft report found that there is no need to license general auctioneers, but that they should be subject to general trust accounting and record management requirements. Tasmania has advised that it intends to repeal the Act and replace it with new legislation in the spring 2002 session of Parliament.

Tasmania did not meet the CoAG deadline of 30 June 2002 for completing the review and reform of this legislation; it has, however, made significant progress towards fulfilling its CPA obligations. Given that Tasmania has replace the Act with new legislation in the spring 2002 session of Parliament, the Council will finalise its assessment of compliance in 2003.

The ACT

The ACT completed an NCP review of the *Auctioneers Act 1959* in conjunction with the Agents Act in 2001. The review found that the regulatory costs are minor, but the benefits appear insufficient to justify licensing auctioneers (Stefaniak 2001). The ACT anticipates repealing the Auctioneers Act 1959 and incorporating relevant provisions into the Agents Act when it makes more general amendments to the Agents Act. The ACT will meet its CPA obligations in relation to the Auctioneers Act when it repeals the Act.

The Northern Territory

The Northern Territory completed the review of the *Auctioneers Act* in May 2002. The review found that the licensing requirements for auctioneers and auctioneers clerks are outdated and can no longer be justified. The review found that some restrictions on the conduct of auctions and record-keeping can be justified, and recommended setting out these requirements in an Industry Code of Practice under the *Consumer Affairs and Fair Trading Act.* The review also recommended that the Government consider imposing some regulations on the handling of trust moneys and trust accounting.

The Government approved the review recommendations and introduced a Bill to repeal the Auctioneers Act in the June 2002 sittings of the Legislative Assembly. It will commence the *Auctioneers Act Repeal Act* when the industry code of practice is in place (Toyne 2002). The Northern Territory will meet its CPA obligations in relation legislation regulating auctioneers when Parliament passes the Auctioneers Act Repeal Bill.

Table 8.6: Review and reform of legislation regulating auctioneers

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Auction Sales Act 1958*	Licensing, entry requirements (residency, character), practice reservation (auctioneers of goods, including livestock), business conduct (suitable premises, no music, no disorderly conduct, maintenance of register for cattle and sheep skins, no collusion)	Review by Victoria University completed in November 1999. It recommended discontinuing licensing and introducing a minimal registration scheme for livestock auctioneers (in the interests of livestock disease control).	The Government accepted the recommendation to discontinue licensing, but rejected the registration proposal as unnecessary. Act repealed by the Auction Sales (Repeal) Act 2001, with effect no later than January 2003.	Meets CPA obligations (June 2002).
Queensland	*Auctioneers and Agents Act 1971*	Auctioneers: licensing, registration, entry requirements (residency in State or within 65-kilometre border, age at least 21 years, good fame and character, fit and proper person, two years experience [including four auctions] on provisional licence before general licence), the reservation of practice, business conduct (suitable business premises, maximum commission)	Review by PricewaterhouseCoopers completed in 2000. Public consultation involved circulation of issues paper, submissions and consultations. Review recommendations included reducing some requirements for licensing, removing maximum commissions and the maximum cap on buyers' premium commissions, and exempting auctioneers acting as *del credere* agents from trust accounting provisions.	Act was repealed and replaced by *Property Agents and Motor Dealers Act 2000*. New Act incorporates most of review recommendations. Restrictions on commissions were retained to allow for community education campaign before deregulation. The Government is reviewing the commissions.	Council to finalise assessment in 2003.
Western Australia	*Auction Sales Act 1973*	Licensing of auctioneers, entry requirements (fit and proper person, requires two years experience on restricted licence before general licence), the reservation of practice, business conduct (maintenance of records in relation to livestock and vendor accounts)	Review was completed in 2001. Discussion paper was released in September 2000, inviting submissions. Discussion paper recommended retaining the licensing system to allow for a full legislative review within the next 12 months, and then repealing the licensing system unless the full review reveals new reasons justifying the system's retention. A general review of the Act is under-way and the Department of Consumer Protection expects to complete it by 30 April 2002.		Council to finalise assessment in 2003.

(continued)

Table 8.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Land and Business (Sale and Conveyancing) Act 1994*	Business conduct (requirement for sale of land or small business, that the auctioneer make the vendor's statement available)	Review was completed in 1999. It involved public consultation. It recommended no reform, including no change to the requirement for auctioneers selling land or a small business by auction make the vendors statement available.	The Government endorsed the review recommendation.	Meets CPA obligations for auctioneers (June 2001).
Tasmania	*Auctioneers and Real Estate Agents Act 1991*	Auctioneers: licensing, registration, entry requirements (sufficient knowledge, fit and proper person), business conduct (no misrepresentation, bids by owners or collusion at auctions)	Review complete. Draft review report was released for consultation. It found that there is no need to license general auctioneers, but that they should be subject to general trust accounting and record management requirements.	The Government intends to repeal the Act and replace it with new legislation in the spring 2002 session of Parliament.	Council to finalise assessment in 2003.
ACT	*Auctioneers Act 1959*	Licensing, entry requirements (age, good character, no pawnbrokers), the reservation of practice, business conduct (maintenance of records for at least 12 months)	Intradepartmental review was completed in 2001. It found that while the regulatory costs are minor, the benefits appear insufficient to justify retaining the licensing requirements in the Act. The review recommended the repeal of the Act.	The Government anticipates repealing the Act and incorporating relevant provisions in the Agents Act.	Council to finalise assessment in 2003.
Northern Territory	*Auctioneer's Act*	Licensing, entry requirements (aged over 18 years, good character, fit and proper person), the reservation of practice, business conduct (maintenance of records for at least 12 months, auctions between 8am and 11pm)	Intradepartmental review was completed in May 2002. Public consultation involved releasing a consultative paper and inviting submissions. Review recommended replacing current licensing system with a negative licensing system through an Industry Code of Practice under the Consumer Affairs and Fair Trading Act. Review also recommended that the Government consider imposing some requirements for handling of trust moneys and trust accounts.	The Government introduced the Auctioneers Act Repeal Bill into the Legislative Assembly in June 2002.	Meets CPA obligations (June 2002).

Conveyancers

New South Wales, Victoria, Western Australia, South Australia and the Northern Territory have introduced legislation permitting non-lawyers to undertake certain activities traditionally reserved for legal practitioners, including conveyancing. Jurisdictions' review and reform of practice restrictions contained in legal practitioner legislation are discussed further in chapter 7; this section examines the review and reform of legislation specifically governing conveyancers.

New South Wales, Western Australia, South Australia and the Northern Territory have separate legislation for non-lawyer conveyancers (or settlement agents). The objective of licensing is generally to protect clients of conveyancers by providing that conveyancers be accountable and meet certain standards of competence.

The scope of work performed by conveyancers varies across jurisdictions.

- New South Wales permits conveyancers to undertake a broad scope of work, covering commercial, rural and residential real estate as well as personal property. Conveyancers are not restricted to transactions involving land, but are also permitted to transfer goodwill, stock-in-trade and other personal property without a related sale of land (Department of Fair Trading 2000a).

- Western Australia allows real estate settlement agents to effect settlements of land transactions (except farming businesses or mining tenements). Business settlement agents may effect settlements of business transactions (except where the business comprises real estate of a mining tenement). Settlement agents are allowed to prepare some legal documents, such as some caveats (Ministry of Fair Trading 1999).

- South Australia limits conveyancing work to preparing conveyancing instruments for fee or reward. Conveyancers are not permitted to provide legal advice on conveyancing transactions generally, such as the preparation of contracts, or on the legal effect of certain transactions.

- In Victoria, the *Legal Practice Act 1996* permits non-lawyer conveyancing firms to undertake the non-legal work associated with conveyancing, such as obtaining title searches, making enquiries of statutory authorities and attending settlement. These firms are not permitted to prepare any document that creates, varies, transfers or extinguishes an interest in land, or to give legal advice. Generally, they engage solicitors to do this legal work.

- Northern Territory conveyancing agents may facilitate the transaction of real property by performing land title searches, preparing and executing sale contracts, arranging settlement, and lodging documents and

completed powers of attorney. The Northern Territory does not permit conveyancers to prepare mortgage leases or business sales (CIE 2000a).

The NCP review of the Commonwealth's *Mutual Recognition Act 1992* highlighted the disparities in the roles of conveyancers and the implications for mutual recognition. The review quoted a South Australian Office of Consumer and Business Affairs submission:

> *OCBA [Office of Consumer and Business Affairs] also expresses concern over the mutual recognition by SA of WA settlement agents and NT conveyancing agents, as these two groups do not draft their own documents and their work does not include commercial property and its components. To date OCBA has not had to refuse any applications received from WA or NT agents, but it is anticipated that this situation could change.* (CoAG 1998)

The following section discusses jurisdictions' progress in completing the review and reform of their legislation regulating conveyancers.

New South Wales

The Department of Fair Trading reviewed the *Conveyancers Licensing Act 1995,* and submitted the final review report to the Minister for Fair Trading in October 2001.

The Government is currently considering a proposal arising from the recommendations of the review and intends to introduce amending legislation into Parliament during 2002 (New South Wales Government 2002). The information provided by New South Wales does not indicate whether the reform proposal addresses all of the review recommendations.

New South Wales will not complete the reform of the Conveyancers Licensing Act by the CoAG deadline of 30 June 2002. As New South Wales anticipates introducing amending legislation into Parliament during 2002, the Council will finalise its assessment of CPA compliance in 2003.

Western Australia

The review of the *Settlement Agents Act 1973* found a net public benefit in licensing settlement agents because the benefits of reduced risk of financial loss and increased consumer confidence outweighed the costs associated with reduced competition. The review recommended, however:

- replacing the requirement for agents to have 'sufficient material and financial resources' with provisions that:
  - prevent people holding settlement agents licences if they are insolvent or have a recent history of insolvency; and

  - prevent businesses holding a licence if a partner or director is insolvent or has a recent history of insolvency;

- removing the residency requirement;

- replacing caps on the maximum fees that an agent can charge with a disciplinary offence of receiving or demanding an excessive fee and giving the Board power to order repayment of an excessive fee received; and

- retaining the requirement for agents to hold professional indemnity and fidelity insurance, but permitting licensees to choose their insurer.

The Cabinet endorsed the review recommendations in March 2002 (Department of Treasury and Finance 2002). Western Australia will meet its CPA obligations in respect of the Settlement Agents Act when it implements the review recommendations. The Council will finalise the assessment of CPA compliance in the 2003 NCP assessment.

South Australia

The 2001 NCP assessment reported that South Australia had met its CPA obligations in relation to conveyancers because the State had introduced legislation to Parliament to remove restrictions on the ownership of incorporated conveyancers. The Council notes that the Conveyancers (Registration) Amendment Bill lapsed in the Legislative Council on the prorogation of Parliament, and thus will need to be reintroduced. The Council will finalise its assessment of CPA compliance in 2003.

The Northern Territory

The Northern Territory Agents Licensing Act regulates realty agents who provide real estate, business and conveyancing services. The Government commissioned the Centre for International Economics to review the Act in 2000. The review report recommended changes to entry requirements, the reservation of practice, and business conduct.

- *Entry requirements* — the review recommended replacing the years-of-experience requirement with a competency-based approach, amending the fit and proper person test to signal to applicants the criteria that will be used; allowing any authorised registered training organisation to receive funding from the fidelity fund to provide realty education; and investigating the possibility of tendering out sole rights to deliver realty education (to promote competition between education providers).

- *Reservation of practice* — the review recommended allowing conveyancers who possess the necessary qualifications to provide mortgage lease and business sale contracts services; and investigating a 'restricted' conveyancing licence to overcome problems if some agents choose not to upgrade their skills.

- *Business conduct* — the review recommended removing the requirement to maintain an office in the Northern Territory (but retaining the requirement that realty businesses have a licensed agent in control of business); and maintaining the requirement for professional indemnity insurance and fidelity fund contributions.

- *Other* — the review recommended recomposing the Agents Licensing Board to include licensed conveyancing agents (CIE 2000a).

The Government is considering the report, together with proposed legislation. Although the Northern Territory did not complete its review and reform activity by the CoAG deadline of 30 June 2002; it has made significant progress, so the Council will finalise its assessment of CPA compliance in the 2003 NCP assessment.

Table 8.7: Review and reform of legislation regulating conveyancers

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Conveyancers Licensing Act 1995*	Licensing, registration, entry requirements (age, qualifications, training, experience), the reservation of practice (lawyers also able to provide these services), disciplinary processes, business conduct (record keeping, trust monies, receipts, professional indemnity insurance)	Review complete. Issues paper was released in March 2000. Final report submitted to the Minister for Fair Trading in October 2001.	The Government is considering a proposal arising from the review recommendations, and anticipates introducing amending legislation into Parliament during 2002.	Council to finalise assessment in 2003.
Western Australia	*Settlements Agents Act 1981*	Licensing, entry requirements (qualifications, two years experience, age, good character, fit and proper person, material and financial resources, residency in Western Australia), the reservation of practice, business conduct (supervision, trust accounts, maximum fees, professional indemnity insurance, fidelity fund), business licensing	Review found that licensing settlement agents is in the public interest, given the benefits of reduced risk of financial loss and increased consumer confidence. It recommended: replacing entry requirements relating to the financial resources of agents with provisions preventing insolvent persons holding a licence; removing the residency requirements; replacing the cap on fees with an offence of 'demanding a fee that is excessive'; and giving agents the option of arranging their professional indemnity and fidelity insurance through an insurer of their choice.	Cabinet has endorsed the review report.	Council to finalise assessment in 2003.

(continued)

Table 8.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Conveyancers Act 1994*	Licensing, registration, entry requirements (qualifications, no convictions for offences of dishonesty), the reservation of practice, disciplinary processes, business conduct (professional indemnity insurance, trust accounts, ownership), business licensing	Review was completed in 1999. It involved public consultation. Recommendations included: revising entry requirements in relation to fitness and propriety; removing ownership restrictions (but introducing requirement that a director of an incorporated company must not unduly influence a registered conveyancer); and removing the requirement that the sole object of a conveyancing company is carrying on business as a conveyancer.	Amendments to implement recommendations were introduced in Parliament in late 2000.	Council to finalise assessment in 2003.
	Land and Business (Sale and Conveyancing) Act 1994	Business conduct of agents, conveyancers and vendors of property for sale of land or small business (information provision, cooling-off, subdivided land, relationship between agent and principal, preparation of conveyancing instruments, representations)	Review complete. Review involved public consultation. It recommended no reform.	The Government endorsed the review recommendation.	Meets CPA obligations (June 2001).
Northern Territory	*Agent's Licensing Act*	Licensing (real estate agents, agent's representatives, conveyancing agents), registration, entry requirements (fit and proper person, age at least 18 years, education or experience, competency), the reservation of practice, business conduct (office in Northern Territory, professional indemnity insurance, fidelity fund, trust monies)	Review was completed in November 2000. It recommended changes to entry requirements, the reservation of practice and business conduct.	The Government is considering the review recommendation and legislative proposal.	Council to finalise assessment in 2003.

Employment agents

Employment agents offer services such as finding employment for unemployed persons or those who want to change employment, recruiting staff for an employer, acting as a counsellor and careers adviser, and assisting with résumé and interview preparation (Department of Fair Trading 2000b).

When governments developed their legislative review timetables in 1996, New South Wales, Victoria, Queensland, Western Australia and South Australia had legislation for licensing employment agents (since repealed in Victoria). The ACT introduced licensing of employment agents through a private members Bill in 1999.

Regulation of employment agents is designed to address problems that arise from information asymmetry between service providers and consumers. The potential risks to consumers include misleading advertising, inappropriate charging of fees, deceptive conduct, unskilled career counselling, inappropriate disclosure of confidential information, and business failure (Department of Fair Trading 2000b).

Employment agents are also subject to State and Territory Fair Trading Acts, which mirror the consumer protection provisions of the Commonwealth *Trade Practices Act 1974*. These Acts prohibit practices that seek to exploit or misinform the community, such as deceptive conduct, false representation and misleading advertising.

New South Wales

The Department of Fair Trading completed its review of the *Employment Agents Act 1996* in February 2001. The review team found that there is no consistent reason that justifies the (albeit limited) competitive restrictions imposed by licensing employment agents. It recommended repealing the Employment Agents Act and amending the *Fair Trading Act 1987* to include specific consumer protection mechanisms in relation to employment agents.

The Government accepted the review recommendations in principle and approved the preparation of an exposure draft Bill for public consultation during 2002 (New South Wales Government 2002). New South Wales will meet its CPA obligations in relation to employment agents if it implements reforms consistent with the review recommendations. The Council will finalise the assessment of CPA compliance in the 2003 NCP assessment.

Queensland

The review of Queensland's *Private Employment Agencies Act 1983* recommended repealing the Act over a two-year period, implementing a simplified licensing regime until the Act expires, and incorporating

restrictions on the charging of fees by employment agents into the *Industrial Relations Act 1999*. Queensland met its CPA obligations through the *Private Employment Agencies and Other Acts Amendment Act 2002*, which implemented the recommendations of the review.

The ACT

In the ACT, employment agents are regulated under the Agents Act. The ACT completed a review of the Agents Act in 2001, in conjunction with a review of the Auctioneers Act. The review questioned the imposition of a licensing regime on the employment agents market. It found that the employment agent licensing scheme is essentially a revenue-raising measure to pay for a licensing system that does little to produce significant public benefits or prevent market failure. The Government is considering the review recommendations (ACT Government 2002).

Although the ACT will not complete its review and reform activity by 30 June 2002, it has made significant progress towards fulfilling its CPA obligations in relation to employment agents. Given this, the Council will finalise its assessment of CPA compliance in the 2003 NCP Assessment.

Other jurisdictions

Western Australia anticipated completing the review of the *Employment Agents Act 1976* in time for Cabinet to consider it before 30 June 2002. Therefore, the Council will finalise its assessment of whether Western Australia has compliance with its CPA obligations in relation to employment agents in the 2003 NCP assessment.

South Australia completed the review of the *Employment Agents Registration Act 1993* in October 2000. The previous government did not respond to the review, so the current government is considering the recommendations. Given that South Australia is continuing to progress this matter, the Council will finalise its assessment of CPA compliance in 2003.

Table 8.8: Review and reform of legislation regulating employment agents

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Employment Agents Act 1996*	Licensing, entry requirements (fit and proper person, age, suitable premises, no previous cancellation), practice reservation, business conduct (separate licence for each premises, registered person in charge, no charge to jobseekers, maintenance of records, no misleading advertising)	Review was completed February 2001. It recommended abolishing licensing of employment agents. It also recommended repealing the Act and inserting specific consumer protection mechanisms in relation to the use of employment agents in the *Fair Trading Act 1987.*	The Government accepted the review recommendations, in principle and approved preparation of an exposure draft Bill for public consultation during 2002.	Council to finalise assessment in 2003.
Victoria	*Employment Agents Act 1983*		Not for review.	Act was repealed in 2000 (had never been brought into operation).	Meets CPA obligations (June 2001).
Queensland	*Private Employment Agencies Act 1983*	Licensing, entry requirements (residency in Queensland, fit and proper person, suitable premises), the reservation of practice, business conduct (no charge to jobseekers except performers and models, maintenance of records, no misleading advertising)	Review was completed. It recommended: expiry of the Act over two years; implementing a simplified licensing scheme until the Act expires; establishing an advisory committee to develop a draft code of conduct and transferring fee-charging restrictions to the *Industrial Relations Act 1999*.	Review recommendations were implemented through the *Private Employment Agencies and Other Acts Amendment Act 2002*.	Meets CPA obligations (June 2002).
Western Australia	*Employment Agents Act 1976*	Licensing, entry requirements (fit and proper person), the reservation of practice, business conduct (scale of fees, maintenance of records, no misleading advertising)	A departmental review is underway. Consultation involved sending a questionnaire to licensed employment agents, inviting public submissions, and consulting on draft report. The final report was expected to be completed for Cabinet consideration before 30 June 2002.		Council to finalise assessment in 2003.

(continued)

Table 8.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Employment Agents Registration Act 1993*	Licensing, entry requirements (fit and proper person, manager with sufficient knowledge and experience to manage business), practice reservation, business conduct (maintenance of records, no misleading advertising)	Review was completed October 2000. Review involved public consultation.	The Government is considering review report.	Council to finalise assessment in 2003.
ACT	*Agents Act 1968*	Licensing, entry requirements (age, not disqualified from holding a licence, character references, police check, requirement to advertise intention to seek registration), reservation of title, ownership (not-for-profit organisations cannot apply for a licence, restrictions on partnerships), business conduct (no charge to job-seekers).	Review was completed in 2001. It questioned the imposition of a licensing regime on the employment agent's market.	The Government is considering the review recommendations.	Council to finalise assessment in 2003.

Hairdressers

New South Wales, Queensland, Western Australia, South Australia and Tasmania regulate hairdressers. New South Wales and Western Australia require hairdressers to be licensed. Queensland licenses hairdressing premises and mobile hairdressers, and imposes business conduct requirements. South Australia has a negative licensing scheme for hairdressers, whereby a person is not permitted to practise hairdressing for fee or reward unless they hold appropriate qualifications. The 2001 NCP assessment reported that South Australia had met its CPA obligations in relation to hairdressers.

In New South Wales, the Department of Industrial Relations commenced a review of part 6 of the *Factories, Shops and Industries Act 1962 (*which regulates hairdressers) in 2000. The department released an issues paper in June 2000, and conducted discussions and negotiations with stakeholders in preparing the review's final report (New South Wales Government 2002). Given that the Government anticipated making a decision on the final report by 30 June 2002, the Council will finalise the assessment of CPA compliance in 2003.

Queensland commissioned SKM Economics to conduct a review of its hairdressing, beauty therapy and skin penetration legislation. The review recommended replacing licensing of premises with licensing of businesses undertaking higher risk procedures (such as procedures involving skin penetration), and discontinuing licensing of hairdressers. The Government endorsed the recommendations, and expected to introduce amending legislation by mid-2002 (Queensland Government 2002). Queensland will meet its CPA obligations in relation to hairdressers when it discontinues licensing, as announced. The Council will finalise the assessment of CPA compliance in 2003.

Western Australia did not complete the review and reform of the *Hairdressers Registration Act 1946* by the CoAG deadline of 30 June 2002, although it expected to consider the Act in July 2002. The Council will finalise the assessment of CPA compliance in 2003.

Tasmania passed a Bill to repeal the *Hairdressers Registration Act 1975* in the Legislative Assembly in June 2002, thus meeting its CPA obligations in relation to hairdressers.

Table 8.9: Review and reform of legislation regulating hairdressers

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Factories, Shops and Industries Act 1962*	Licensing, entry requirements (training and exams or otherwise qualified), reservation of practice (hairdressing for fee, gain or reward), disciplinary processes	Review by Department of Industrial Relations is underway. Issues paper was released June 2000. Further discussions and negotiations with stakeholders are taking place in the preparation of the final review report.	The Government anticipated making a decision on the report by 30 June 2002.	Council to finalise assessment in 2003.
Queensland	*Health Act 1937*	Licensing for hairdressing premises and mobile hairdressers, business conduct (premises constructed and maintained to specific standards, standards of practice)	Review was completed in December 1999, recommending discontinuing licensing.	The Government endorsed the recommendations, and expects to finalise their implementation by mid-2002.	Council to finalise assessment in 2003.
Western Australia	*Hairdressers Registration Act 1946*	Licensing, registration, entry requirements (good character, training and exam), reservation of practice and title, disciplinary processes	Review by independent consultants is being finalised. A consultative committee has been established (including industry, Government and consumer representatives), and public submissions are being sought.		Council to finalise assessment in 2003.
South Australia	*Hairdressers Act 1988*	Negative licensing, entry requirements (qualifications), practice reservation (washing, cutting, colouring, setting, permanent waving or other treatment of a person's hair or the massaging or other treatment of a person's scalp for fee or reward)	Review found the entry requirements to be justified at the current time given the potential health and safety risks, the risk of substandard work, and the potential costs to consumers of enforcing their legal rights. It also found that this justification is unlikely to be sustainable in the longer term because none of these risks are significant. It recommended reducing the scope of work reserved for hairdressers and reviewing the Act in three years with a view to its repeal.	The Government endorsed the recommendations. Parliament passed the legislative amendments in March 2001.	Meets CPA obligations (June 2001).
Tasmania	*Hairdressers' Registration Act 1975*	Licensing, registration of hairdressers (hairdresser, master, principal), entry requirements, business conduct (premises must be licensed and comply with prescribed design, construction, furnishings and equipment requirements)	The Department of Infrastructure Energy and Resources undertook an assessment of the legislation and recommended repealing the Act.	Parliament passed the *Hairdressers Repeal Bill* in May 2002.	Meets CPA obligations (June 2002).

Hawkers

Hawkers are generally defined as persons who sell, or hold themselves out as being ready to sell goods carried on their person, on an animal or from a vehicle (Office of Fair Trading 2000; Allen Consulting Group 2000b). When governments developed their legislative review timetables in 1996, New South Wales, Queensland, the ACT and the Northern Territory had legislation requiring hawkers to be licensed (since repealed in New South Wales and the Northern Territory). The activities of hawkers are also governed by State and Territory Fair Trading Acts (see chapter 12).

The 2001 NCP assessment reported that New South Wales and the Northern Territory met their CPA obligations in relation to hawkers when they repealed their legislation regulating hawkers. Since then, Queensland has also passed legislation repealing its *Hawkers Act 1984*. The ACT is the only remaining jurisdiction with specific hawker legislation.

The ACT

The ACT's *Hawkers Act 1936* establishes a licensing scheme for hawkers. About 40 licensed hawkers work in the ACT at any time, mostly selling take-away food or a mix of flowers and fruit. Most hawkers operate stands at the side of major roads, although others set up near building sites or in car parks at the fringe of commercial areas.

The Department of Urban Services engaged the Allen Consulting Group to undertake a combined review of the Hawkers Act and the *Collections Act 1959*. The review found that the objectives of the Hawkers Act are to protect consumers from fraudulent commercial behaviour and to ensure that business is conducted in a safe and orderly fashion in public places.

The review was sceptical about the need for specific consumer protection regulations, but concluded that there is a need to regulate hawking in public spaces. In other jurisdictions, local government regulations minimise the impacts of hawking on public safety and pedestrian and vehicular traffic. Having only a single level of government, the ACT must legislate to address these issues (Allen Consulting Group 2000b).

The review recommended:

- continuing positive licensing for hawkers operating from a single location and adopting a negative licensing regime for mobile hawkers;
- removing the character and minimum age requirement for licence applicants;
- removing limits on the number of people that a hawker can employ and the number of vehicles that a mobile hawker can operate;

- permitting businesses to hold hawker licences; and
- replacing the ban on hawking within 180 metres of shops (unless exempted by the Minister) with alternative location controls similar to those used for moveable signs.

The ACT Government supports the major recommendations of the review, and intends to introduce legislation to implement these recommendations in the Legislative Assembly's spring 2002 sittings. It rejected the recommendation to replace the exclusion zone, however, because the alternative approach proposed by the review would be more prescriptive and increase administration costs whilst achieving largely the same outcome as the exclusion zone (ACT Government 2002b).

The Council accepts that some restrictions on the location of hawking are justified on public safety, traffic management and land use planning grounds. In principle, the review's proposal offers a more direct (and less restrictive) means of aligning hawking activities with public land use strategies and policies than an arbitrary exclusion zone. Given that both approaches appear to result in broadly similar location restrictions, the lower administration costs justify retaining the exclusion zone.

The ACT will meet its CPA obligations in relation to legislation regulating hawkers when the Government implements its response to the legislation review.

Table 8.10: Review and reform of legislation regulating hawkers

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Hawkers Act 1974*	Licensing, business conduct	Review complete.	Act has been repealed.	Meets CPA obligations (June 2001).
Queensland	*Hawkers Act 1984*	Licensing, entry requirements (age, no mental disease, fit and proper), business conduct (no business between 6 p.m. and 7 a.m.). Act does not apply to certain businesses (for example, charity or sale by maker of goods).	Reduced NCP review undertaken by Office of Fair Trading, overseen by a review committee comprising representatives of the Office of Fair Trading, Queensland Police, the Department of Communication and Information, the Department of Local Government, Planning and Sport and the Treasury. Review involved targeted consultation with licensed hawkers, local governments and consumer associations.	Act was repealed by the *Tourism and Fair Trading (Miscellaneous Provisions) Act 2002*	Meets CPA obligations (June 2002) .
ACT	*Hawkers Act 1936*	Licensing, entry requirements (age, good character, fit and proper person), business conduct (geographic and time restrictions, business structure)	Reviewed by Allen Consulting Group, in conjunction with the *Collections Act 1959*. Review involved targeted public consultation with issues paper, meetings and submissions. It recommended: refocusing legislation on land use and continuing positive licensing for hawkers operating from a single location, but having negative licensing for mobile hawkers; removing restrictions on number of vehicles a hawker can operate, number of people hawkers can employ and their age; removing 180-metre exclusion zone from traditional shops, and regulating health, liquor and contraband goods via other legislation.	The Government supports the major recommendations of the review. Legislation is being drafted for introduction into the Legislative Assembly in May 2002.	Council to finalise assessment in 2003.
Northern Territory	*Hawkers Act*	Licensing, business conduct.	Stakeholder-focused review was completed in August 2000. The review found licensing requirements, exemption provisions and restrictions on hawking on Crown land were anticompetitive, although necessary to protect the public in terms of proper commercial dealings and annoyance. Regardless, it was also found that the objectives of the legislation could be pursued through other legislation. The review recommended repealing the legislation, pending consideration of other legislative means for regulating hawking offences.	The Government accepted the recommendations in September 2000. Bill to repeal Act was passed in November 2000 (and brought into effect in April 2001).	Meets CPA obligations (June 2001).

Other licensed occupations

The 2001 NCP assessment reported that Victoria had met the CPA new legislation obligations in relation to the *Introduction Agents Act 1997,* and that Western Australia had met its CPA obligations for the review and reform of the *Boxing Control Act 1987*. The following section discusses jurisdictions' review and reform activity since the 2001 NCP assessment.

Commonwealth

The Commonwealth completed a review of legislation governing migration agents in 1997. The review concluded that consumer protection concerns mean voluntary self-regulation is not immediately achievable. The review recommended implementing a transitional arrangement to enable the industry to prepare for self-regulation.

The Government accepted the review findings, and passed legislation to implement statutory self-regulation for two years from March 1998 then voluntary self-regulation. A further review in 1999 found that the industry was not ready for voluntary self-regulation. In response, the Commonwealth passed the *Migration Legislation Amendment (Migration Agents) Act 1999* to extend the transitional statutory self-regulation system for three years to March 2003.

The Government assessed the Migration Legislation Amendment (Migration Agents) Act under its new legislation gatekeeping arrangements. It prepared a regulatory impact assessment, which the Office of Regulation Review approved (PC 2001a). The Commonwealth has met its CPA legislation review and reform obligations in relation to migration agents.

New South Wales

New South Wales completed a review of the *Boxing and Wrestling Control Act 1986* and is preparing the final report of the *Entertainment Industry Act 1989* review. The Government has advised, however, that it anticipated considering a boxing reform proposal shortly and introducing amending legislation during 2002 and that it anticipated making a decision on the entertainment industry review by 30 June 2002. Although New South Wales did not complete the review and reform of either Act by the CoAG deadline of 30 June 2002, it is continuing to make progress, so the Council will finalise its assessment of CPA compliance in 2003.

The review of the *Wool, Hides and Skins Dealers Act 1935* recommended repealing the Act. The Government considered the review recommendations in conjunction with the findings of the Pastoral and Agricultural Crime Working Party, and decided to retain the Act as part of a package of rural crime measures. New South Wales has yet to demonstrate that retaining the

Wool, Hides and Skins Dealers Act 1935 complies with the requirements of the CPA. It advised, however, that it was developing a public benefit assessment to support the Act's retention, which it anticipated completing by June 2002. The Council will finalise the assessment of CPA compliance in 2003, after receiving the Government's public interest arguments.

Victoria

Victoria completed a review of the *Professional Boxing and Martial Arts Act 1985* in 1999. The Act aims to protect the health and safety of contestants in professional boxing and kickboxing contests. It requires promoters, trainers, match-makers, referees and judges of professional contests to hold a licence or permit and contestants to be registered. It also enables the Minister to prescribe rules for the proper conduct of professional contests.

The review recommended streamlining the contestant registration system to allow contestants competing in both boxing and martial arts contests to register once rather than separately for each category, and examining the scope for replacing detailed rules and conditions with less prescriptive national or international standards. The review also recommended amending the provision that exempts Victoria's Amateur Boxing Association from the Act's requirements, so that other suitable qualified amateur boxing associations can also be granted exemptions (Department of Treasury and Finance 2000).

The Government accepted all of the recommendations with one exception: it rejected the recommendation to consider replacing adopting national or international standards because the industry is fragmented into different bodies that follow various rules, so it is not possible to adopt a single set of rules. Victoria met its CPA obligations in relation to boxing when it implemented its response to the review through the *Professional Boxing and Martial Acts (Amendment) Act 2001*.

The ACT

The ACT *Boxing Control Act 1993* bans the conduct of boxing contests without the approval of the Minister, and requires officials and contestants in professional contests to be registered under New South Wales *Boxing and Wrestling Control Act 1986*. The references to the New South Wales Act in the ACT Act prevented the ACT from starting its review until the New South Wales review is finished. The ACT Government advised, however, that it expects to complete the review and implement reforms by September 2002 (ACT Government 2002b).

The ACT did not complete the review and reform of its legislation regulating boxers by the CoAG deadline of 30 June 2002. Given that the Act is unlikely to impede competition significantly, and that the ACT is committed to completing the review and reform within a few months, the Council will finalise the assessment of CPA compliance in 2003.

The *Collections Act 1959* governs public collections and fundraising. Under the Act, people or organisations collecting donations from members of the public in public places must hold a licence. The ACT Government commissioned the Allen Consulting Group to review the Collections Act 1959 (in conjunction with the Hawkers Act 1936). The review recommended:

- removing the power to refuse a licence-based on where the funds are to be spent, or on the level of fundraising costs or remuneration for collectors;

- streamlining the licensing system by issuing licences for periods of time rather than particular days, and requiring annual reporting of funds raises and expenses incurred rather than reporting for each collection; and

- increasing disclosure to the community by requiring collectors to wear a badge (or display information) relating to the collection and nature of the collector (volunteer, staff member or paid collector).

The ACT Government supports the major recommendations of the review and proposes to introduce amending legislation into the Legislative Assembly in the spring 2002 session. Given this progress, the Council will finalise the assessment of CPA compliance in the 2003 NCP assessment.

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Table 8.11: Review and reform of legislation regulating other occupations licensed by some, but not all jurisdictions

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Migration Act 1958,* part 3 (migration agents)	Licensing, registration, entry requirements (qualifications, good character), disciplinary processes, business conduct (adherence to code of conduct)	Review was completed in 1997 in combination with review of *Migration Agents Registration (Application) Levy Act 1992* and *Migration Agents Registration (Renewal) Levy Act 1992*. Review concluded that voluntary self-regulation was not immediately achievable due to consumer protection concerns, and a transitional arrangement is required to enable the industry to prepare for self-regulation.	The Government accepted the review findings and passed legislation implementing statutory self-regulation for two years from March 1998 then voluntary self-regulation. Statutory self-regulation was extended to March 2003 after a review in 1999 found the industry was not ready for voluntary self-regulation.	Meets CPA obligations (June 2002).
New South Wales	*Boxing and Wrestling Control Act 1986*	Conduct of professional boxing, conduct of wrestling and amateur boxing contests	Issues paper was released in July 2001. Final report was submitted to the Minister for Sport and Recreation in February 2002.	The Government anticipated considering a reform proposal and introducing amending legislation during 2002.	Council to finalise assessment in 2003.
	Entertainment Industry Act 1989	Licensing (entertainment industry agents, managers and venue consultants), maximum fees (entertainment industry agent).	Review is under way. Issues paper was released in September 2001. Final report is being prepared.	The Government anticipated making a decision on the final report by 30 June 2002.	Council to finalise assessment in 2003.
	Wool, Hides and Skins Dealers Act 1935	Restrictions on the buying and selling of wool, hides and skins	Review recommended repeal of the Act.	The Government decided to retain the Act.	Council to finalise assessment in 2003.

(continued)

Table 8.11 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Introduction Agents Act 1997*	Negative licensing, business conduct (disclosure requirements, cooling-off period, restriction on advance payments to 30 per cent of the total contract price)	New legislation, examined under Victoria's legislation gatekeeping arrangements. Legislation was introduced after other forms of intervention failed to correct problems in the introduction services market. Government considered that the benefits (better informed consumers and reduced consumer loss) outweigh the compliance costs.		Meets CPA obligations (June 2001).
	Professional Boxing and Martial Arts Act 1985	Registration (professional contestants, promoters, trainers, match-makers, referees and judges), business conduct	Department review was completed in August 1999. Consultation involved release of discussion paper, receipt of submissions and further targeted consultation. It recommended streamlining the contestant registration system so the Act refers to competition in a professional contest (rather than a boxing or martial arts contest); examining scope for replacing detailed rules and conditions with less prescriptive national or international standards; and amending the provision that exempts the Victorian Amateur Boxing Association from the Act so other suitable qualified amateur boxing association can be exempted.	The Government accepted all the recommendations except that to examine the scope for replacing detailed rules with national standards. The Government rejected this recommendation because the industry is fragmented into bodies following various rules, so it is not possible for it to adopt one set of rules. Amending legislation was passed in 2001 (which also changed the Act's name to the Professional Boxing and Combat Sports Act).	Meets CPA obligations (June 2002).

(continued)

Table 8.11 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Boxing Control Act 1987*	Registration (boxers, trainers, promoters and judges)	Department review was completed in 1997. Consultation involved submissions. Review found a public interest for the restrictions in the Act that limit who can practise as a boxer, promoter or manager of boxers, and that ensure the health of boxers is satisfactory. These benefits include improved boxer welfare, fewer serious injuries, reduced boxer health care costs, less litigation over claims of fraud and personal injury, and a decline in the costs for promoters.	The Government endorsed the review, and retained the legislation without reform.	Meets CPA obligations (June 2001).
	Firearms Act 1973	Registration (firearm repairers)	Act was removed from the legislation review timetable in view of a national approach to firearms policy.		Meets CPA obligations.
ACT	*Boxing Control Act 1993*	Registration of professional boxers, officials and promoters (defined in NSW *Boxing and Wrestling Control Act 1986*).	The ACT review cannot be done independently of the NSW Boxing and Wrestling Control Act Review. NSW review is due for completion by June 2002. ACT review is expected to be completed by September 2002.	Act will be amended to reflect relevant changes in NSW.	Council to finalise assessment in 2003.
	Collections Act 1959	Licensing (fit and proper person, cause must be in the public interest, costs/remuneration not likely to be excessive, funds raised to be applied in ACT – unless there is no ACT body supporting that cause,), business conduct (reporting of funds raised and costs,).	Review by Allen Consulting Group, in conjunction with review of the *Hawkers Act 1936,* was completed in 2000. Review involved targeted public consultation, with an issues paper, meetings and written submissions. It recommended: not limiting the level of costs/remuneration; removing the power to refuse a licence based on where the funds are to be spent; continuing to allow the refusal of licences on public interest grounds; not limiting the locations of or number of collections; requiring licensees to report funds raised and costs on an annual basis rather than for individual collections; and requiring collectors to wear a badge or prominently display information about the collection.	The Government accepted most review recommendations. Legislation is being drafted for introduction in spring 2002.	Council to finalise assessment in 2003.

9 Finance, insurance and superannuation services

The total financial assets of financial institutions are estimated at around $1400 billion (Hockey 2001). The scale of the industry underlines the importance of effective financial, insurance and superannuation regulation.

The financial sector

The Commonwealth Government is responsible for much of Australia's financial regulation, particularly regulation of trade, banking, insurance, bills of exchange, insolvency and foreign corporations. States and Territories regulate trustees and apply credit controls. Further information is provided on trustee legislation in this section and on credit controls in chapter 11.

Regulation of the financial sector is designed to facilitate the creation and movement of capital while ensuring market participants act with integrity and protecting consumers. Proponents of financial sector regulation argue that government intervention is warranted, given the complexity of financial products and the inherent information imbalance between financial service providers and consumers. Regulation takes several forms, including:

- licensing of individuals and businesses (which amounts to entry restrictions);
- conduct and disclosure requirements (which reduce information barriers and costs); and
- financial reserve requirements (which are related to prudential supervision).

The Commonwealth's major review of the financial system in 1996-97 led to the 1997 release of the Wallis Report, which found that Australia's regulatory system was unnecessarily costly and complex. It made 115 recommendations, suggesting changes to both Commonwealth and State and Territory legislation. The recommendations included regulatory changes, the standardisation of regulatory regimes to ensure consistency, and increased competition in many areas of the financial sector. In responding to the report, the Federal Treasurer categorised the proposed reforms as:

- rationalising the regulatory framework;

- balancing prudential and competition goals, which involves maintaining financial system safety while allowing flexible reactions to financial system developments and minimal effects on competition, competitive neutrality and efficiency;

- maintaining the protection of depositors;

- promoting efficiency, competition and confidence in the payments system; and

- promoting more effective disclosure and consumer protection (Costello 1997).

All levels of government have undertaken legislative reform in response to the Wallis Report. Each State and Territory enacted financial sector reform legislation in 1999 to transfer powers of regulation and supervision of certain financial institutions to the new Commonwealth regulators, the Australian Prudential Regulation Authority (which is concerned with the prudential regulation of banks, insurance companies, superannuation funds, credit unions and friendly societies) and the Australian Securities and Investments Commission (which enforces company and financial services laws to protect consumers, investors and creditors). This shift involved amending legislation in all jurisdictions and repealing several legislative instruments due for review under the National Competition Policy (NCP).

The *Financial Services Reform Act 2001* and the *Financial Sector Reform (Consequential Provisions) Act 2001* contain the most recent substantial Commonwealth reforms to the financial sector. This legislation represented a third major segment of the Commonwealth's legislative response to the Wallis Report. In introducing the Financial Services Reform Bill 2001 to Parliament, the then Minister for Financial Services and Regulation stated that the legislation introduces a harmonised regulatory regime for market integrity and consumer protection across the financial services industry, replacing the different frameworks that had applied to different financial sector services (Hockey 2001). The legislation provides for:

- a harmonised licensing, disclosure and conduct framework for all financial service providers;

- a consistent and comparable financial product disclosure regime; and

- a streamlined regulatory regime for financial markets and clearing and settlement facilities.

The Financial Services Reform (Consequential Provisions) Act provided for a transition to the new regulatory arrangements over a two-year period in most cases, with the general date for compliance commencement being 1 October 2003.

Assessment

Governments' review and reform activity in response to the Wallis report is consistent with NCP principles. A national NCP review of legislation relating to trustee corporations is under way. The Standing Committee of Attorneys General released a consultation paper and a draft uniform Bill in May 2001. Governments have not finalised their consideration of these documents. Some jurisdictions have removed minor restrictions in trustee legislation in recent years. The Council will finalise its assessment of trustee legislation in 2003.

Insurance services

The insurance industry offers a wide range of products. Information relating to premium revenue by class of insurance business indicates the relative importance of the different insurance products. The most important class is domestic motor vehicle insurance, which accounted for 22 per cent of total premium revenue reported to the Australian Prudential and Regulatory Authority in 2000-01; householder insurance accounted for 14 per cent, followed in significance by compulsory third party (CTP) insurance (10 per cent), fire and industrial special risks insurance (8 per cent), commercial motor vehicle insurance (6 per cent), workers compensation insurance (5 per cent), public and product liability insurance (5 per cent), other accident insurance (4 per cent) and professional indemnity insurance (3 per cent) (ACCC 2002, p. 39).

Insurance markets are experiencing considerable uncertainty and change, and governments are introducing or contemplating changes to legislative arrangements to reduce uncertainty and slow growth in the cost of premiums. Governments are particularly concerned with developments in the public liability and medical indemnity insurance markets. Governments' responses to liability and indemnity insurance issues will affect the wider industry, because most insurance companies offer a range of insurance products. Commonwealth, State and local governments are developing responses to the difficulties being experienced in the public liability and medical indemnity insurance markets. The 2002 National Competition Policy (NCP) assessment is prepared against these circumstances of change and uncertainty in the industry.

In many insurance markets, government legislation allows for competitive provision and competing private insurers are the principal underwriters. In the cases of CTP and workers compensation insurance, however, several governments have legislated for monopoly underwriting of at least one of these forms of insurance by government-owned entities. Governments also have legislated for monopoly provision of indemnity insurance for some professions (especially lawyers practising as solicitors). Under the National Cooperative Scheme for the Regulation of Travel Agents (the 'National Scheme'), the States and the ACT Government legislate for monopoly

provision by the Travel Compensation Fund of travel agents' indemnity insurance. This fund compensates travel consumers in the event of the financial failure of a travel agent. The National Scheme is subject to a national review commissioned by the Ministerial Council on Consumer Affairs; more information on this review is provided in Chapter 8.

CTP insurance for motor vehicles applies in all States and Territories. Governments are motivated to ensure all road accident injury victims, as well as relatives of those killed in traffic accidents, are compensated regardless of fault. The schemes in the States and Territories provide for coverage of parties injured in road accidents who are not required to take out insurance (for example, pedestrians and cyclists).

There is a similar universality for workers compensation insurance, which also is compulsory and under which employees receive entitlements reflecting the participation of their employers in the insurance market. Exceptions are minor, with some jurisdictions allowing employers over a certain size to self-insure (while conforming to regulatory requirements) and, in some cases, exempting very small companies from insuring. This universal coverage aspect of CTP and workers compensation insurance differentiates them from other forms of insurance.

The benefits paid under CTP and workers compensation schemes typically cover medical, hospital and rehabilitation expenses, legal costs, loss of earnings and, in many cases, compensation for pain and suffering. In some cases, the benefits are based on statutory formulas; in others, they are based on common law or statutory benefits and the common law. In the case of CTP insurance, access to the common law is unlimited in three jurisdictions (Queensland, Tasmania and the ACT), and restricted in four (New South Wales, Victoria, Western Australia and South Australia.) In Victoria and Tasmania, statutory no fault benefits are also available. In the Northern Territory, statutory benefits are available to residents only, while non-residents have unlimited access to the common law. In the case of workers compensation, statutory benefits are available in all jurisdictions. Common law access is unlimited in the ACT, and limited in New South Wales, Victoria, Queensland, Western Australia and Tasmania. The workers compensation schemes in South Australia and the Northern Territory provide access to statutory benefits only.

In most jurisdictions, there is only a muted connection between the riskiness of the insured party and the premium that party pays. This is particularly the case with CTP insurance, for which all motorists tend to pay the same regulated premium regardless of their driving history or the evidence of driving behaviour by their cohorts. Younger and inexperienced drivers typically face the same CTP premiums paid by more experienced drivers, despite incurring substantially higher premiums for non-CTP or comprehensive insurance. In workers compensation schemes, an employer's premium broadly reflects the nature of the employer's industry and the employer's experience. Industry ratings, however, tend to blunt the latter factor.

This 'community rating' aspect of CTP and workers compensation insurance diminishes the incentives for risk minimisation that could arise from differential premiums reflecting factors such as age, driver or workplace safety history, experience and measures taken to reduce risk. Governments argue that community rating contributes to the high proportion of drivers and employers taking out insurance.

Current insurance market environment

Over the past two to three years, public liability and professional indemnity insurance premiums have risen sharply, reflecting the growth in litigation (and courts awarding large payouts), insurers' underpricing of premiums during preceding years, a concurrence of catastrophes and other factors.[1] This rise has been exacerbated by the huge claims arising from the 11 September 2001 events in the United States, which have contributed to increased reinsurance costs, and by the collapse of HIH, which increased the demand on other insurance companies and encouraged them to be more cautious in setting premiums.

The Australian Competition and Consumer Commission (ACCC) found that the largest average premium increases across the Australian insurance industry in 2000-01 occurred in the areas of industrial special risks, professional indemnity and product and public liability insurance (ACCC 2002). It identified the following factors as the key drivers of these premium rises.

- Insurers have shifted from targeting business volume growth to focusing on return on equity.
- Insurers have recognised that low returns on capital have resulted from:
  - inadequate premium rates in these and other areas of insurance;
  - catastrophes such as the Sydney hailstorm in 1999, floods in New South Wales, Queensland and the Northern Territory in 1998, and the Longford gas plant explosion in Victoria in 1998;
  - realisation of the extent of past losses, as liability provisions are increased to reflect emerging claims experience in professional indemnity and public liability insurance;
  - low investment returns;

[1] According to a J.P. Morgan/Deloitte/Trowbridge survey (Trowbridge Consulting 2002, p. 26), public liability premiums rose by more than 15 per cent in each of 1999-2000 and 2000-01, and were expected to increase by an estimated 30 per cent in 2001-02.

- reinsurance premium increases which constitute part of the industry's strategy to recover from the recently low profitability of the international reinsurance market. (Reinsurance premiums reached their lowest point in 1999-2000.) The rise in reinsurance premiums, largely driven by international factors, coincided with the above Australian catastrophes; and

- the removal of a barrier to price increases after the HIH insurance group collapsed (ACCC 2002, pp. ii–iii).

The Commonwealth Government commissioned Trowbridge Consulting to prepare a report on public liability insurance for consideration by Commonwealth and State Ministers attending the 27 March 2002 Ministerial Meeting on Public Liability. The report (Trowbridge Consulting 2002) argues that there is a crisis in public liability insurance as indicated by a large number of people being able to obtain cover only at sharply increased premiums or not at all. Trowbridge believes the crisis is likely to persist for a year or two without government intervention. It argues that the crisis has been caused by:

- personal injury claims, which have risen in number and size of average compensation, driving up the cost of claims overall;

- underpricing by insurers during most of the 1990s;

- insurers now being more conscious of protecting shareholder value;

- difficulties that insurers are experiencing in assessing risks; and

- revised insurer attitudes and competitive conditions flowing from the HIH collapse. Trowbridge believes the demise of HIH has contributed to a lessening of competition in the public liability insurance market.

Trowbridge predicts that premium increases for public liability insurance in 2002 will be 30 per cent higher, on average, than in 2001 — even five to ten times as high in some cases (Trowbridge Consulting 2002, pp. i–ii, 10–11).

Governments are concerned about the rising costs of public liability and professional indemnity insurance. While these areas of insurance in total comprised just 8 per cent of total Australian premium revenue in 2000-01, the sharply increased premium costs have caused great concern to particular industries and community groups.[2]

[2] On 20 March 2002, the Senate asked the Senate Economic References Committee to report by 27 August 2002 on the impact of public liability insurance on small business and community and sporting organisations, and of professional indemnity insurance on small business, with particular reference to the cost of such insurance, reasons for premium increases, and reforms that could reduce the cost and better calculate and pool risk.

The Commonwealth, State and Territory governments have recently given some attention to the possibility of new national approaches to aspects of insurance. This attention has been in response to the HIH collapse, sharply increased premiums for public liability insurance, and recent adverse developments in builders warranty insurance and medical indemnity insurance. Government actions over the next several months are likely to affect the claims outlook and profitability of the industry. These effects will have implications for insurance generally and for CTP, workers compensation and professional indemnity insurance specifically. In these three insurance markets, government legislation affects the structure of the market and the extent of competition.

The 27 March 2002 Ministerial meeting agreed to remove the tax impost on structured settlements for personal injury compensation, and States agreed to examine tort reform, legal system costs and practices and possible targeted measures for specific areas, especially volunteer and community organisations. The meeting occurred against a background of media discussion of these and other possible initiatives, including capping legal costs, banning 'no win, no fee' advertising by lawyers, changing the professional negligence test to protect community groups, and disallowing lump sum payouts.

The meeting of the Council of Australian Governments (CoAG) on 5 April 2002 reinforced these discussions. CoAG initiated another Commonwealth–State Ministerial meeting on 30 May 2002. In addition, the Heads of Treasuries have coordinated national consideration of public liability and medical indemnity insurance reforms, reporting to Commonwealth–State senior officials in July 2002.

Following a meeting with the Australian Medical Association (AMA) on 30 April 2002, the Commonwealth's Assistant Treasurer announced that the Commonwealth has agreed to give priority to the development of a national scheme for the care and rehabilitation of severely injured patients. The Commonwealth has indicated that it is looking to the States and Territories to examine tort law reform to contain the costs of claims and deliver predictability for the pricing of insurance products.

Governments have begun to implement some of the initiatives agreed at the March summit. On 6 June 2002, the Commonwealth introduced the Taxation Laws Amendment (Structured Settlements) Bill 2002 which will exempt, from income tax, annuities and deferred lump sums paid as compensation to seriously injured persons under structural settlements.

The legislative changes introduced by the New South Wales Government in the Civil Liability Bill 2002 provide for limits on personal injury damages,

including caps on some categories of damages.[3] Lawyers run the risk of meeting court costs if their public liability insurance cases are shown to be unmeritorious. The Bill will also enable courts to agree to structured settlements.

Queensland introduced the Personal Injuries Proceeding Bill 2002 on 18 June 2002, and the Parliament passed the Bill on 20 June 2002. The Bill deals with awards other than those covered by the *Motor Accident Insurance Act 1994* and the *WorkCover Queensland Act 1996*. The Bill provides for a cap on economic loss claims, streamlined legal proceedings to reduce legal costs, expressions of regret not being used as an admission of liability, facilitation of structured settlements, and protection of volunteers from liability. The Bill also restricts lawyers from advertising personal injury services on a 'no win, no fee' basis[4].

Late in May 2002, Victoria's Finance Minister indicated the measures that are likely to be introduced in the Spring 2002 session of Parliament to address liability and indemnity insurance issues. The measures include: waivers allowing people to accept responsibility for participating in risky activities; protection of volunteers from being sued; allowance of damages payments in instalments; and assurance that apologies does not represent an admission of guilt.

Other States and Territories also recently announced measures to rein in claims costs, maintain the supply of public liability insurance, and protect voluntary and not-for-profit organisations.

At least one insurance company (Insurance Australia Group) has called for a nationally uniform approach to the 'long tail' insurance issue, arguing that the current framework of different arrangements adds to costs and encourages a 'culture' of compensation. The ACCC has indicated that it would review the competition implications of the Insurance Council's suggestion of pooling premiums for public liability insurance (if insurance companies take this idea towards an agreement stage). The Royal Australasian College of Surgeons has proposed the pooling of the insurance reserves and current liabilities of 'medical defence organisations', which offer medical indemnity insurance. The ACCC would probably review any such arrangement.

At the Ministerial meeting on public liability insurance on 30 May 2002, Commonwealth, State and Territory governments decided to appoint an

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[3] This Civil Liability Bill was passed on 7 June 2002 and received assent on 18 June 2002. The Bill applies to personal injury claims, subject to some exceptions such as those covered by New South Wales' *Motor Accident Compensation Act 1989* and the *Workers Compensation Act 1987* (which contain caps on common law access for CTP and workers compensation insurance).

[4] The Queensland Bill's restrictions on lawyers' advertising will apply to lawyers representing clients who have experienced motor vehicle and workplace injuries as well as lawyers representing other injured clients.

expert panel to examine the law of negligence, including its interactions with the *Trade Practices Act 1974*. The panel was announced by the Commonwealth Minister for Revenue and Assistant Treasurer on 2 July 2002. The panel will report on the terms of reference in two stages, with the first report to Commonwealth, State and Territory Ministers to be made by 30 August 2002, and the second report by 30 September 2002. The panel is asked to report on several matters, including:

- the operation of common law principles applied in negligence to limit liability from personal injury or death;
- principled options to limit liability and the quantum of awards;
- evaluate proposals to allow self assumption of risk;
- options to limit claims of negligence to within three years of an event; and
- options for a requirement that the standard of care in professional negligence matters accords with generally accepted practice of the relevant profession. (Coonan 2002a)

The governments also agreed at the second summit that:

- the ACCC will monitor market developments and premium prices and update its Insurance Industry Market Pricing Review every six months over a two-year period;
- a number of jurisdictions will introduce legislation to protect volunteers from being sued;
- jurisdictions will allow self-assumption of risk for people participating in inherently risky activities;
- all States and Territories will examine aligning damages under common law more closely with statutory third party insurance awards for other personal injury claims; and
- individual governments will consider limits on lawyers' advertising and legal fees. (Coonan 2002b)

On 27 June 2002, the Commonwealth introduced a Bill to Parliament to implement one of the measures agreed at the May summit. The Trade Practices Amendment (Liability for Recreational Services) Bill 2002 will provide the option to individuals participating in risky recreational and sports activities to voluntarily waive their right to sue.

On 20 June 2002, the Commonwealth Minister for Employment and Workplace Relations asked the Standing Committee on Employment and Workplace Relations in the Australian Parliament to report on matters relevant to Australian workers compensation schemes in respect of the incidence, cost and detection of fraudulent claims; employers' noncompliance with premium and other obligations; factors affecting different safety and

claims records among industries; and the adequacy of rehabilitation schemes. The findings of the Committee might cause jurisdictions to consider and potentially change their workers compensation arrangements. On 24 July 2002, the Minister for Employment and Workplace Relations and the Parliamentary Secretary to the Treasurer jointly announced that the Government will ask the Productivity Commission to inquire into more nationally consistent arrangements for workers compensation and occupational health and safety schemes.

Governments probably will consider a range of possible initiatives — further to those already introduced — with the objectives of reining in claims costs and providing for more certainty for insurance companies. They are aiming to check the growth in premium prices and ensure that insurance is widely available at reasonable prices.[5] Governments also are likely to encourage insurance companies to be more receptive to participation in some insurance markets (including medical indemnity and professional liability insurance).

The range of likely government initiatives may affect CTP, workers compensation and professional indemnity insurance by influencing the nature of benefits available to claimants, including seriously injured people with 'long tail' rehabilitation requirements. In addition, the government initiatives could change the landscape of the insurance industry generally. Changes in the circumstances of the insurance industry, particularly in the CTP, workers compensation and professional indemnity insurance sectors, could have significant implications for governments' attitudes to legislation on the monopoly provision of these forms of insurance.

Restrictions in legislation

Under clause 5 of the Competition Principles Agreement (CPA), governments undertook to review and, where appropriate, reform legislation that restricts competition. This section summarises the legislative restrictions that exist in the areas of CTP, workers compensation and professional indemnity insurance. Legislation relating to these areas of insurance was identified as containing restrictions that should be subject to NCP review.

[5] Governments are giving careful consideration to their initiatives, because they do not wish to introduce measures that have anticompetitive impacts or significantly affect the capacity of seriously injured people to claim compensation commensurate with their financial needs for care and rehabilitation.

Compulsory third party and workers compensation insurance

Mandatory insurance

In all jurisdictions, CTP insurance is mandatory and applies to the vehicle. Workers compensation insurance also is mandatory (for employers), except in the cases of self-insurance and very small employers.

Governments believe these requirements are important, ensuring all injured parties have access to insurance. NCP reviews have supported this argument, also noting that the mandatory nature of these forms of insurance ensures parties responsible for accidents cannot avoid contributing to the benefits available for affected individuals. The reviews have argued that there is a net community benefit from CTP and workers compensation insurance being mandatory, and the National Competition Council accepts this argument.

Premium controls

Governments tend to set CTP premiums in Australia according to community rating approaches. Workers compensation premiums reflect industry ratings and experience, but also a degree of centralised premium setting and a blunted approach to relating individual employer risk to price. Such premium controls reduce the role of price in influencing safety behaviour and increase premium costs for those employers and drivers who have good safety records. In this way, insurance holders are not rewarded for good historical performance. The Council believes that the benefits of risk-related premiums are potentially important and worthy of further consideration by jurisdictions.

Licensing of insurers

Licensing of insurers to offer CTP and workers compensation insurance allows governments to account for prospective insurers' financial viability and history. While the work of prudential authorities should assure governments, it is appropriate that governments undertake their own checks of prospective insurers, given the ramifications of insurance companies becoming unviable.

The capacity of governments to provide and withdraw licences is likely to serve as an incentive for insurers to conduct their finances and customer relations effectively and with probity. Governments' licensing role does not, however, ensure insurance companies perform well. Prudential authorities and the boards of insurance companies should retain the responsibility for monitoring the finances and probity of insurance companies.

Licensing also can enable governments to enforce particular requirements (for example, the contribution of a proportion of premium revenue to rehabilitation services or safety advertising campaigns).

The Council accepts that these roles for licensing are consistent with the CPA. Provided licensing criteria are not anticompetitive and are the minimum necessary to achieve government objectives, the Council considers that licensing is consistent with the CPA.

Monopoly provision

CTP and workers compensation insurance are provided in several jurisdictions by a government-owned monopoly under statute. This arrangement is the principal restriction with NCP implications. Table 9.1 summarises the provider arrangements in each jurisdiction.

Table 9.1: Provider arrangements for CTP and workers compensation insurance

Jurisdiction	*CTP insurance*	*Workers compensation insurance*
Commonwealth	Not applicable	Monopoly insurer for Commonwealth employees (Comcare)
New South Wales	Multiple private insurers	Monopoly insurer (WorkCover NSW)
Victoria	Monopoly insurer (Transport Accident Commission)	Monopoly insurer (Victorian WorkCover Authority)
Queensland	Multiple private insurers	Monopoly insurer (WorkCover Queensland)
Western Australia	Monopoly insurer (Insurance Commission of Western Australia)	Multiple private insurers
South Australia	Monopoly insurer (Motor Accident Commission)	Monopoly insurer (WorkCover Corporation of South Australia)
Tasmania	Monopoly insurer (Motor Accident Insurance Board)	Multiple private insurers
ACT	Legislative provision for licensing of multiple insurers – only one licensed insurer (Insurance Australia Group)	Multiple private insurers
Northern Territory	Monopoly insurer (Territory Insurance Office)	Multiple private insurers

A number of jurisdictions (New South Wales, Queensland, Western Australia, Tasmania and the Northern Territory) license multiple private companies to provide one of these two forms of insurance, but legislate for monopoly supply of the other form of insurance. This occurs despite the two types of insurance being similar in some key respects:

- both are concerned with accident insurance;
- both are mandatory; and
- in all instances (except workers compensation insurance in Tasmania, the ACT and the Northern Territory), premiums are set, regulated or subject to oversight.

The differential treatment of the two forms of insurance across and within jurisdictions reflects complex issues that governments have considered in deciding whether to provide for monopolistic or competitive provision.

Legal professional indemnity insurance

All States and Territories require lawyers practising as solicitors to take out professional indemnity insurance. Most jurisdictions require (generally by legislation) that practitioners insure through a monopoly provider. In New South Wales, professional indemnity insurance for solicitors is mandatory and must be arranged through the NSW Law Society, which is the statutory monopoly provider of this insurance under the *Legal Profession Act 1987*. In Victoria, the Legal Practitioners Liability Committee is the statutory monopoly provider of legal professional indemnity insurance. In Queensland, lawyers' public indemnity insurance must be taken through a Queensland Law Society master policy or an insurer approved by the law society. Monopolies also provide this insurance in Western Australia, South Australia, Tasmania and the Northern Territory, while the ACT allows for two providers.

Review and reform progress

Compulsory third party and workers compensation insurance

All governments completed reviews of their statutory monopoly insurers by early 2001 (some significantly earlier). In New South Wales, the Grellman Report into workers compensation insurance was finalised in 1998, and the State Government legislated for private underwriting to commence in October 1999. The Government subsequently deferred implementation of the legislation until an unspecified date; then in 2001, it repealed provisions that provided for competitive underwriting. New South Wales is now proposing a further review with a reporting deadline of the second half of 2003.

In Victoria, second reviews of CTP insurance and workers compensation were finalised in 1999 and 2000 respectively, reversing the first reviews' recommendations for multiple provision. As in its 2001 annual report to the

Council, the Victorian Government informed the Council in 2002 that it will review the scope for greater contestability in the provision of CTP and workers compensation insurance via further outsourcing ('market testing') by the Transport Accident Commission (the TAC) and the Victorian WorkCover Authority. The Government is still considering the mechanism for third party reviews of the TAC and the Victorian WorkCover Authority premiums, which was a recommendation of the 2000 reviews.

In Queensland, the review of workers compensation insurance was completed in early 2001, leading the Government to legislating minor changes in 2002. The monopoly insurance arrangements continue.

The review of CTP insurance in Western Australia was finalised in 2000, recommending multiple provision. Amending legislation was withdrawn in 2000, and no action has been taken since. The State Government is not considering changing the multiple provider arrangements in workers compensation insurance.

South Australia conducted a second review of CTP insurance in 1999, reversing the 1998 review's recommendation that multiple provision be introduced. The Government reaffirmed in September 2001 that the Motor Accident Commission remains the sole provider of CTP insurance in South Australia. South Australia's 2002 NCP annual report reiterates that the State has demonstrated a public interest case for retaining the single statutory provider of CTP insurance. In the case of workers compensation insurance, South Australia is preparing a final report for the Government's consideration.

The Tasmanian Government stated in its 2001 and 2002 NCP annual reports that it is examining the Victorian review of the TAC before making decisions about its Motor Accident Insurance Board. In the Northern Territory, the review of CTP insurance was completed in late 2000 and the Government is considering the recommendations. This review argued for retaining the monopoly arrangements, but suggested that the Government consider franchising out the operation of the CTP scheme. It recommended clarification of legislative objectives and replacing references in legislation to the Territory Insurance Office with 'the designated insurer.' The Northern Territory Government is also considering a review of workers compensation insurance. The ACT allows for multiple providers of both CTP and workers compensation insurance, so no issues with NCP compliance arise in that jurisdiction. The review of the monopoly compensation insurer for Commonwealth employees, Comcare, was completed in 1997, but no reforms have been introduced.

Tables 9.2 and 9.3 summarise legislative review and reform activity by jurisdictions in the areas of CTP and workers compensation insurance.

Legal professional indemnity insurance

Most governments have reviewed of the professional indemnity provisions of their legal practitioner legislation. New South Wales completed a review of its Legal Profession Act in 1998. The review recommended deregulating the market for professional indemnity insurance for solicitors, subject to the provision of appropriate protection for clients through minimum standards for policies, run-off cover and indemnity. The Government rejected this recommendation and instead proposes to establish a new mutual fund to cover all solicitors (except those with exemptions). It anticipates that the fund would be administered by an insurer selected by an independent Board. The Government envisages that commercial insurers would re-insure all or part of the fund's liabilities.

Victoria has conducted two professional indemnity insurance reviews. The first review, conducted by KPMG, recommended removing the Legal Practitioners Liability Committee's monopoly over the provision of professional indemnity insurance to solicitors. The second review, conducted by the Legal Practice Board, recommended retaining it. The Government released the Legal Practice Board report (and its draft response) for public comment in November 2000. It subsequently provided a supplementary report on professional indemnity insurance for solicitors to the Council in June 2001 and confirmed its decision to retain the monopoly arrangement.

Queensland released a green paper on legal profession reform in June 1999. The green paper recommended providing competition in the professional indemnity insurance market. It proposed specifying the objectives to be achieved by the professional indemnity insurance cover (for example, that the policy must include appropriate run-off cover) in legislation, but not prescribing whether the insurance should be through a master policy or open to the market. In December 2000, the Government announced that it would allow the professional bodies to select professional indemnity cover — subject to the cover meeting minimum standards — while also allowing the current arrangements to continue for a further three years. The Government subsequently commenced an NCP review of its legal practitioner legislation (including the professional indemnity insurance arrangements), releasing a discussion paper in November 2001.

Western Australia released the draft review report on the *Legal Practitioners Act 1983* in April 2002. The draft report recommended retaining requirements for legal practitioners to insure through the Law Society, but amending the Act to codify the Law Society's practice of allowing practitioners to opt out of the scheme where they give adequate notice and evidence of having made suitable alternative insurance arrangements.

South Australia completed a review of the *Legal Practitioners Act 1981* in October 2000. The review recommended maintaining the Law Society's monopoly over professional indemnity insurance for legal practitioners, provided premiums remain competitive. The Government accepted the review's recommendations.

Tasmania released a regulatory impact statement containing preliminary recommendations for the reform of its *Legal Profession Act 1993* in April 2001. The regulatory impact statement found that the requirement for legal practitioners to have professional indemnity insurance is in the public interest, but that legal practitioners should be able to arrange their own insurance rather than be required to use the Law Society scheme. This recommendation was conditional on the public benefits (guaranteed indemnity and run-off cover) being maintained. The review team completed its report in August 2001. The Government is re-considering the review's recommendations, given the decision by the Standing Committee of Attorneys General to prepare and adopt uniform national laws for the legal profession (see chapter 7 on legal services).

The ACT commenced a review of the *Legal Practitioners Act 1970* in 1999. As an interim measure pending the full NCP review, the ACT Government amended the Act to introduce a second approved insurance provider. Willis Corroun Professional Services Limited indicated that in its experience as the agent of insurers entering the market in the ACT, competition leads to broader cover, cheaper premiums and a higher level of service. The ACT subsequently ceased its NCP review, in light of the upcoming development of uniform national laws for the legal profession.

The Northern Territory has not completed its review of the *Legal Practitioners Act.*

Chapter 7 provides tables that summarise legislative review and reform activity by jurisdictions in the area of solicitors' professional indemnity insurance.

Public interest evidence

Compulsory third party and workers compensation insurance

The issue of monopoly versus multiple provision is central to the Council's consideration of whether jurisdictions' CTP and workers compensation insurance arrangements are consistent with the NCP. Governments have argued a public interest case that the benefits of monopoly provision outweigh the costs. The following sub-sections discuss some arguments that governments have made and about which the Council has been (and is) seeking additional information from governments.

Economies of scale

Some governments have argued that the size of the market in their jurisdictions does not justify the provision of insurance by more than one

supplier because economies of scale would not be realised. They have not provided sufficient evidence of the market size required to achieve economies of scale, but they have implied that costs would be higher if smaller, multiple suppliers were allowed in place of monopoly providers. Some governments with monopoly providers of CTP and workers compensation (for example, Victoria and South Australia) have acknowledged that the NCP reviews conducted could not be conclusive about economies of scale. The Council has noted that competitive insurance markets in some jurisdictions are smaller than the markets of other jurisdictions that retain monopoly providers.

The Council has sought assistance from the States over the past two years in considering the optimal scale of insurance provision. States have not yet provided sufficient information for the Council to ascertain likely scale economies. If those governments that argue for monopoly provision are correct, then insurance providers that are larger than the statutory monopolies in any jurisdiction (ultimately, perhaps, a single national entity) may reap further economies of scale. The Council will seek more information from the States on economies of scale over the period to the 2003 assessment.

Economies of scope

Statutory monopoly providers specialise in providing one insurance type. This specialisation denies the monopoly insurer access to economies of scope, whereas private insurers participating in competitive markets usually offer a range of insurance products and can take advantage of the systems, human resources and insurance expertise that they have developed. Private insurers can spread many of their costs over a range of insurance products and thus enjoy economies of scope.

Victoria's second NCP review of CTP insurance recognised that diseconomies of scope may occur with a monopoly insurance provider (Department of Treasury and Finance, Victoria, PricewaterhouseCoopers and MinterEllison Lawyers 2000, p. 86). Governments with monopoly providers argue that economies of scope can be gained by outsourcing certain functions (for example, premium collection, accident investigations, investment management, and information technology and claims management) to private insurers. There is merit in this argument, but the extent to which such outsourcing allows economies of scope is unclear. The Council will seek more information on this issue over the period to the 2003 NCP assessment.

Choice and innovation

The various reviews of the CTP and workers compensation schemes have identified costs of monopoly provision that relate to choice and innovation. The lack of choice for consumers denies them the potential to compare the services and benefits offered by competing companies. Monopolies typically require more price regulation than required by competing companies, so monopoly provision means that it is difficult to assess the reduction in average premiums that may arise from competition. In addition, the

competitive provision of insurance services would be more likely to result in innovative approaches to premiums that reflect the safety risks associated with individual drivers and workplaces. The Council has been unable to obtain sufficient information to assess the extent of these costs of monopoly provision.

Systems improvements, safety and rehabilitation, and high risk customers

Some States (especially Victoria and South Australia) have argued that private competing CTP and workers compensation insurers would have a reduced incentive to invest in systems improvements (for example, strategies to control litigation costs and fraud), public safety measures and rehabilitation technologies because there would be potential for leakage to other insurers. South Australia acknowledges that it is difficult to find evidence that multiple insurers would be less active than monopolies in these areas of investment.

The second Victorian review of CTP insurance concluded that private insurers seek to avoid high risk classes of customer, regardless of any legal requirement to insure, but the report did not offer data or anecdotal evidence to justify this conclusion, or provide examples of motorists failing to obtain insurance in other markets. The Northern Territory review of CTP insurance also argued that insurers in competitive market arrangements would seek to avoid high risk drivers, requiring regulatory responses. The extent and potential cost of private insurers' avoidance of high risk groups need to be considered, together with the additional costs of dealing with this avoidance (for example, a regulator taking complaints from motorists unable to obtain insurance, or an arrangement for covering 'bad risks'). The Victorian review did not consider ways of ensuring coverage of high risk groups other than through the monopoly. One alternative is a levy on insurers' premiums. Another possible approach is to allow higher premiums for high risk drivers.

The Council has sought more information on whether these perceived deficiencies occur in those jurisdictions with competitive provision, and whether regulation and levies could require and fund system improvements, safety and rehabilitation initiatives, and insurance of high risk parties. The Council has been unable to obtain sufficient information to assess whether monopoly provision holds inherent advantages in meeting these objectives.

'Long tail' liabilities

The recent discussion of public liability and professional (including medical) indemnity insurance has given much attention to the cost to the insurance industry of those accident victims who require benefits and special rehabilitation over a long period (so-called 'long tail' liabilities). In some cases, courts have awarded very large insurance lump sum payouts to such victims; some recipients have disabilities arising from medical complications many years ago. Some governments are concerned about the capacity of the

insurance industry to meet such uncapped lump sum payouts, especially if there is no constraint on the scope for litigation.

These recent developments reinforce the views of some States that the 'long tail' claims in workers compensation and CTP insurance increase the complexity of these areas of insurance. It is argued that provision by public monopolies is necessary to deal with the complexities and to provide the particular rehabilitation services (albeit through outsourcing) required by those with serious injuries.

Proponents of monopoly provision suggest that these features have welfare characteristics and that only public monopolies would be prepared to devote resources to such features. An alternative view is that private insurance companies participating in these insurance markets would undertake the necessary actuarial work to ensure they provide for the expected rate of 'long tail' claimants, and that they would have an incentive to contribute to community programs that aim to ensure the rate of severe injuries does not increase. Rehabilitation programs that are planned by governments and conducted under their supervision seem appropriate. Such programs appear equally compatible with monopoly insurance provision or with private provision coupled with levies to fund the rehabilitation schemes.

Victoria in particular has a strongly held position that public monopoly providers are more likely to meet 'long tail' commitments. A 'long tail' of seriously injured road or workplace accident victims occurs all around Australia, including in those jurisdictions where private insurers operate. Victoria points out that payments for economic loss as a result of a workplace accident can be made for a longer period in that State than in some other jurisdictions. The Northern Territory review of CTP insurance points out that provisions need to be made under competitive insurance arrangements to cover the long tail liabilities of insurers that become insolvent. This also would be necessary, however, under monopoly arrangements. The Council has argued, given the range of CTP and workers compensation insurance arrangements operating across Australia, that the evidence should be available to compare the performance of public and private schemes. Jurisdictions have not provided any such information, and the Council will be seeking comparative data from the States over the period to the 2003 NCP assessment.

The Council believes that more work is necessary on the extent to which the 'long tail' problem could be reduced by appropriate actuarially estimated premiums, and by government and insurer efforts to reduce accident rates and improve vehicle, road and workplace safety. This information would assist the Council's appraisal of whether multiple insurance provision is consistent with addressing the 'long tail' issue.

Prudential supervision

The HIH experience has been noted as adding to the costs of insurance in some of those jurisdictions where private insurers compete for CTP or

workers compensation insurance business. It also has been claimed to result in large bills to governments to meet HIH liabilities. The relevant States imply that public monopoly insurers are more immune to such failures, assuming that monopoly providers benefit from an extra layer of oversight.

Effective prudential supervision makes a substantial contribution to sound financial performance by insurers. This relationship has been belatedly recognised in the cases of HIH and UMP, the medical indemnity insurer that recently was placed in provisional liquidation. Some States appear reluctant to consider departing from monopoly provision of CTP and workers compensation insurance while they have concerns about national prudential supervision arrangements. Victoria argues that the nature of the CTP and workers compensation schemes in that State presents special barriers to prudential regulation, given the delayed onset of compensation claims, the gradual onset of injuries and the 'long tail' nature of compensation payments. The Council is not convinced that the Victorian schemes are markedly different from those in other jurisdictions. Prudential supervision of different insurance schemes and companies usually presents similar issues and difficulties.

States should provide more information about the extent to which their ownership of monopoly CTP and workers compensation insurance providers contributes to greater certainty about the financial positions of the providers. Such information may support Victoria's view that monopoly provision of CTP and workers compensation insurance in that State has protected the schemes from recent adverse developments in insurance markets. All jurisdictions, working together, should contribute to the development of improved national prudential supervision arrangements. The Australian Prudential Regulatory Authority commenced such development by announcing new prudential standards for general and life insurance companies (effective from 1 July 2002). It also met with medical defence organisations to develop options for bringing unregulated medical indemnity business under the authority's new prudential regime for general insurance.

Outsourcing

The monopoly providers in various jurisdictions outsource some of their functions to private companies (or, in some cases, 'panels' of companies). To the extent that these companies are chosen after a competitive bidding process, outsourcing may allow the achievement of at least some of the cost savings likely to arise from competitive provision of insurance. The realisation of some economies of scope seems likely.

In Victoria, the functions of the TAC that are outsourced (largely to private companies) include premium collection, information technology services and system development, mail and payroll services, investment and funds management, advertising and publicity, market research, and accident and other investigations. The Victorian WorkCover Authority also outsources several significant functions, including premium collection, claims management, premium audits, medical services, panel law and actuarial

services. South Australia provides another example of such outsourcing: the Motor Accident Commission outsources claims management, a large part of its investment management, and premium collection. The Territory Insurance Office in the Northern Territory outsources some claims management.

Governments have not provided any information on the extent to which outsourcing has led to cost savings, or compared such savings with potential cost savings under competitive provision of insurance. The Council will seek more information from States to form a view of the extent to which outsourcing by monopoly insurers, using a competitive bidding process, enables the reaping of cost savings (and thus premium reductions) that otherwise would be likely to be achieved only through multiple insurers.

Legal professional indemnity insurance

Governments require legal practitioners to hold professional indemnity insurance to ensure compensation for consumers suffering a loss as a result of negligent or deficient legal services. The following sections discuss reasons put forward by reviews and governments for requiring solicitors to obtain this insurance through a statutory monopoly provider. As with CTP and workers compensation insurance, the Council's consideration of NCP compliance mainly covers the issue of monopoly versus multiple provision.

Coverage of all registered practitioners

Some governments contend that monopoly provision of professional indemnity insurance ensures insurance is available to all practitioners, reinforcing the mandatory requirement for all solicitors to take out professional indemnity insurance. Under competitive arrangements, high-risk practitioners may have difficulty in finding insurance and thus be unable to practise. Some governments are concerned that such noncoverage would undermine the availability of solicitors and the financial protection afforded to solicitors' clients in the event of poor or improper performance by a solicitor. Monopoly insurance provision, however, dulls the signals — higher premiums or non-availability of insurance — that poorly performing or negligent legal practitioners are likely to receive under competitive arrangements. The South Australian review noted that the monopoly arrangements could be altered to exclude practitioners with a history of negligence (Legal Practitioners Act Review Panel, South Australia 2000, p. 67).

Some reviews have argued, however, that some competent solicitors would be denied insurance in a deregulated market for reasons unrelated to their professional performance and competence, leading to inefficiencies in the delivery of services and increases in the cost of legal services to the community. These reviews have argued that the premium income that insurers would receive from a small firm or sole practice would not justify a thorough risk assessment. Insurers would offer or deny insurance to small

firms and sole practitioners on the basis of rough indicators (for example, the number of claims made against a practitioner, regardless of their merit) rather than properly pricing risk (State Government of Victoria 2001c, p. 7). The Council is not convinced by these arguments. Competitive insurance markets are likely to include insurance companies that seek to expand their business by offering insurance to smaller legal firms and sole practitioners. Competition among these firms would be likely to contribute to appropriate risk assessment, competitive premiums and choice for lawyers.

The draft report of the Western Australian review suggested that individual insurers in a deregulated market may be unable to generate the comprehensive long-term actuarial data they require to accurately price risk. This lack of data would result in insurers being unwilling to offer cover to practitioners, not because they know the practitioners are a poor risk, but because they could not assess the probability of a claim occurring. The Western Australian review argued that a deregulated environment is thus unlikely to generate more efficient outcomes than those of a monopoly arrangement (Department of Justice, Western Australia 2002, p. 103). The Council does not believe this argument is strong. Private insurers bring to insurance markets their experience in risk assessment and actuarial analysis in similar markets in Australia (for example, insurance markets for other professionals) and overseas. Competitive pressures are likely to encourage them to offer legal professional indemnity insurance, especially given that most solicitors make few claims. Insurance companies would see most solicitors as a good risk.

KPMG pointed to New Zealand experience that suggests professional indemnity insurance would be available outside a monopoly scheme (KPMG Consulting 1996, p. 61). In Victoria, the Legal Practice Board (1998, p. 15) reported that commercial insurers had advised that nearly all practitioners would be able to secure cover in a commercial market.

Some insurers recently suggested, however, that a substantial number of solicitors may be unable to obtain insurance given the uncertainty in the world insurance markets following the events of 11 September 2001 and the HIH collapse (New South Wales Government 2002, p. 37). The Council finds it difficult to assess the likelihood of such nonprovision in the absence of competitive insurance markets for solicitors. Some insurance industry participants recently argued for tort law reform. Suggestions of potential supply shortfalls reinforce the pressures on governments to engage quickly in such reform. The current insurance market environment is not conducive to accurate prediction of market reactions to the end of monopoly provision. Governments' liability law reforms and the recently announced review of negligence laws may alter expectations of these reactions.

Some reviews proposed mechanisms to ensure solicitors who are poor risks are able to obtain insurance in a deregulated market. These mechanisms include:

- creating an assigned risk pool and requiring insurers to accept a certain number of high risk practitioners (Speedman 1994, appendix IV; Attorney-General's Department, New South Wales 1998); and

- requiring insurers participating in the market to accept any application for professional indemnity insurance, but limiting the differential between the minimum and maximum premiums that they offer (Hoffman and Masel 1997, p. 6; Attorney-General's Department, New South Wales 1998).

The Council believes that most solicitors would be able to obtain insurance cover under a competitive regime, and that market signals (higher premiums and reduced cover availability) for poorly performing solicitors would contribute to improving the overall quality of solicitors.

Cost-effective coverage

Some jurisdictions identified lower insurance premiums as a significant benefit of retaining statutory monopoly insurance arrangements. The South Australian review suggested that the promise of a significant market share under its master policy approach (which it characterises as compulsory collective bargaining scheme) may encourage insurers to compete for the work (Legal Practitioners Act Review Panel, South Australia 2000, p. 66).

Victoria provided actuarial evidence that its monopoly mutual fund offers 30 per cent lower premiums in the long term compared with those premiums offered by commercial insurance firms. The mutual fund does not have to pay advertising, brokerage and commissions. Further, as a nonprofit-making entity, the mutual fund does not need to include a profit margin in its premium rates (Trowbridge cited in Legal Practice Board, Victoria 1998). New South Wales also provided evidence that mutual funds offer the most cost-effective professional insurance model (New South Wales Government 2002, p. 38).

In some professional indemnity insurance markets, professional associations offer insurance products to their members, using their bargaining strength with the insurers to negotiate attractive premiums. Mutual funds also compete in a range of insurance markets.

Delivery of run-off cover

Professional indemnity insurance policies are generally written on a 'claims made' basis. They cover claims made during the life of the policy, regardless of the date of the events giving rise to the claims, but do not cover claims made after the policy expires, even if the event giving rise to the claim occurred while the policy was current. Professional indemnity insurance claims tend to have a 'long tail', so practitioners require 'run-off' cover for several years after they cease to practise, to insure against claims that may be made during this time.

Under monopoly insurance arrangements, the premium collected from current practitioners generally includes a component funding run-off cover for former practitioners: retirees do not need to purchase separate run-off cover. This arrangement ensures consumers will never be denied compensation due to the practitioner at fault being dead or lacking financial resources. In a commercial insurance market, former practitioners need to purchase run-off cover or have it purchased on their behalf. There is no mechanism for compelling former practitioners to purchase run-off insurance, however, because they no longer need a licence to practise (Trowbridge cited in Legal Practice Board, Victoria 1998).

Medium to large firms usually have enough practitioners to continue to exist indefinitely, so their professional indemnity insurance continues to cover their former partners and employees. Solicitors working in sole practice or small partnerships are most likely to require run-off cover. Some sole practitioners may not bother or be able to purchase run-off insurance in a commercial insurance market. Victoria provided evidence from other professions to suggest the commercial insurance industry may resist providing extensive run-off cover to former practitioners. The extent to which former practitioners would experience difficulties in obtaining run-off cover at reasonable prices in a competitive market is unclear. Private insurers could assess the risk of claims on retirees and set premiums accordingly. The Council requires more information on this issue to gauge the likely price and availability of run-off insurance for retired solicitors in a competitive market.

The significance of the run-off cover benefits of a statutory professional indemnity insurance monopoly depends on the number of potentially uninsured 'run-off' claims. Victoria provided some evidence about the number of run-off claims: it found that about 8 per cent of claims are run-off claims (and noted that this figure would rise if some practitioners ceased to practise because they could no longer afford or obtain compulsory insurance cover). Not all of these claims would be uninsured, however; some would be covered by run-off insurance that former practitioners voluntarily take out in view of the potential financial risks.

The significance of statutory insurance monopolies in providing run-off cover benefits also depends on the capacity of the monopoly insurer to fund the run-off claims. Provision of run-off insurance implies the need for a scheme that specifies minimum insurance coverage and has a secure funding base that is not subject to erosion (State Government of Victoria 2001c, p. 18). Many jurisdictions, however, allow national law firms to opt out of their insurance scheme if they have insured elsewhere. A few large firms moving from one scheme to another can significantly affect each scheme's premium base: in 2000, the transfer of four large national firms increased Victoria's premium pool by 23 per cent to 8403 practitioners (Legal Practitioners Liability Committee, Victoria 2001).

It may not be necessary to establish a professional indemnity insurance monopoly to ensure adequate run-off cover. The Queensland NCP review issues paper sought comments on whether the professional body could provide run-off cover under a master policy (paid for by a levy that is a condition for

practising certificates) but allow practitioners to negotiate their own current cover.

Prudential supervision

Some reviews have argued that a major benefit of statutory monopoly legal professional indemnity insurance schemes is greater confidence in the financial position on the insurance provider (Legal Practitioners Act Review Panel, South Australia 2000, p. 66; State Government of Victoria 2001c, p. 15). In a commercial market of competing insurers, the collapse or withdrawal of a major insurer would require substantial numbers of solicitors to find a new insurer, creating disruption and uncertainty while this occurs. The collapse of a statutory monopoly insurer, however, could have even worse effects.

The Council is not convinced that monopoly provision necessarily contributes to better prudential outcomes. States should provide more information about the extent to which statutory monopoly schemes provide greater prudential certainty. HIH underwrote the New South Wales' monopoly scheme, LawCover. The collapse of HIH led to delay and adjournment of trials of claims it was handling on behalf of New South Wales solicitors, and the delay of payment settlements (State Government of Victoria 2001c, p. 17). The monopoly provision in New South Wales did not provide any warning of the adverse events. Schemes based on mutual funds are unable to spread risk away from the profession and rely on a narrow base from which to draw their reserves (Legal Practice Board, Victoria 1998, p. 18).

Risk management

Some reviews have contended that monopoly arrangements facilitate risk management. They have argued that having access to information about all claims made or threatened against private practitioners in a State enables the monopoly providers to identify hazards of practice that may result in claims and to inform practitioners of emerging risks and encourage them to institute risk management practices. Reviews have provided evidence that proactive risk management by the monopoly providers has substantially reduced the numbers of some types of claim, thereby reducing the costs of legal services and the financial losses suffered by the community as a result of the negligent delivery of legal services (for example, State Government of Victoria 2001c, pp. 12–14).

These reviews have argued that these benefits would not arise under a commercial insurance market, because there may be little commercial incentive for insurers in an open market to encourage risk management initiatives that ultimately benefit their competitors if the insured person changes insurers. The New South Wales review, however, proposed a potential solution to this problem. It suggested placing a levy on commercial insurance premiums and using this to fund the profession's regulatory bodies to provide risk and practice management and training. In addition,

commercial insurers could be required to provide specified claims information to the regulatory bodies, to ensure these bodies are aware of emerging risks (Legal Practice Board, Victoria 1998).

Individual legal practitioners would have an increased incentive to improve their risk management practices under competitive insurance arrangements, because such practices would tend to reduce their premiums.

Reducing competition impacts of monopoly

There are several options for reducing the adverse effects of retaining professional indemnity insurance monopolies.

- Where it does not occur already, the monopoly schemes could provide for risk rating of premiums. This would reduce the extent to which clients of better performing practitioners subsidise solicitors facing payouts for negligence, thus increasing consumer welfare.

- The draft report of the Western Australian review (Department of Justice, Western Australia 2002, p. 15) noted that the Law Society has legislative discretion to exempt practitioners from its insurance scheme. It recommended amending the legislation to codify the Law Society's practice of allowing practitioners to opt out if they give adequate notice and evidence of having made suitable alternative arrangements for professional indemnity insurance cover.

- The New South Wales Government proposes to establish a monopoly mutual fund, given concerns that deregulation under present market conditions could lead to substantial numbers of solicitors being unable to obtain insurance. It intends, however, to review the mutual fund after two years operation, having regard to changing market conditions (New South Wales Government 2002, p. 37).

The Council will seek further information from jurisdictions to enable a more conclusive assessment of the impacts of competitive provision of legal professional indemnity insurance. The Council's assessment will also be influenced by developments in the regulatory environment as governments consider liability law reforms during 2002-03.

Assessing compliance

Need for further information

The restriction in any legislation that requires monopoly provision of CTP, workers compensation and/or solicitors' professional indemnity insurance is central to the Council's consideration of NCP compliance. The Council has sought information that supports monopoly arrangements. The arguments

and information presented to date (much drawn from NCP reviews) has greatly assisted the Council.

The issues that the Council and governments have raised are not easily resolved. Reviews and governments have not presented firm evidence of a public interest case for the monopoly restriction. The Council still does not have, for example, a clear view on the scale of enterprise that would reap economies of scale in providing CTP or workers compensation insurance. Despite the existence of multiple CTP and workers compensation insurers in several jurisdictions, governments operating statutory monopolies have not provided evidence that private insurers would neglect high risk customers and participate only weakly in systems improvements and safety initiatives. This information should be available, particularly where there is monopoly provision of one of the two forms of insurance, and multiple provision of the other form.

Governments need to provide more information about the extent to which their ownership of monopoly insurance providers gives them comfort about the financial positions of those providers. Governments should be able to indicate that the extent is substantial, because the financial failure of a monopoly provider would be arguably more serious than the failure of one of a number of private insurers.

Governments have not provided data to identify the cost savings from outsourcing. Some governments have informed the Council of the significant functions that their monopoly insurance providers have outsourced, but the extent to which this outsourcing has followed competitive bidding processes is unclear. More significantly, the Council has not received information that would allow it to assess the extent to which the savings from outsourcing approximate those that would be realised from competitive pressures and economies of scope if multiple insurers replaced the monopoly. The extent of these potential savings is still an open question to the Council, which will follow up this query with governments over the period to the 2003 assessment.

Finalising the assessment of NCP compliance

The insurance industry has experienced substantial change in recent times, with sharply increased premiums in particular insurance markets, concerns about insurers' willingness to supply some products to certain classes of customer, major catastrophes and cyclical factors increasing the cost of reinsurance, and the collapse of some major insurance companies. Premium costs have become a particular issue in public liability and professional indemnity insurance. Commonwealth, State and Territory governments have been discussing major changes to the regulatory environment in these two areas of insurance to rein in claims costs and increase the degree of market certainty. They are aiming to ensure insurance is available at premiums that are not greatly more expensive than previous rates.

Changes in the insurance industry and its regulatory environment are likely to continue over 2002-03, with ramifications for all insurance markets. Governments are likely to focus on the extent to which they should amend their laws to check the growth in liability and indemnity claim volumes and costs. This environment of heightened change in the insurance industry is not conducive to finalising in the 2002 NCP assessment how the Council and governments perceive the benefits and costs of changing from monopoly to multiple provision of CTP, workers compensation and professional indemnity insurance.

The Council proposes to defer until June 2003 its assessment of jurisdictions' compliance against the central NCP issue — that is, whether it can be shown that the community benefits of monopoly provision of insurance exceed the costs and that the objectives of governments' legislation can be achieved only by restricting competition. This deferral reflects the need for the Council to obtain more information on several issues (as described above), including the current heightened degree of change in the industry and its regulatory environment.

Case for a comprehensive interjurisdictional review

The Council believes that governments should consider a comprehensive review of the economics of the insurance industry and the various insurance markets. This review would help governments to decide the appropriate changes to address the difficulties in the public liability and professional indemnity insurance markets. The Council believes that such a review would:

- enhance understanding of the causes of the recent increases in premium prices. While the factors contributing to the premium increases have been described in the Trowbridge Consulting (2002) and ACCC (2002) reports, the relative importance of each contributory factor is unclear. For governments to decide on changes to the regulatory environment of the insurance industry, they must have a firm understanding of the extent to which recent premium increases have been driven by cyclical factors as opposed to factors that may be reversed only through government intervention;

- contribute to governments' introduction of measures that are similar;

- enhance governments' consideration of the complex issues of tort law (including negligence law) reform;

- increase knowledge of the links between insurance markets and thus the extent to which changes in public liability and professional indemnity markets will flow through to other insurance markets; and

- contribute to the Council's and governments' understanding of those factors that are pertinent to the monopoly provision issue, including:

- the economies of scale and scope in the industry;
- the extent to which competition would be likely to lead to a sustained fall in premiums;
- the approaches of private insurers to systems and safety improvements, high risk customers and 'long tail' liabilities;
- the contribution of variability in premiums to altering the behaviour of high risk insured parties;
- the design and importance of prudential supervision and government monitoring of CTP and workers compensation insurance providers; and
- the potential contribution of outsourcing to the achievement of cost savings.

The Council believes that the Productivity Commission may be the body best placed to undertake a review, drawing on its knowledge of the industry, other market participants and governments.

The Commonwealth Government announced on 26 July 2002 that it has asked the Productivity Commission to undertake a research study that will examine Australian insurers' claims management practices in public liability insurance and benchmark them against world's best practice. The Productivity Commission is to complete its report by 31 December 2002. This study will contribute to governments' understanding of a sector of the insurance market. The Council believes, however, that a comprehensive review of the wider insurance industry and markets, as suggested above, would greatly assist the Council's and governments' consideration of the issues surrounding monopoly provision of compulsory insurance.

Public sector superannuation

Some governments allow their public sector employees a choice of superannuation fund. New Victorian public servants, for example, can opt to make their superannuation contributions to VicSuper or a private fund. New South Wales, Tasmania and the Northern Territory also allow a choice of fund. Other governments require most, if not all public servants to contribute to a government monopoly fund. The Council has been discussing the monopoly approaches with relevant governments, some of which point out that their public servants can choose an investment strategy and that funds management is outsourced to one or more private funds managers. The Council is considering the extent to which the outcomes for superannuation contributors in these jurisdictions may be significantly different from the outcomes achievable if a choice of fund was allowed. Commonwealth legislation to allow a choice of fund for certain Commonwealth employees (with ramifications for ACT Government employees) was defeated in the

Senate in August 2001. The Commonwealth introduced the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 to Parliament on 27 June 2002. If passed, this legislation would facilitate the provision of choice of superannuation fund to certain Commonwealth employees, providing these employees the option of having their superannuation contributions paid to retail superannuation funds or their corporate or industry fund. (The legislation would also allow non-public sector employees the option of requesting their employers to make superannuation contributions to the superannuation fund of their choice.) Such changes would be effective from 1 July 2004.

The Commonwealth Government does not intend to introduce choice of fund for military personnel because the superannuation schemes operated under the *Defence Forces Retirement Benefits Act 1948* and the *Military Superannuation and Benefits Act 1991* contain benefit features that are unique to the nature of military service. The schemes are also unfunded defined benefit schemes and allowing choice of fund would concentrate fiscal impacts in a particular period.

The superannuation scheme operated under *Parliamentary Contributory Superannuation Act 1948* is very small (with minimal consequences arising from lack of competition) and is also an unfunded defined benefit scheme.

The Council will be making further queries of governments during 2002-03 and reach a final view on governments' NCP compliance in June 2003.

Table 9.4 summarises legislative review and reform activity in the area of public sector superannuation.

Table 9.2: Review and reform of legislation regulating compulsory third party motor vehicle insurance

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Motor Accidents Act 1988* *Motor Vehicles (Third Party Insurance) Act 1942*	Mandatory insurance, licensing of insurers, file-and-write premium setting	Review was completed in 1997, recommending changing scheme design and that insurers file premiums with the Motor Accidents Authority.	Legislation was passed in line with review recommendations.	Meets CPA obligations (June 1999).
Victoria	*Transport Accident Act 1986*	Mandatory insurance, monopoly insurer, centralised premium setting	Internal review was completed in 1998, recommending removing the statutory monopoly in favour of competitive provision. Second review was completed in December 2000, recommending maintaining the monopoly and centralised premium setting. Review also recommended a third party review of premiums and market testing.	The Government rejected the findings of the first review and accepted the findings of the second review.	Council to finalise assessment in 2003.
Queensland	*Motor Accident Insurance Act 1994*	Mandatory insurance, licensing of insurers, file-and-write premium setting	Review was completed in 1999, recommending retaining licensing of insurers, but removing restrictions on market re-entry and on motorists changing insurers. Review also recommended introducing greater competition in premium setting through a 'file-and-write' system.	The *Motor Accident Insurance Amendment Act 2000*, which commenced in October 2000, was passed in line with review recommendations.	Meets CPA obligations (June 2001).
Western Australia	*Motor Vehicle (Third Party Insurance) Act 1943*	Mandatory insurance, monopoly insurer, centralised premium setting	Review was completed in 1999-2000, recommending removing the monopoly provision of insurance and retaining Ministerial approval of premiums.	The Government is considering recommendations.	Council to finalise assessment in 2003.

(*continued*)

Table 9.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Motor Vehicles Act 1959*	Mandatory insurance, monopoly insurer, centralised premium setting	Review was completed in 1998, recommending removing the monopoly and controls on premiums. Second review was completed in 1999, rebutting previous review's recommendations. The Government issued both reviews for public consultation in early 2001.	The Government announced retention of mandatory insurance, the sole provision of insurance by the Motor Accident Commission and community rating.	Council to finalise assessment in 2003.
Tasmania	*Motor Accidents (Liabilities and Compensation) Act 1973*	Mandatory insurance, monopoly insurer, centralised premium setting	Review was completed in 1997, recommending retaining the monopoly provision of insurance. Following 1999 NCP assessment, the Government agreed to re-examine the issue.	The Government is considering the Victorian review of the TAC.	Council to finalise assessment in 2003.
ACT	*Road Transport (General) Act 1999*	Mandatory insurance, licensing of insurers	Not for review. Legislation allows the Government to approve multiple insurers.		Meets CPA obligations (June 1997).
Northern Territory	*Territory Insurance Office Act* *Motor Accidents (Compensation) Act*	Mandatory insurance, monopoly insurer, centralised premium setting	Review of Territory Insurance Office Act completed in 2000. Review of the Motor Accidents (Compensation) Act was completed in December 2000 and is under consideration by the Government.	The Territory Insurance Office Act was amended in December 2000, removing the requirement that the Territory Insurance Office be the sole administrator of the Motor Accident Compensation scheme. The Motor Accidents (Compensation) Act continues to enforce the monopoly.	Council to finalise assessment in 2003.

Table 9.3: Review and reform of legislation regulating workers compensation insurance

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Safety, Rehabilitation and Compensation Act 1988*	Mandatory insurance, monopoly insurer, centralised premium setting	Review completed in 1997, recommending introducing competition to Comcare.	The Government has not responded to the review.	Council to finalise assessment in 2003.
New South Wales	*Workers Compensation Act 1987*	Mandatory insurance, monopoly insurer, centralised premium setting	Review was completed in 1997-98, recommending removing the monopoly insurer in favour of competitive underwriting. Further examination of the scheme in 2000-01 resulted in proposals for changing to scheme design. Further review has been proposed, with report to be completed in second half of 2003.	Legislation was passed to introduce private underwriting in October 1999. Subsequent legislation delayed implementation to a date to be determined by the Minister. Provisions for competitive underwriting were repealed in late 2001. Scheme design changes were introduced in 2001.	Council to finalise assessment in 2003.
Victoria	*Accident Compensation Act 1985* *Accident Compensation (Workcover Insurance) Act 1993*	Mandatory insurance, monopoly insurer, centralised premium setting	Internal review was completed in 1997-98, recommending competitive provision. Second review was completed in December 2000, recommending maintaining the monopoly and centralised premium setting, and a third party review of premiums and market testing.	The Government rejected the findings of the first review and accepted the findings of the second review.	Council to finalise assessment in 2003.
Queensland	*Workcover Queensland Act 1996*	Mandatory insurance, monopoly insurer, centralised premium setting	Review was completed in December 2000, recommending retaining mandatory insurance and public monopoly insurer, and creating Q-COMP as a separate regulatory entity.	The Government is legislating in 2002 to establish Q-COMP as a separate entity.	Council to finalise assessment in 2003.

(*continued*)

Table 9.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Workers Compensation and Rehabilitation Act 1981*	Mandatory insurance, licensed insurers, centralised premium setting	Review was completed in early 2002.	Minor legislative amendments scheduled for Autumn 2003.	Council to finalise assessment in 2003.
South Australia	*Workers Rehabilitation and Compensation Act 1986*	Mandatory insurance, monopoly insurer, centralised premium setting	Review under way. Draft report completed in May 2000. Final report near completion.		Council to finalise assessment in 2003.
Tasmania	*Workers Rehabilitation and Compensation Act 1988*	Mandatory insurance, licensed insurers	Review by the Parliamentary Joint Select Committee of Inquiry was completed in 1997, recommended minor amendments.	Legislation was amended in March 2001 in line with recommendations.	Meets CPA obligations (June 2001).
ACT	*Workers Compensation Act 1951*	Mandatory insurance, licensing of insurers	Review was completed in July 2000, recommending changes to scheme design elements and a greater capacity to self-insure.	The *Workers Compensation (Amendment) Act 2001* was passed in August 2001 (effective from 1 July 2002). It retained no premium setting, and choice of provider.	Meets CPA obligations (June 2002).
Northern Territory	*Work Health Act*	Mandatory insurance, prescribed standards that insurers must meet.	Review was completed in September 2000 and released for public comment in June 2001, recommending that premiums remain unregulated and insurers remain unlicensed.		Council to finalise assessment in 2003.

Table 9.4: Review and reform of legislation regulating public sector superannuation

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Superannuation Act 1976* *Superannuation Act 1990* *Superannuation Guarantee (Administration) Act 1992* *Defence Forces Retirement Benefits Act 1948* *Military Superannuation and Benefits Act 1991* *Parliamentary Contributory Superannuation Act 1948*	Limits on choice of funds	Following a review in 1997, legislation was introduced into Parliament to allow choice of fund for Commonwealth employees. The Government does not intend to provide choice of fund for military personnel because the superannuation schemes operated under the Defence Forces Retirement Benefits Act and the Military Superannuation and Benefits Act contain benefit features that are unique to the nature of military service. The schemes are also unfunded defined benefit schemes and allowing choice of fund would have a significant fiscal impact at a particular point in time. Review of the Parliamentary Contributory Superannuation Act was completed, concluding that administration costs are trivial and that there are efficiencies. The scheme operated under this Act is very small (with minimal consequences arising from lack of competition) and also an unfunded defined benefit scheme.	Amending legislation was defeated in the Senate in 2001. The Government has since restated its commitment to choice of fund for Commonwealth employees. Choice of fund legislation (for Commonwealth and other employees) was reintroduced to Parliament on 27 June 2002. Choice of fund will not apply to military personnel or parliamentarians.	Council to finalise assessment in 2003.

(*continued*)

Table 9.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	Superannuation Acts including: *Superannuation Industry (Supervision) Act 1993* *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987* *Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991* *Superannuation (Resolution of Complaints) Act 1993* *Occupational Superannuation Standards Regulations Applications Act 1992* *Superannuation (Financial Assistance Funding) Levy Act 1993*	Legislation provides for prudential regulation and supervision of the superannuation industry and the imposition of certain levies on superannuation funds and approved deposit funds.	The Productivity Commission undertook a NCP review of this legislation and submitted its final report to the Government on 10 December 2001. The report made various recommendations relating to the prudential supervision and regulation of the superannuation industry.	The Minister for Revenue and Assistant Treasurer released the Commonwealth Government's interim response to the Productivity Commission report on 17 April 2002. The Government will complete its response after it has received the outcomes of other examinations of superannuation that are under way, including the report of the Superannuation Working Group chaired by Mr Don Mercer. The interim response noted (for further consideration) the Productivity Commission's recommendations with respect to strengthening the net tangible asset requirements of approved superannuation trustees, requiring trustees of superannuation entities regulated by the Australian Prudential Regulation Authority to prepare a risk management strategy, and other recommendations. The Government has agreed to various recommendations, including one relating to simplifying compliance requirements and enhancing capital adequacy requirements.	Council to finalise assessment in 2003.

(*continued*)

Table 9.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Superannuation Administration Act 1987*	Limits on choice of funds		Legislation was passed in 1999 to corporatise the scheme regulator and market test the administration. Choice was introduced.	Meets CPA obligations (June 2001).
Victoria	*State Superannuation Act 1985* *Superannuation (Public Sector) Act 1992*	Limits on choice of funds	Review was completed in 1999.	Government employees have had a choice of fund since 1994: VicSuper or a private superannuation fund.	Meets CPA obligations (June 2001).
Queensland	*Superannuation (Government and Other Employees) Act 1988*	Limits on choice of funds	Review was completed in late 2000, concluding that the Act does not restrict competition.		Council to finalise assessment in 2003.
Western Australia	*State Superannuation Act 2000*	Limits on choice of funds	Review currently being considered by the Government.		Council to finalise assessment in 2003.
South Australia	*Southern State Superannuation Act 1987*	Limits on choice of funds	Full NCP review was not conducted. The Government considers the restrictions to be trivial.	No reform.	Council to finalise assessment in 2003.
Tasmania	*Retirement Benefits Act 1993*	Limits on choice of funds		Choice of funds was introduced for new and existing contributors. The Government moved to fund existing public scheme.	Meets CPA obligations (June 2001).
ACT	As for Commonwealth	As for Commonwealth		Reform depends on Commonwealth reforms. New entrants have a choice of funds.	Council to finalise assessment in 2003.

(*continued*)

Table 9.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Superannuation Act*	Limits on choice of funds	Review was completed in 1998, recommending that the Government close the unfunded scheme and introduce choice.	Reforms were implemented in line with review recommendations.	Meets CPA obligations (June 2001).

10 Retail trading arrangements

There are three areas of retailing in which legislation significantly restricts competition. Prescribed shop trading hours prevent sellers from trading at the times they consider appropriate and include provisions that discriminate between sellers on the basis of location, size or product sold. Liquor licensing laws frequently preclude entry by responsible sellers and favour some sellers at the expense of others, and legislation governing petrol retailing restricts entry and reduces the ability of sellers to raise and lower prices.

Shop trading hours

Historically, governments have restricted shop trading hours for reasons including observance of the Sabbath, protection of small businesses from competition from larger competitors and to reduce the need for shop employees to work outside traditional working hours. Pressure to change laws restricting trading hours has arisen from a range of sources, from retail business owners to consumer groups. A significant driver of reform is changing social and work patterns such as increasing numbers of dual-income households and more flexible and longer working hours. All governments, except the Northern Territory which has no legislation that specifically regulates trading hours, included trading hours legislation on their legislation review programs.

Legislative restrictions on competition

At the commencement of the National Competition Policy (NCP) legislation review program, shop trading hours varied significantly across Australia. Jurisdictions other than the Northern Territory had various arrangements, including designated days for late night shopping and restrictions on Sunday trading. Often, central city and tourist shopping precincts had fewer restrictions than those in suburban and rural areas and discrimination occurred between retail outlets according to their size or the product they sold. Many of these restrictions have been removed following reviews which found that they did not provide a net public benefit.

Victoria introduced extended trading hours in 1996 following a review and the ACT repealed its *Shopping Hours Act 1996* in 1997 after finding that its restrictions did not provide a net public benefit. In the 1999 NCP assessment,

the Council concluded that Victoria and the ACT had fully met their NCP obligations regarding trading hours. No assessment was required for the Northern Territory.

The following significant legislative restrictions on competition were in operation at 30 June 2002:

- In Queensland, daily trading hours for large, nonspecialist shops are prescribed and these shops cannot trade on Sunday if they are outside designated tourist precincts. Queensland introduced uniform Sunday trading hours for these shops in south-east Queensland from 1 August 2002.

- Western Australia restricts daily trading hours and allows large nonspecialist shops to trade on Sundays only if they are located within tourism precincts and trade between prescribed hours. Restrictions do not apply above the 26th parallel of South Latitude.

- South Australia restricts Monday-to-Saturday trading hours and prohibits Sunday trading in Adelaide outside the central business district except on six designated Sundays each year. There is also discrimination among shops on the basis of their size and the merchandise they sell.

- Tasmania prohibits major retailers (shops employing more than 250 people) from trading on Sundays, public holidays and week days after 6 p.m. other than Thursday and Friday. Tasmania has passed legislation to remove these restrictions from 1 December 2002.

These are significant competition questions. The provisions typically discriminate between sellers on the basis of their location, size or product sold. They prevent consumers from shopping at the times they find convenient and prevent businesses that consider they would benefit from extended trading hours (including major retailers, national specialty chains, franchisors and many small businesses) from opening. There is evidence from reviews and from the experience of deregulated jurisdictions to indicate that restrictions reduce retail sales and employment.

Table 10.1 summarises restrictions on trading hours in each jurisdiction and review and reform activity to date.

In addition to restrictions on trading hours, some governments also legislate to restrict trading hours for particular activities, such as the hours in which hawkers and door-to-door sellers may operate. The Council has identified several examples of trading-related legislation which are summarised in table 10.2. All jurisdictions have completed review and reform activity and therefore comply with their NCP obligations for this legislation.

Review and reform activity

New South Wales

The relevant New South Wales legislation is part 4 of the *Factories, Shops and Industries Act 1962*, which restricts the ability of 'general' shops (that is, larger stores not predominantly selling nominated products) to trade on Sundays and public holidays. In practice, exemptions to this restriction are readily granted on the basis of employment effects, potential tourist demand, impact on the community, other planning restrictions on the site, and other relevant factors. There are no restrictions on Monday-to-Saturday trading hours in New South Wales. The outcome is a virtually unrestricted trading hours environment with only a few remaining locality-based restrictions (including Tenterfield, Inverell and Gilgandra).

The New South Wales Government reviewed the legislation and considers that the assessment of applications to remove the locality-based restrictions on shop trading hours involves a satisfactory cost-benefit analysis of each individual case. Under the Act, the Director-General of the Department of Industrial Relations makes the assessment and determination. The Act does not contain specific statutory guidelines for assessing applications, but a department protocol introduced in 1995 requires the department to invite comment from interested parties as part of community and public consultation. This process involves approaching local government authorities, retail industry associations, small business organisations in the affected areas and the relevant trade union. The applicant shopkeeper is required to provide information and data about the exemption sought, using guidelines developed by the department.

Assessment

The extensive use by New South Wales of exemptions from the restrictions in its Act means that trading hours in the State are, in practice, unrestricted. (The Council accepted, in the 2001 NCP assessment, that any anticompetitive effects are negligible.) The remaining restrictions on Sunday trading apply to a limited range of regional centres. New South Wales is reviewing these, using similar criteria to those of the NCP public interest test. The Council nevertheless considered in the 2001 NCP assessment that there may be value in New South Wales removing (redundant) anticompetitive elements of part 4. The New South Wales Government advised that it will assess the appropriateness of retaining part 4 after the regional reviews are complete. The Council considers that New South Wales has met its NCP obligations in relation to shopping hours. It will monitor the outcome of the Government's review of part 4 in the 2003 NCP assessment.

Queensland

Queensland's *Trading (Allowable Hours) Act 1990* places restrictions on:

- Monday-to-Saturday trading hours for 'nonexempt' stores;[1] and
- Sunday trading by nonexempt stores which is prohibited outside major cities and some tourist areas (except hardware stores which are permitted to trade on Sundays but have limited trading hours).

Queensland has not undertaken an NCP review of its legislation. Instead, questions about trading hours are addressed via the Queensland Industrial Relations Commission process for determining applications for extended trading hours. The Act requires the commission to consider a range of criteria when determining an application for extended trading hours. The criteria include the locality of the shop, the needs of the population, tourist demand and the public interest, consumer interest and business interest. In 2000 and 2001, the Queensland Government made submissions to the Queensland Industrial Relations Commission to ensure it is aware of the competition tests in the Competition Principles Agreement (CPA) and of the Government's support for them in relation to trading hours. The Council has indicated that the commission's process for assessing applications is sufficiently public, independent and transparent.

Queensland Industrial Relations Commission decisions on trading hours have resulted in some liberalisation of trading hours arrangements. In October 2000, the commission granted applications for a Statewide extension of trading hours during the Christmas 2000 trading period and for an extension of weekend and public holiday trading hours in the Newfarm area of Brisbane. In December 2001, the commission granted an application for Sunday trading to the local government area of the City of Brisbane. The decision was criticised for disadvantaging traders and consumers in populated areas adjacent to Brisbane. The decision also drew attention to the numerous and inconsistent trading hours zones between the Sunshine Coast area and the Gold Coast area

In February 2002, the Trading (Allowable Hours) Amendment Bill 2002 was introduced into the Queensland Parliament. The Bill overrides the Queensland Industrial Relations Commission's December 2001 decision and legislates uniform Sunday trading hours (from 9 a.m. to 6 p.m.) for the south-east Queensland region from 1 August 2002. The Bill also replaces the word 'regulate' where it appears in the objects of the Act with the word 'decide'. This clarifies that an object of the Act is to decide allowable trading

[1] Exempt shops are retailers predominantly selling particular categories of good nominated in the Trading (Allowable Hours) Act. The list includes antiques, florists, various foods, pet shops, sporting goods, etc. In addition 'independent retail shops' (defined in the Act as shops employing fewer than 20 employees in one location or fewer than 60 Statewide) have unrestricted opening hours.

hours of shops as opposed to regulating hours (which has been interpreted as requiring the restriction of hours).

Assessment

The Council's considers that Queensland has in place an appropriate process for considering changes to trading hours and that Queensland's actions to extend Sunday trading to a considerable area of the State and to clarify the intent of its legislation meet NCP review and reform obligations. The Council will make its final assessment in 2003.

Western Australia

Western Australia's *Retail Trading Hours Act 1987* (and Regulations):

- restricts Monday-to-Saturday trading hours for all categories of shops to within prescribed opening and closing times. Small retail shops and special retail shops have longer opening hours than those of 'general retail shops'; [2]
- prohibits Sunday trading for 'general retail shops' outside tourism precincts; and
- does not apply north of the latitude of 26 degrees.

The Western Australian Ministry of Fair Trading completed a review of the Act in June 1999. The review took 12 months to complete, involved wide consultation with business and the community and received over 1600 submissions. The review report has not been made public. A December 1999 media release by the Minister expressed the then Government's opposition to reform of shop trading hours but did not detail the review's recommendations (Shave 1999).

Western Australia's 2001 NCP annual report, which was the first report by the current Government, stated that 'Western Australia is in the final stages of reviewing legislation that regulates retail trading arrangements. The State is committed to closely examining the benefits and costs of government intervention in relation to these arrangements. Reforms judged to be in the public interest will be implemented'. The annual report further stated that 'The legislation review report of the *Retail Trading Hours Act 1987* is currently being finalised and is expected to be submitted to Cabinet in 2001'. Western Australia's 2002 NCP annual report advised only that the trading hours review report was expected to be submitted to Cabinet before 30 June 2002.

[2] The Act distinguishes between 'general', 'small', and 'special' retail shops according to their size or types of good sold.

Assessment

At 30 June 2002 — the CoAG target date for completing the legislation review and reform program — there were significant remaining restrictions on trading hours in Western Australia. The Government had not announced a response to its trading hours NCP review and had provided no public interest reasoning to support the existing regulatory regime.

The findings of completed reviews and the experience of jurisdictions with unrestricted trading indicate that Western Australia's current arrangements are likely to be imposing significant costs on the community. There is significant discrimination between categories of traders. Consumers are disadvantaged; they are unable to purchase household items at a time they find convenient. In Sydney and Melbourne where Sunday trading by supermarkets is permitted, around 35 per cent of consumers shop for food and groceries on Sunday whereas in Perth and Adelaide, where only smaller food stores can trade on Sundays, the comparative figure is 7–8 per cent (Jebb Holland Dimasi 2000, p. ii).

Predictions by opponents of change that deregulation in Western Australia would lead to a decline in retail activity and employment are not supported by experience elsewhere. Retail sales growth in the Victoria has averaged 5.6 per cent per year from December 1996 when Victoria removed restrictions, more than double the total Australian average of 2.5 per cent per year recorded over the same period (Jebb Holland Dimasi 2000, p. iii). Following the removal of restrictions, Victoria's trend level of employment in the retail sector expanded by 2–4 per cent to May 1998, while Australia wide retail employment fell by 1 per cent (Productivity Commission 1999b, p. 259). Tasmania's second review of its trading hours arrangements predicts that an increase in retail employment of 1.1 per cent will result from the deregulation of shopping hours (Workplace Standards Tasmania 2002, p. viii).

The Council discussed competition restrictions in trading hours arrangements with the Western Australian Government during the 2002 NCP assessment. The Premier stated that the Government appreciates the need for reform of retail trading arrangements and will take active steps to progress this during 2002-03. The Premier advised the Council that the Government will establish a Ministerial Task Force within the next few weeks to conduct a review of the retail trading hours issue in the context of the changing economic and social climate in Western Australia. This review will also take account of experiences in other jurisdictions. The Premier indicated that the review would be very important to effecting change in Western Australia.

Western Australia has had considerable opportunity over a long period to address its obligations relating to trading hours arrangements. Its legislation contains considerable restrictions on competition, for which the Government has offered no supporting public interest argument. Western Australia therefore has not met its CPA clause 5 obligations in relation to shop trading hours. The Council acknowledges that reform of trading hours arrangements presents some difficulty for the Western Australian Government given

commitments it made during the last election that did not recognise obligations under the NCP. These commitments do not excuse Western Australia from its NCP obligations, which the Premier's statements on the need for reform and on the role of the proposed Ministerial Task Force in achieving policy change appear to recognise.

South Australia

South Australia reviewed its *Shop Trading Hours Act 1977* in 1998. This legislation imposed significant restrictions on trading hours in the Adelaide metropolitan area.[3] South Australia's legislation exempts certain shops from the controls on trading hours based on the size and type of shop.

Arising from the review, the South Australian Government announced new trading hours arrangements, which came into effect in June 1999. These arrangements provided some extension to trading hours for nonexempt shops but retained the following restrictions:

- trading by nonexempt shops in the central business district until 9 p.m., Monday–Friday, but only until 7 p.m. in the suburbs (except for Thursday, when trading is allowed until 9 p.m.); and

- trading on Sundays in the central business district between prescribed hours and in the suburbs on six Sundays a year (whereas exempt shops may trade every Sunday if they consider it worthwhile).

South Australia amended its Act again in December 2000 to extend trading hours for shops in the Glenelg tourist precinct. It did not, however, provide a public benefit explanation for the restrictions still in place (for example, it did not release the 1998 review report) or a detailed comparison of the review's recommendations and the Government's decisions.

During the 2002 assessment, the Council met with the South Australian Treasurer to seek advice on how the Government intended to address outstanding NCP questions relating to trading hours. The Treasurer committed South Australia to revisiting the original retail trading hours review report and exploring options for reform, although he provided no details of the Government's likely approach. Subsequently (11 August 2002), the Minister for Industrial Relations issued a news release stating that the Government will introduce legislation into the current session of Parliament to extend shop trading hours (Wright 2002). The media release indicated that the Government proposes to:

- allow five days of Sunday trading before Christmas and five days of Sunday trading after Christmas;

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[3] Trading hours in South Australia's regional areas are determined by local government.

- extend trading by nonexempt shops in suburban areas to 9 p.m. Monday to Friday

- allow electrical stores within suburban areas to trade on Sundays and public holidays as hardware and furniture shops do currently;

- streamline the current law to remove confusion and reform the current complex system of exemptions; and

- protect retailers in enclosed shopping centres from being required to open for more than 54 hours a week and put Sundays outside of the 'core hours' that a landlord can require a tenant to trade.

Assessment

The Council initially raised its concerns about the restrictions in South Australia's legislation in the 1999 NCP assessment, noting that the Government had not provided a public interest explanation for its restrictions. South Australia's subsequent NCP annual reports also do not provide satisfactory public interest analysis. The 2002 annual report for example states only that:

> *The South Australian Government believes that the benefits achieved through the 1998 amendments and the Glenelg Tourist Precinct proposal represent an outcome that provides greater amenity for the public of South Australia and balances the competing stakeholder interests on this issue. It is also a pragmatic, achievable result which reflects the Parliamentary realities which operate in this State at present.* (Government of South Australia 2002, p. 34)

The discrimination among different retailers (including some who sell the same types of products) in South Australia's legislation is a significant competition issue.

- The Act discriminates between exempt shops, which may trade at any time, and nonexempt shops whose opening hours are prescribed. The criteria for exemption appear arbitrary: for example, an exempt shop must have a floor space of less than 200 square metres; an exempt supermarket must have floor space of less than 400 square metres; shops selling trailers and caravans are exempt, motor vehicle dealers are nonexempt.

- Within the category of nonexempt shops, further discrimination occurs based on location. Nonexempt shops located in the central business district or the Glenelg tourist area may trade on Sunday, those located elsewhere in the metropolitan area are prohibited from opening on Sunday except on the prescribed Sunday trading days.

- Finally, all specialist retailers of hardware and building supplies, furniture, floor coverings and motor vehicle parts and accessories may

open on Sunday. Suburban department stores (that also sell some of these products along with other merchandise) are unable to trade, however.

In addition to inhibiting competition, these arrangements impose costs on retailers and consumers. To trade on Sundays, for example, some suburban retailers of electrical goods and computers have incurred additional legal and accounting costs to split their business into several smaller entities, each with a trading space of 200 square metres or less. The law encourages retailers wishing to trade on Sundays to locate in the central business district and Glenelg, placing upward pressure on the cost of purchasing or renting premises. Consumers are unable to shop at convenient times, and those living in suburban areas must travel to the city or Glenelg if they wish to shop on Sundays. Further, there are likely to be costs to the community in forgone employment opportunities. Large retailers have stated, for example, that they would require over 2000 new employees in South Australia if restrictions were removed (Oakley and Wheatley 2002). The statement by South Australian retailers is consistent with the evidence in Tasmania's report of its review of trading hours arrangements (see below), which found that removing restrictions on trading hours would lead to an increase in retail sector employment in all regions of the State.

It is difficult to see how the reforms announced on 11 August 2002 address the problems identified above. The extension of week night trading does not cater for consumers who find it convenient to shop after 9 p.m., and although the number of Sunday trading days will be increased, Sunday trading for suburban nonexempt shops is still prohibited on 42 Sundays of the year. The proposed reforms appear to do little to rectify the discrimination against large suburban department stores and supermarkets that are prevented from opening on Sundays while businesses selling similar merchandise in the central business district or Glenelg may open. While electrical goods retailers can now open on Sundays (along with specialist hardware, furniture, floor covering and motor vehicle parts retailers), suburban department stores which sell similar merchandise are still unable to trade. The proposed reforms also continue the discriminatory treatment of suburban shopping centres, particularly those with department stores (which are unable to open) as 'anchor' tenants.

The reforms announced by South Australia on 11 August 2002 appear to recognise the confusion caused by the State's current complex system of exemptions. In this regard, the Government appears to be proposing future activity to reform the current legislation. At the time of completion of this assessment report, however, the Council had no details (apart from the news release) of the further action being considered by the Government in relation to reforming exemptions and streamlining the current law. Given this, and that significant restrictions on competition still remain, the Council is unable to conclude that South Australia has complied with its CPA clause 5 obligations in this area. The August 2002 reform package indicates that South Australia intends to further develop its reform program. The Council will complete its 2002 NCP assessment when more details are available.

Tasmania

Tasmania's *Shop Trading Hours Act 1984* prohibited major retailers (those employing more than 250 people) from trading on Sundays, public holidays and week days after 6 p.m, other than Thursday and Friday. Tasmania has completed two NCP reviews of its legislation. The first review consulted extensively and commissioned market research, releasing its report in May 2000 (Workplace Standards Tasmania 2000). The review found that restrictions impose a major constraint on consumer choice and anticipated that their removal would result in additional employment, increased real wages or a combination of these outcomes as the retail sector expands. The report concluded that restrictions on trading hours are not in the public interest and recommended that they be removed.

The Tasmanian Government subsequently asked the review panel to further investigate public interest issues associated with the trading hours restrictions including how the removal of restrictions would affect the independent grocery sector and rural and regional Tasmania. The review panel consulted further with key stakeholders and commissioned additional market research on household shopping patterns. The report of the supplementary review (Workplace Standards Tasmania 2002) confirmed the original review finding that the removal of restrictions on shop trading hours would lead to an increase in retail sector employment in all regions of Tasmania. The report also found that the removal of restrictions would not affect the viability of the vast majority of independent grocery stores in either rural or urban areas.

The original review proposed a 12–18 month adjustment period between when new legislation is introduced into Parliament and when it comes into effect, to help independent supermarkets and convenience stores adjust to the extended trading arrangements and the introduction of the goods and services tax (GST). The supplementary review recommended no delay because the GST had since been introduced and because the impact of deregulation on the independent stores was estimated to be less than initially anticipated.

Following the reviews, Tasmania passed legislation to remove restrictions and allow unrestricted trading except for Good Friday, Christmas Day and before noon on Anzac Day. The legislation allows local governments to conduct a vote, at any time, on retaining restrictions within their area.[4] The changes to Tasmania's legislation will operate from 1 December 2002, to allow any local referendums on shopping hours to be conducted in conjunction with the 2002 local government elections.

[4] The right of shops to open on week nights cannot be removed by local vote. Other restrictions may be introduced if approved at a referendum in which votes are received from more than 50 per cent of eligible voters.

Assessment

Tasmania has implemented review recommendations and has a firm reform schedule in place. The Council assesses Tasmania as having met its CPA clause 5 review and reform obligations in relation to the regulation of shop trading arrangements.

Table 10.1: Review and reform of legislation regulating shop trading hours

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Factories, Shops and Industries Act 1962* (part 4 covers trading hours)	No restrictions on Monday-to-Saturday trading hours. Restrictions exist on Sunday trading and public holiday trading but exemptions are readily granted.	Review of part 4 was completed. New South Wales has advised that a comprehensive public benefit test is in place for the assessment of any remaining restrictions.	Widespread granting of exemptions has reduced the impact of restrictions.	Meets CPA obligations (June 2002).
Victoria	*Shop Trading Act 1987* and the *Capital City (Shop Trading) Act 1992*	Restrictions on Saturday and Sunday trading hours depending on shop type and location.	Review was completed in 1996.	*Shop Trading Reform Act 1996* removed restrictions except for Christmas Day, Good Friday and ANZAC Day.	Meets CPA obligations (June 1999).
Queensland	*Trading (Allowable Hours) Act 1990* and Regulations	Restrictions on Monday-to-Saturday trading hours for nonexempt shops (shops not predominantly selling nominated products). Sunday trading by nonexempt stores is prohibited outside major cities and tourist areas. Restrictions do not apply to independent retail shops (shops employing fewer than 20 employees and fewer than 60 statewide).	Review was not undertaken. The Queensland Industrial Relations Commission determines applications for extended trading hours.	Decisions of the Queensland Industrial Relations Commission to liberalise trading hours resulted in the removal of some restrictions. In February 2002, the Government introduced amendments to the Act providing uniform Sunday trading hours for nonexempt stores in south-east Queensland to take effect in August 2002.	Council to finalise assessment in 2003.

(*continued*)

Table 10.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Retail Trading Hours Act 1987* and Regulations	Restrictions on Monday-to-Saturday trading. Sunday trading is prohibited outside tourism precincts, where it is restricted. No restrictions above the 26th parallel.	Review was completed in 1999. Shop trading hours regulation considered by Cabinet in July 2002. The Government is to establish a Ministerial Task Force 'within the next few weeks' to conduct a review of retail trading hours.	No reform to date.	Does not comply with CPA obligations.
South Australia	*Shop Trading Hours Act 1977*	Significant restrictions exist in, including: controls on the hours during which shops may open; variation in allowed opening hours based on the day of the week; and variation in permitted opening hours depending on shop location, shop size and products sold. Monday-to-Saturday trading hours are restricted. Most Sunday trading is prohibited in the Adelaide metropolitan area except within the central business district, where hours are restricted.	Review was completed in 1998. Review report is not publicly available.	Limited changes took effect from June 1999. Key restrictions were retained. Extended trading hours were introduced in the Glenelg Tourist Precinct in December 2000. In August 2002, the Government announced that further changes would be introduced in the current Parliamentary session. The proposed changes retain the key restrictions with some modifications.	Does not comply with CPA obligations.

(*continued*)

Table 10.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Shop Trading Hours Act 1984*	Major retailers (shops employing more than 250 people) are prohibited from trading during prescribed periods (Sundays, public holidays and weekdays after 6 p.m. other than Thursday and Friday).	Reviews were completed in 2000 and 2002, both recommending removal of restrictions.	Amendments to remove restrictions have been passed and the removal of restrictions will take effect from 1 December 2002.	Meets CPA obligations (June 2002).
ACT	No specific shop trading hours legislation	After a period of liberal trading arrangements, restrictions were re-introduced for larger shopping centres in 1996.		*Trading Hours Act 1962* was repealed in 1997 due to lack of community support for trading hours restrictions.	Meets CPA obligations (June 1999).
Northern Territory	No specific shop trading hours legislation	No restrictions on Monday-to-Sunday trading hours.	Not required.	Not required.	Meets CPA obligations.

Table 10.2: Review and reform of trading-related legislation

Jurisdiction	*Legislation*	*Restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Funeral Services Industry (Days of Operation) Act 1990*	Regulates the days of operation of businesses providing funeral, burial or cremation services.		Act was repealed.	Meets CPA obligations (June 2001).
Queensland	*Hawkers Act 1994* and Hawkers Regulation 1994	Prevents hawkers operating between 6 p.m. and 7 a.m.	A reduced NCP review was completed.	Act is to be repealed.	Meets CPA obligations (June 2002).
Tasmania	*Sunday Observance Act 1968*	Restricts a number of business activities on Sunday.		Act was repealed.	Meets CPA obligations (June 2001).
	Bank Holidays Act 1919	Restricts bank trading days.		Act was reformed consistent with NCP principles.	Meets CPA obligations (June 2001).
	Door to Door Trading Act 1986	Restricts the hours in which door to door sellers can operate.	A minor review of this Act was completed and the restrictive provisions were justified as being in the public interest.		Meets CPA obligations (June 2002).
ACT	*Door to Door Trading Act 1991.*	Restricts the hours in which door-to-door sellers can operate.	Intradepartmental review was completed in 2001. The review concluded that that the restrictions provide a net public benefit.	Act was retained without reform.	Meets CPA obligations (June 2002).
Northern Territory	*Hawkers Act*	Restricts selling by hawkers on land that is reserved or dedicated as a public road.	Review was completed in August 2000.	Bill to repeal was passed in November 2000. Act is to be brought into effect before June 2002.	Meets CPA obligations (June 2001).

Liquor licensing

Governments have historically sought to minimise harm from the consumption of alcohol. Their efforts have included prohibiting consumption by certain members of the community (such as minors), establishing requirements for the responsible sale and serving of alcohol and restricting the number and type of licensed premises and their trading hours.

Licensing laws that prescribe accepted community standards relating to alcohol consumption — such as a minimum age for legal consumption, requirements that liquor retailers be suitable persons with adequate knowledge of the relevant Act, and measures to prevent the sale of alcohol to intoxicated persons — do not raise NCP compliance issues. When assessing governments' compliance with NCP objectives, the Council has not considered regulations imposing requirements in these areas.

On the other hand, licensing laws that do not allow responsible sellers to enter the industry, that discriminate between responsible sellers of similar products/services and that impose arbitrary restrictions on sellers' behaviour do little to achieve harm minimisation objectives. The evidence shows, for example, no clear relationship between the number of outlets selling liquor and the level of consumption.[5] Australia's more recent experience suggests that misuse of alcohol is often better addressed via better drinking environments and more direct targeting of problems such as drink-driving and under-age drinking.

Legislative restrictions on competition

Legislation governing the sale of liquor involves three broad categories of restrictions. First, some restrictions limit entry by potential sellers; a public needs or proof-of-needs test, for example, restricts competition because it requires licence applicants to demonstrate that there is a public need for an additional liquor outlet in a particular area. The test operates to protect existing outlets from new entrants, who must show that existing outlets do not already adequately serve the area. Legislation in New South Wales, Western Australia, South Australia and the Northern Territory contains a needs test that potentially excludes new entrants on the basis of their potential competitive threat to incumbents. There is also direct prohibition of

[5] Australia, Canada and New Zealand are among many developed countries to have experienced a general downward trend in average consumption since the late 1970s. This trend occurred at a time of considerable deregulation of the alcohol industry, generally greater availability of alcoholic beverages and increased numbers of liquor outlets (Roche 1999, p. 39).

particular types of seller. Tasmania, for example, prohibits supermarkets from holding a liquor licence.

A second category of restrictions discriminates between different sellers of packaged (take-away) liquor. In Queensland, only the holders of a general (hotel) licence can sell packaged liquor to the public. In Tasmania, the '9 litre rule' prevents nonhotel sellers of packaged liquor from selling less than 9 litres of liquor in any one sale whereas hotels and hotel bottle shops may sell liquor in any quantity. Victoria's '8 per cent rule' prevented a licensee from holding more than 8 per cent of the total number of packaged liquor licences and may have restricted the activities of the major supermarket chains. In Western Australia, liquor stores cannot open on Sundays, although hotels are able to sell packaged liquor.

A third category of restriction regulates the market conduct of licence holders. In Queensland, hotels are limited to a maximum of three bottle shops, which must be detached from the hotel premises. Each bottle shop must have no more than 150 square metres of display space, and drive-in facilities are prohibited. In South Australia, a condition of a packaged liquor licence is that the licensed premises must be devoted entirely to the sale of liquor and must be physically separate from premises used for other commercial premises. South Australia's review noted the anomaly that liquor could be purchased from a bottle shop which is immediately adjacent to, but separate from a supermarket, but not from a bottle shop within the same four walls as the supermarket (Anderson 1996, p. 19).

Australia has in excess of 8000 hotels, clubs, taverns and bars and almost 4000 packaged liquor outlets. Annual household expenditure on liquor is in excess of $7 billion (ABS 2000b). Legislation that prevents entry, discriminates against some types of competitors and restricts competitive behaviour can have a significant economic impact in an industry of this size.

Review and reform activity

Victoria, Queensland and South Australia have reviewed their legislation and implemented some reform, although the latter two States still have measures that raise compliance questions. Western Australia has reviewed its licensing legislation and proposes to conduct a further review during 2002-03. South Australia has proposed a further review of its remaining restrictions, with the objective of implementing any recommended reforms by June 2003. New South Wales, Tasmania, the ACT and the Northern Territory are currently undertaking reviews of their liquor licensing legislation. Table 10.3 summarises governments' progress at 30 June 2002 in reviewing and reforming liquor licensing legislation.

New South Wales

The *Liquor Act 1982* contains a needs test which allows people who would be affected by a licence application to object on the grounds that existing facilities meet the needs of the public. The discussion paper issued by the New South Wales review states that it is questionable whether the test succeeds in protecting community interests and achieving the harm minimisation objectives of the legislation. The discussion paper states that 'there are very few examples of persons, other than direct competitors, using these provisions in an attempt to prevent or minimise alcohol-related harm' and that 'the delay to applications associated with needs based objections generally imposes significant legal costs on applicants and objectors' (Department of Gaming and Racing, New South Wales 2002). The discussion paper is to form the basis for submissions and targeted public consultation, before a final report is prepared for consideration by the Government.

Assessment

While New South Wales has not completed its review and implemented appropriate reform by the CoAG deadline of 30 June 2002, the date for completion of the liquor licensing review is imminent. Moreover, the discussion paper prepared for the review clearly recognises that there is a significant question about the contribution of the current needs test to delivering the harm minimisation objectives in the legislation. The discussion paper concludes for example that most benefits of the current needs test arrangements flow to existing operators of liquor businesses, because restriction on the number of licensed premises in a given local area helps to protect the market share held by existing licensees. Other evidence provided to the Council supports this acknowledgment by the discussion paper. One party for example told the Council that in a rural town of more than 3000 inhabitants, the needs test has entrenched a single licensed outlet charging such high prices that many consumers travel to neighbouring towns to purchase packaged liquor.

The needs test is crucial to an investigation by the Australian Competition and Consumer Commission (ACCC) into alleged anticompetitive agreements between new and established operators of retail liquor licences to share sections of the New South Wales marketplace. The ACCC investigation followed complaints that, in some situations, applicants for liquor licences, when faced with significant financial losses from delays while a competitor's objections are waiting to be heard by the Licensing Court, may have agreed to certain restrictions (proposed by that competitor) on their future trading activities. In some cases, aspects of these restrictions may have subsequently been applied as conditions on the applicant's liquor licence by the Court. The investigation alleges that the competitor agreed to withdraw the objection in return for the applicant's agreement to restrict their future trading activities. The ACCC also expressed concern that consumers may have been forced to pay higher prices for packaged liquor in many local areas, including rural and

regional areas, as a result of these alleged agreements and had lesser choice and convenience due to fewer competing liquor outlets.

The Council discussed New South Wales' progress with the Government during the 2002 NCP assessment and is satisfied that New South Wales is on target to complete its review and reform activity by June 2003, the date of the next NCP assessment.

Victoria

Victoria reviewed its liquor licensing arrangements in 1998 and implemented a series of pro-competitive reforms in 1998 and 1999. These reforms included simplifying licensing arrangements and abolishing the public needs criterion. Contrary to the recommendation of the review, however, the then Victorian Government retained the '8 per cent rule' that prevents a licensee from holding more than 8 per cent of the total number of packaged liquor licences.

The public interest evidence provided by Victoria as part of the 1999 NCP assessment gave little support to the argument that the '8 per cent rule' provides a net community benefit, in either managing under-age drinking or shielding current holders of packaged liquor licences from greater competition. The Council concluded that Victoria, to comply with its NCP obligations, would need to remove the 8 per cent limit from its licensing Act.

Following the 1999 NCP assessment, the new Victorian Government established another review, focusing on only the '8 per cent rule' particularly the effectiveness of the rule in promoting the viability of smaller, independent liquor stores. This review released its report in September 2000.

The review concluded that the 8 per cent rule is not an effective way in which to promote the viability of small liquor retailers (Office of Regulation Reform Victoria 2000). It noted that any protection available to independent sellers could be lost at any time if one of the supermarket chains restricted by the rule transfers a licence to a previously unlicensed supermarket, or if chains that are unaffected by the cap expand their liquor retailing. Further, the review found that if the current growth in the number of packaged liquor licences continues, then one of the two major supermarket chains would be able to license all its supermarkets within five years without breaching the rule.

The review noted that removing the 8 per cent limit may 'increase the risk of aggressive price competition between the major chains and could conceivably lead to market domination by several players' (Office of Regulation Reform Victoria 2000, pp. xi – xii). The review recommended not removing the 8 per cent rule until a mechanism is in place to ensure diversity in the marketplace. It provided examples of potential mechanisms, including a cap phase-out linked to an industry adjustment program aimed at improving the competitiveness of small liquor stores.

The Government responded to the review recommendations in January 2001, stating that it would gradually phase out the cap from the end of 2003 or earlier if the industry agreed. On 18 June 2002, the Parliament passed legislation raising the cap to 10 per cent following industry participants' agreement on a package of industry adjustment measures. The cap will increase to 11 per cent from 1 July 2003 and 12 per cent from 1 July 2004. The cap will be removed from the start of 2006.

The industry adjustment measures include the establishment of a $3 million Packaged Liquor Industry Development Trust Fund, to improve the competitiveness of independent liquor stores, and special arrangements (including specified minimum payments) governing the purchase of independent liquor stores by the major chains during the phase-out period.

Assessment

Victoria has commenced the phase out of legislation capping the number of licenses that can be held by an entity. There are benefits to the community (in the form of reduced transitional costs to independent retailers) in phasing reform beyond 30 June 2002. The phased approach is consistent with the CoAG decision that a transitional approach extending beyond 30 June 2002 complies with CPA principles where a public interest case supports the transition.

Queensland

Queensland regulates the liquor retail industry via the *Liquor Act 1992*. The Act has the key objectives of facilitating the development of the liquor industry, given the welfare, needs and interests of the community and the economic implications of change, and regulating the industry so as to minimise harm from alcohol misuse. Queensland reviewed the Act in 1999 (Department of Tourism, Sport and Racing 1999). At the time of the review, the legislation contained several significant restrictions on competition, being:

- a public needs test, whereby the licensing authority explicitly considered the competitive impact on existing sellers when ruling on applications for new licences (s. 116); and

- a requirement that sellers of packaged liquor to the general public hold a general (hotel) licence, with the hotel licence limited to a maximum of three bottle shops which had to be located within a 5 kilometre radius of the main licence, which could not be drive-in facilities and which could not have more than 100 square metres of display area.

Queensland's review recommended that s. 116 be retained — given that removing the requirement for the licensing authority to assess the potential competitive impact of new entrants might lead to a decline in responsible service as liquor sellers sought to maintain profitability. The review made

this recommendation despite its own research citing studies showing that there is no significant association between outlet numbers and the level of consumption and that the pattern of consumption is a more important determinant of alcohol misuse. Consultants to the review also provided little support for s. 116; they recommended removing anticompetitive criteria used to assess applications and giving the licensing authority greater powers to police compliance with the Act.

Queensland's review also recommended retaining the requirement for sellers of packaged liquor to hold a general licence, meaning that they must provide bar facilities at their main premises. It proposed some relaxation of the location and size constraints relating to bottle shops and of the limits on the quantity of liquor that members may purchase from licensed clubs.

Following the review, the Queensland Government amended the Liquor Act via the *Liquor Amendment Act 2001*. The amendments:

- replace the public needs test with a public interest test that focuses on the social, health and community impacts of a licence application rather than the competitive impact on existing licensees;

- relax slightly the size and location constraints applying to packaged liquor outlets: the bottle shop location radius from the main premises was extended from 5 kilometres to 10 kilometres and the maximum permitted floor area for bottle shops was extended from 100 square metres to 150 square metres in line with review recommendations;

- remove quantity limits on club sales of packaged liquor to members and permit diners at licensed restaurants to purchase a single bottle of wine for consumption off the restaurant premises; and

- retain the requirement that sellers of packaged liquor hold a hotel licence (including the limit on a licence holder to a maximum of three packaged liquor outlets) and must provide bar facilities at the site of the hotel licence.

Assessment

Queensland's decision to require its licensing authority to assess the public interest associated with a new licence, rather than the effect of the new entrant on the viability of existing outlets, is consistent with CPA principles. Consistency arises because the assessment of the public interest focuses on demographic information and data on associated social, health, community and regional development impacts, rather than protecting the viability of incumbents. The Council notes the Minister's statement that:

> *The test as to whether a licence or extended trading hours will be granted will not be based on whether the public needs another licence in the locality. Rather, the chief executive will concentrate more on the impact of an additional facility or the impact on the community of a*

> *change in trading hours. In particular, the impact on vulnerable subgroups within the community will receive greater focus.* (Rose 2001)

Queensland's rationale for retaining the hotel licence requirement for packaged liquor sales and the associated restrictions has two elements.

- The potential harms from alcohol misuse support the concept of a 'specialist provider' model limited to general licence holders; and
- Any loss of revenue from packaged liquor sales by country hotels would have adverse effects on their viability and would adversely affect the important social role that the hotels play in rural areas.

Queensland contends that its approach to liquor licensing achieves its objectives without constraining competition. Queensland cited data showing that beer prices in the State are competitive with those in other States and Territories, claiming that Queensland has a diversity of bar facilities, that the number of bottle shops has increased in recent years commensurate with population growth, and that the changes allowing liquor sales by licensed clubs and restaurants have introduced additional competition to the hotel and bottle shop sector. Queensland also considers that the current regulatory structure prevents any participants from gaining significant market power, while ensuring participants are substantial players with sufficient buying power to keep prices competitive.

The Council considers that significant anticompetitive effects arise from Queensland's decisions to retain the requirement that only hotel licence holders can operate bottle shops and the associated restrictions (particularly the regulation of bottle shop location and numbers and the requirement to establish a bar facility at the site of the hotel). The hotel licence requirement prevents entry by nonhotel packaged liquor sellers such as specialist packaged liquor bottle barns and retailers who may wish to sell packaged liquor in conjunction with sales of pre-prepared food for home consumption. Sellers must operate a hotel if they wish to operate a take-away liquor outlet. This restriction has the effect of increasing the demand for hotels relative to the supply, and appears to be creating a market in hotels/licences similar to that which has developed for taxi plates.

The decision to allow sales by licensed clubs and restaurants appears to be a marginal change at best. The wide range of alcohol sold in bottle shops in other States and Territories suggests movements in beer prices alone may not be a sufficient indicator of the competitiveness of the whole market. Data published by the Australian Bureau of Statistics show for example that in March 2002, the price of wine in Brisbane was 7 per cent higher than in Melbourne (ABS 2002). In assessing competitiveness, factors other than price levels are also relevant. Victoria's review found for example that the partial deregulation of its 1987 Act was likely to have resulted in extra nonprice competition directed toward the services associated with liquor rather than liquor itself (State Government of Victoria 1998, p. 35).

The experience of other jurisdictions and evidence from other NCP reviews casts considerable doubt on whether Queensland's licensing arrangements meet the CPA tests. No other Australian jurisdiction requires sellers of packaged liquor to hold a hotel licence. Other jurisdictions seek to ensure the responsible selling of alcohol by specifying the qualifications required of licensees (for example, prescribed standards for character, training and knowledge of obligations in relevant legislation) and the conditions relating to the responsible service of alcohol. There is little evidence that misuse of alcohol is a more significant problem in other States and Territories than in Queensland. Moreover, the evidence from NCP reviews does not support the proposition that nonhotel sellers of packaged liquor are any less responsible than hotel sellers. (Evidence from the Victoria Police to Victoria's review of its liquor licensing legislation acknowledged that nonhotel retailers of packaged liquor are responsible sellers.) Queensland's public interest evidence does not consider the extent to which nonhotel licence holders are responsible sellers of packaged liquor. Further, imposing a State wide requirement that sellers of packaged liquor hold a general licence appears unnecessarily restrictive if the objective is to support rural communities by safeguarding the profitability of rural hotels. While accepting at face value Queensland's contentions that rural hotels make a significant contribution to their local communities and that licensing restrictions are necessary to protect those hotels, the Council considers that this argument does not warrant the same restrictions in urban areas. Indeed, Queensland's recent reform of its retail trading arrangements, which focused on the more populous south-east region, adopted in effect a differentiated approach to reform.

Queensland's review indicates that in 1995-96, the last year for which reliable data are available,[6] Queensland hotels recorded liquor sales (bar and take-away) of approximately $1 billion. It also cites data showing that packaged liquor retailers (as distinct from hotels) account for 46 per cent of liquor sales in New South Wales. This suggests that Queensland's hotel licence requirement each year directs around $500 million of packaged liquor sales to Queensland hotels which may otherwise have gone to nonhotel outlets. While removal of the hotel licence requirement could not be expected to result in nonhotel retailers immediately achieving this share of Queensland's packaged liquor market (in New South Wales, the non-hotel share of liquor sales has gradually increased since deregulation of the packaged liquor market in 1966), the restriction of competition in packaged liquor sales appears to be significant.

The Council does not consider that Queensland's liquor licensing arrangements meet the CPA clause 5 guiding principle. The Council raised its concerns about liquor licensing with the Queensland Government during the 2002 assessment. In response, the Government undertook to revisit this area of regulation, but reiterated its concern that a change in arrangements might

[6] Following legal decisions in 1997 which placed in question the States' right to collect licence fees on liquor and tobacco, States no longer require licensees to provide data on their liquor purchases.

adversely affect the viability of rural hotels and consequently rural communities.

Western Australia

Western Australia's *Liquor Licensing Act 1988* contains two significant competition restrictions.

- A needs test requires licence applicants to satisfy the licensing authority that the licence is 'necessary' to provide for the requirements of the public, having regard to the number and condition of licensed premises existing in the affected area, their distribution, and the extent and quality of the services they offer. Objection to the granting of a licence may be made on the grounds that it is unnecessary to provide for the requirements of the public.

- There is discrimination between hotels and liquor stores: liquor stores are prohibited from trading on Sundays, whereas hotels may open from 10 a.m. to 10 p.m. on Sundays.

Western Australia's review reported in March 2001. The review made the following recommendations in relation to the above restrictions.

- The granting of a licence should depend on the licensing authority being satisfied that the licence is in the public interest. The review stated that the licensing authority, in determining the public interest, may consider (but not be limited to) the likely effect on competition in the retail market or in a particular area where this may be relevant to a matter such as propensity for harm, but should not consider the impact of competition on individual competitors.

- Both hotels and liquor stores should be permitted to trade on Sundays between 10 a.m. and 10 p.m.; that is Sunday trading hours for hotels and liquor stores should be the same.

The Western Australian Government released the review report as a draft for public comment. The Premier has subsequently advised the Council that the Government appreciates the need for reform and will take active steps to progress this during 2002-03. The Premier indicated that the Government would conduct a further review of liquor licensing arrangements during 2002-03.

Assessment

Western Australia's restrictions on liquor licensing constitute a significant competition issue given the size of the market. Annual household expenditure on liquor in Western Australia in excess of $800 million, based on ABS household expenditure data (ABS 2000b).

The recommendations from Western Australia's NCP review provide a useful path to reform. They would ensure a focus on harm minimisation while also enabling consumers to benefit from competition. The measures recommended by the review are in place in several other jurisdictions. The measures would help address the current regulatory discrimination between different types of on-premises and packaged liquor outlets in Western Australia's legislation. The Council considers that licensing tests that focus on public interest factors such as harm minimisation and community amenity (without references to outlet density or competitive effects on incumbents) and are nondiscriminatory in application are unlikely to offend NCP principles.

As discussed above, one of the significant competition questions relating to liquor licensing in Western Australia is the discriminatory treatment of different sellers of take away liquor; in particular, nonhotel liquor stores are prohibited from trading on Sundays whereas hotel bottleshops are not. The questions concerning the prohibition on Sunday trading by liquor stores appear to have some similarities to those relating to the prohibition on retail trading more generally on Sundays, and might usefully be considered by the Ministerial Task Force that Western Australia is to establish to consider retail trading issues.

The Government appears to recognise the need for reform of liquor licensing arrangements and has committed to a further review during 2002-03. In the Council's view, there may also be an opportunity for liquor trading hours matters to be considered by the retail trading Ministerial Task Force. Nonetheless, Western Australia's licensing legislation at the time of this assessment contains significant competition restrictions. Given the findings and recommendations of the State's NCP review report released for public comment, these restrictions do not appear to be in the public interest. Consequently, Western Australia has not met its CPA clause 5 obligations in relation to liquor licensing.

South Australia

South Australia completed its NCP review of liquor licensing in 1996 and removed a number of restrictions in 1997. It retained, however, the proof-of-need test and the requirement that packaged liquor is sold only from premises exclusively devoted to the sale of liquor. The review had recommended retaining these provisions, then a further review after three or four years when evidence of outcomes in less regulated jurisdictions would be available.

Assessment

The Council initially raised the proof-of-need test with the former South Australian Government in the 1999 NCP assessment. It noted that the main effect of the test is to restrict new entry, thus protecting incumbents, rather than to directly address harm minimisation. In almost any other market,

legislation would not facilitate an objection to the establishment of a new business on the basis that need is already satisfied. In line with the review recommendation for a further examination of liquor licensing arrangements in three to four years, the then South Australian Government undertook to reconsider the case for the needs criterion in late 2000 or early 2001. The Council considered that this undertaking satisfied 1999 NCP obligations but the review has not been conducted.

At 30 June 2002, South Australia's liquor licensing legislation contained restrictions on competition that are not supported by robust public interest evidence. The State therefore has not complied with CPA obligations in relation to liquor licensing.

The Council raised this matter with the new South Australian Government, elected in February 2002, in the course of the 2002 NCP assessment. The Government subsequently wrote to the Council to confirm that it intends to review the State's liquor licensing legislation, with the objective of completing the review and appropriate reform activity by June 2003. A team drawn from the Attorney General's Department is to conduct the review against terms of reference that reflect CPA clause 5.

The Council considers that South Australia's commitment to complete the further review and appropriate reform activity by the 2003 NCP assessment is sufficient for the 2002 NCP assessment. The Council will finalise the assessment of South Australia's compliance with the CPA clause 5 in relation to liquor licensing in the 2003 NCP assessment.

Tasmania

Tasmania's legislation contains two significant restrictions on competition:

- the '9 litre rule' that prevents nonhotel sellers of packaged liquor from selling liquor in quantities less than 9 litres in any one sale (except for Tasmanian wine, which may be sold in any quantity); and

- a prohibition on sales of alcohol by supermarkets.

Tasmania's review is under way but had not reported by the CoAG deadline of 30 June 2002. The review group has released an issues paper which identifies the 9 litre rule and the prohibition on supermarket sales of packaged liquor as significant competition restrictions.

Assessment

The '9 litre rule' discriminates between different categories of seller: the effect is to discourage entry by nonhotel liquor outlets. The rule does not appear to have any relationship to the objective of reducing alcohol-related harm. The requirement that customers of nonhotel bottle shops buy at least 9 litres of liquor at each purchase arguably increases the probability of harm.

Tasmania's prohibition on sales of alcohol by supermarkets is likely to significantly reduce competition. Supermarkets are significant participants in the packaged liquor sector in all other jurisdictions.[7]

Restrictions on entry into the Tasmanian packaged liquor market constitute a significant competition issue. In 1998-99, annual household expenditure on packaged liquor in Tasmania is approximately $95 million, based on ABS household expenditure data (ABS 2000b).

The Council raised liquor licensing with the Tasmanian Government during the 2002 NCP assessment. The Government assured the Council that it is committed to resolving the competition questions associated with the State's liquor licensing legislation, consistent with the public interest, as soon as possible. In line with this assurance, the Government has stated that it will consider the recommendations of the final report as a priority, and is likely to introduce amending legislation in autumn 2003 session of Parliament. Given the assurances provided by Tasmania, the Council will finalise the assessment of Tasmania's compliance in 2003.

The ACT

The ACT completed a review of the *Liquor Act 1975* in 2001. The review found that the restrictions in the Act provide a public benefit by protecting consumers from harm caused by the misuse of alcohol. Minor amendments arising from the review were included in the *Legislation Amendment Act 2001*. The Council has previously noted the absence of significant competition restrictions in the ACT legislation and assesses the ACT as having met its CPA clause 5 obligations in this area.

The Northern Territory

The Northern Territory's *Liquor Act* and *Liquor Regulations* contain two significant restrictions.

- The Northern Territory imposes a public needs test that requires the licensing authority, when determining applications for a new licence, to consider whether existing sellers could meet consumer needs.

- The Northern Territory discriminates between hotels and liquor stores: liquor stores are prohibited from trading on Sundays, whereas hotels may open from 10 a.m. to 10 p.m. on Sundays.

[7] In Queensland, supermarkets participate by obtaining hotel licences and operating hotels and associated bottle shops. Jurisdictions generally require supermarkets to separate their liquor sales area from the rest of their business premises and in South Australia, the licensed premises must be in a separate building.

The NCP review of the *Liquor Act* is nearing completion. A draft final review report is being finalised and the Government is expected to consider the report shortly. An issue of particular significance is the restriction of liquor sales in locations where alcohol has created stresses in the community. A licensing test that focuses on public interest factors such as harm minimisation and community amenity (without references to outlet density or competitive effects on incumbents) and is non-discriminatory in application, would be consistent with NCP principles.

Assessment

Given that the Northern Territory has not completed its review, it has yet to comply with its NCP review and reform obligations relating to liquor licensing. The review and reform process is likely to be completed soon, however, so the Council will finalise the assessment of compliance in 2003.

Table 10.3: Review and reform of legislation regulating liquor licensing

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Registered Clubs Act 1976* *Liquor Act 1982*	Public needs test allows licensing authorities to consider the capacity of existing facilities in determining the public need for a new licence.	Review is underway. Draft report is being prepared.		Council to finalise assessment in 2003.
Victoria	*Liquor Control Act 1987* *Liquor Control Reform Act 1998*	Despite implementing significant pro-competitive reforms, Victoria retains the '8 per cent rule', under which no liquor licensee can own more than 8 per cent of general or packaged liquor licences.	Initial review was completed in 1998. A further review of the '8 per cent rule' reported to the Government in June 2000.	Several pro-competition changes in response to the initial review were implemented through the Liquor Control Reform Act. The Government has commenced a gradual phase-out of the 8 per cent cap in conjunction with a package of measures to assist the competitiveness of independent liquor stores. The cap was raised to 10 per cent on 18 June 2002 and will increase to 11 per cent from 1 July 2003 and 12 per cent from 1 July 2004. The cap will be removed from the start of 2006	Meets CPA obligations (June 2001).

(*continued*)

Table 10.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Liquor Act 1992*	Public needs test (whereby licensing authorities can consider the capacity of existing facilities in determining the public need for a new licence). Only hotel licensees may sell packaged liquor to the public; A limit on the number of bottle shops that any one hotel can establish. Restrictions on the size and configuration of bottle shops.	Review was completed in 1999 and endorsed by Cabinet in February 2000. Review recommended retaining key restrictions and removing some other restrictions.	*Liquor Amendment Act 2001* replaces the public needs test with a public interest test which will examine social, health, community and regional development impacts of licensing proposals. Although the licensing authority must still collect data on liquor outlets in the relevant locality, the Government stated that it did not intend to use the new public interest test to restrict competition. The Act also retains the hotel monopoly on the sale of packaged liquor to the public and restrictions on the ownership, location and configuration of bottle shops. The Council does not consider that there is a net public benefit from these restrictions.	Council to finalise assessment in 2003.

(*continued*)

Table 10.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Liquor Licensing Act 1988* and Regulations	Public needs test allows licensing authorities to consider the capacity of existing facilities in determining the public need for a new licence. Liquor stores, unlike hotels, are prohibited from trading on Sunday.	Review reported in March 2001 and recommended: • that the granting of a licence depend on the licensing authority being satisfied that the licence is in the public interest which should not involve consideration of the competitive impact of a new licence on existing competitors. • identical Sunday trading hours for hotels and liquor stores. Western Australia released the review report as a draft for public comment. Western Australia to conduct a further review during 2002-03.	No reform to date.	Does not comply with CPA obligations.

(*continued*)

Table 10.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Liquor Licensing Act 1997* (which retained certain restrictions from the earlier *Liquor Licensing Act 1985*)	Review recommendations accepted by Government include: • the proof-of-need test requiring licence applicants to demonstrate that a consumer need exists for the grant of a licence; and • the requirement that only hotels and retail liquor stores devoted to the sale of liquor exclusively may sell liquor.	Review was completed 1996 and changes were implemented in 1997. Government has undertaken to review the proof-of-need test in 2002.		Council to finalise assessment in 2003.
Tasmania	*Liquor and Accommodation Act 1990*	The '9 litre rule' prevents non-hotel sellers of packaged liquor from selling liquor (except for Tasmanian wine) in quantities less than 9 litres in any one sale. Supermarkets cannot hold a liquor licence.	Review commenced in March 2001.		Council to finalise assessment in 2003.
ACT	*Liquor Act 1975* (except ss 41E[2] and 42E[4])	Licensing of sellers.	Review was completed in 2001. The restrictions contained in the Act were found to be in the public interest.	Minor amendments were made to the Act	Meets CPA obligations (June 2002).
Northern Territory	*Liquor Act*	Public needs test allows licensing authorities to consider the capacity of existing facilities in determining the public need for a new licence.	A draft final review report has been prepared. The Government advised that it expected to consider the report before 30 June 2002.		Council to finalise assessment in 2003.

Petrol retailing

Review and reform activity

Western Australia and South Australia have legislation that restricts competition in petrol retailing. Western Australia's Ministry of Fair Trading reviewed legislation in that State and South Australia reviewed its legislation. The ACT has reviewed legislation that allows the Minister to regulate retail fuel prices. The legislation has not been used. Table 10.4 summarises jurisdictions' progress in reviewing and reforming legislation that regulates petrol retailing.

Western Australia

Western Australia's *Petroleum Products Pricing Amendment Act 2000* is intended to limit petrol and diesel retail price fluctuations. The Act provides for:

- retail prices to be fixed for at least 24-hours; and
- a minimum wholesale price to be established for motor fuels.

Western Australia has advised that a final report of the legislation review of the Petroleum Products Pricing Amendment Act and the *Petroleum Legislation Amendment Act 2001* has been completed and endorsed by Cabinet. Western Australia has advised that the review report found that regulation of the petroleum industry is in the public interest because it protects consumers, encourages stability in pricing and provides for transparency in pricing. (The review report is not a public document.)

The Australian Competition and Consumer Commission (ACCC) considered Western Australia's petrol pricing arrangements in its report on fuel price variability (ACCC 2001a). The ACCC found that industry participants (including oil majors, independents, industry organisations, consumer organisations and governments other than the Government of Western Australia) do not support the arrangements in Western Australia. It also found that the State's legislation had no consistent impact on prices. The ACCC has advised the Council that its subsequent monitoring of Perth's fuel prices suggests they are generally higher than those of Sydney and Melbourne. Given that the ACCC's price monitoring indicates that the legislation may be failing to achieve its objective, the Council considers that there is a case for Western Australia to consider the repeal of this legislation. The Council will make a final assessment in 2003.

South Australia

South Australia's *Petrol Products Regulation Act 1995* allows the relevant Minister to withhold new retail petroleum licences if the new licence holder would provide 'unfair and unreasonable competition' to sellers in the area immediately surrounding the proposed new outlet. South Australia completed a review of the Petrol Products Regulation Act in 2001 which the Government is yet to be consider.

The restriction in South Australia's legislation is unusual in that it limits entry on the basis of its impact on the competitive position of incumbents. The *Trade Practices Act 1974* allows for the consideration of possible unfair competition. Because South Australia has not yet removed these restrictions, or provided a public interest argument to support them, it is yet to comply with its CPA clause 5 obligations relating to this Act. The Council will make a final assessment in 2003.

The ACT

The ACT has completed NCP reviews of the *Fair Trading (Fuel Prices) Act 1993* and the *Fair Trading (Petroleum Retail Marketing) Act 1995*. The ACT has retained former Act in accordance with review recommendations. The review found that the Act has no effect unless the Minister regulates prices, but that the costs of exercising this power would be significant. The Act has never been used. The review concluded that the Minister would be unlikely to regulate prices unless the entire market is acting in a collusive or anticompetitive manner and that regulation, in such circumstances, would provide a countervailing community benefit. The review also found that there is no viable or realistic alternative to the restriction. The *Fair Trading (Petroleum Retail Marketing) Act 1995* has been repealed in line with review recommendations.

The ACT's actions are consistent with CPA clause 5 obligations although, given that the *Trade Practices Act 1974* deals with collusive and anticompetitive behaviour, there is a case for the ACT to consider repealing this legislation.

Table 10.4: Review and reform of legislation regulating petrol retailing

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Petroleum Products Pricing Amendment Act 2000*	Allows Government regulation of fuel prices.	Review by Ministry of Fair Trading was completed in 2001. Restrictions were found to be in the public interest. An ACCC inquiry found, however, that the restrictions have no consistent effect on price and are not supported by industry participants, consumer groups and other governments.		Council to finalise assessment in 2003.
	Petroleum Legislation Amendment Bill 2001	As above.	As above.		Council to finalise assessment in 2003.
South Australia	*Petrol Products Regulation Act 1995*	Allows the Minister to withhold new retail petroleum licences if they provide 'unfair and unreasonable competition' to sellers in the area immediately surrounding the proposed new outlet.	Review was completed mid-2001 but report is yet to be considered by the Government.		Council to finalise assessment in 2003.
ACT	*Fair Trading (Fuel Prices) Act 1993*	Allows the Government to impose price controls on fuels in certain circumstances.	Intradepartmental review recommended retention of restrictions on public interest grounds. Review argued that provisions would be exercised only at times of widespread anticompetitive behaviour.	Restrictive provisions were retained.	Meets CPA obligations (June 2001).

(*continued*)

Table 10.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT (continued)	*Fair Trading (Petroleum Retail Marketing) Act 1995*		Review was completed.	Act was repealed.	Meets CPA obligations (June 2001).

11 Fair trading legislation and consumer protection legislation

States and Territories have enacted a range of legislation dealing with fair trading and consumer protection issues. This legislation regulates aspects of business conduct, including advertising, dealings with customers and the provision of information. It falls into three broad categories: general fair trading legislation, which includes governments' fair trading Acts; legislation regulating the provision of consumer credit, including the Consumer Credit Code; and trade measurement legislation, which deals with the measurement of goods for sale. Attempts have been made to achieve national uniformity in each of these areas, but variation across jurisdictions remains.

A subset of legislation aimed at protecting consumers deals with the licensing of occupations and the review and reform of this legislation is discussed in chapter 8.

Legislative restrictions on competition

Fair trading and consumer protection legislation imposes a wide range of restrictions on business conduct. Fair trading Acts, for example, regulate business conduct by prohibiting: misleading or deceptive conduct; the employment of harassment or coercion to win sales; and certain types of sales technique (such as pyramid and referral selling). These Acts and other related legislation also impose miscellaneous restrictions, including price controls, mandatory cooling-off periods, the requirement to disclose products from which goods are made, the requirement to provide warranties, the banning of unsafe goods, and quality standards.

Regulation relating to the provision of consumer credit generally involves licensing requirements and restrictions on the conduct of credit providers. Such restrictions may take the form of documentary and disclosure requirements, provision for change in contractual arrangements, limits on commissions and the types of product that may be offered, and restrictions on advertising and methods of sale.

Legislation dealing with trade measurement imposes restrictions on the method of sale of certain goods. These restrictions include labelling and

licensing requirements, restrictions on the units of measurement in which certain goods may be sold, restrictions on the types of measuring instrument that businesses may use, and requirements relating to the verification, certification and servicing of measuring instruments.

Regulating in the public interest

Fair trading and consumer protection legislation aims to protect consumers by addressing market failure, such as information asymmetries between businesses and consumers, which may lead to some businesses gaining an unfair advantage. The legislation may encourage competition, for example by promoting consumer confidence. It may also impose some costs, however. In particular, legislative restrictions on business activities may, by restricting market entry and competitive conduct, result in increased compliance costs for businesses and have an impact on product innovation and consumer choice.

Regulating to protect consumers' interests requires governments to balance these considerations. In assessing jurisdictions' compliance with the National Competition Policy (NCP), the National Competition Council looks for appropriate regulatory outcomes. In the Council's view, such outcomes require restrictions on business activity to be as closely targeted to market failure as possible, to be proportionate to the market failure's potential detriment, and to be the least restrictive means available of achieving the regulatory objectives.

The Council has used these principles to assess jurisdictions' review and reform activity against obligations under clause 5 of the Competition Principles Agreement (CPA). Where restrictions in legislation generally reflect this framework, the Council has assessed the jurisdiction as meeting its CPA obligations in this area. Where legislation contains restrictions on competition in addition to those consistent with the principles of effective regulation, the Council's assessment accounts for the relevant government's public benefit arguments.

Regarding fair trading Acts, the Council considers that they do not require NCP review where they essentially mirror part V of the *Trade Practices Act 1974* (the TPA). The Council has taken this view because the consumer protection provisions contained in the TPA are pro-competitive. The Council has considered all other restrictions in these Acts against the general principles for appropriate regulation.

Review and reform activity

Fair trading legislation

Commonwealth, State and Territory consumer affairs Ministers agreed in 1983 to adopt nationally uniform consumer protection legislation, with the objective of promoting efficiency and reducing compliance costs. The model chosen for the uniform scheme was the consumer protection provisions (part V) of the TPA, which contains general prohibitions against misleading or deceptive conduct in trade or commerce, as well as more specific prohibited practices. Each jurisdiction adopted these provisions in mirror legislation.

Fair Trading Acts

In the 2001 NCP assessment, the Council assessed Victoria and Tasmania as having met their CPA obligations in regard their fair trading Acts.[1]

New South Wales

The final report on the combined review of the *Fair Trading Act 1987* and *Door to Door Sales Act 1967* has been prepared and soon will be submitted for Government consideration. New South Wales has advised the Council that a number of consumer protection provisions in the existing Fair Trading Act mirror those of the TPA and thus are in the public interest. It anticipates that any legislative amendments resulting from the review will be introduced into Parliament in the second half of 2002. Given that New South Wales is progressing reform in this area, the Council will make a final assessment in 2003.

Queensland

Queensland's review of the *Fair Trading Act 1989* is under way and was expected to be completed by mid-2002. Given that the implementation of any reforms will extend beyond this date, the Council will make its final assessment in 2003.

[1] The Council's assessment of Tasmania covered all provisions except those applying to motor vehicle dealers, which are discussed in chapter 8.

Western Australia

Western Australia is reviewing the *Fair Trading Act 1987* and the *Consumer Affairs Act 1971* as part of the State's consumer justice strategy. The strategy renews emphasis on the investigation of complaints and the imposition of sanctions on those who contravene acceptable standards. The review is not scheduled for completion until December 2002. The review will include an examination of any restrictions on competition to ensure they are in the public interest. The Council will make a final assessment in 2003.

South Australia

South Australia did not include the *Fair Trading Act 1987* on its original legislation review schedule. In response to Council comments in the 2002 NCP assessment, the Government has requested that the relevant agency ensure that any provisions beyond those that duplicate parts of the TPA are reviewed according to CPA principles. This review may not be achieved before 30 June 2002. The Council acknowledges that governments may need time beyond the Council of Australian Governments (CoAG) target to complete reviews of legislation that is added to the program, so it will finalise its assessment of CPA compliance on a case basis in 2003.

The ACT

The ACT completed a departmental review of its *Fair Trading Act 1992* in 2001. The review found that the Act is pro-competition. Minor amendments were made in the *Fair Trading (Amendment) Act 2001*. The Council assesses the ACT as having met its CPA obligations in this area.

The Northern Territory

The Northern Territory conducted a review of the *Consumer Affairs and Fair Trading Act,* which recommended retention of restrictions relating to product safety and product information and door-to-door trading (CIE 2000b). The then Government approved the review's recommendations except in relation to recommended changes to the fair reporting and motor vehicle dealer provisions. (The recommendations relating to motor vehicle dealers are discussed in chapter 8.)

The Act's fair reporting provisions include requiring traders to notify consumers where a reporting agency report has been used, and requiring reporting agencies to disclose information relating to a person when requested by that person. The review determined that these provisions potentially restrict competition through their impact on the costs of reporting agencies. The review found that the benefits of the provisions have not been demonstrated and that the provisions should be repealed. The review, however, recommended that repeal be deferred pending resolution of new national issues relating to residential tenancy data bases Given that the

provisions entitle consumers to both credit and noncredit information held about them, and that this information can be accessed with little cost to business, the then Northern Territory Government argued that the benefits of the provisions outweighed the costs.

The current Government introduced amendments to the Fair Trading Act into Parliament in July 2002 which give effect to the review recommendations. The Government accepted the recommendation to defer repeal of the fair reporting provisions and stated that it would further consider the issue. The Council assesses the Northern Territory as having met its CPA clause 5 obligations in this area.

Other fair trading legislation

In the 2001 NCP assessment, the Council assessed governments as having met their CPA clause 5 obligations in relation to the following legislation:

- New South Wales: *Business Licences Act 1990*;
- Victoria: *Funerals (Pre-Paid Money) Act 1993* and *The Retirement Villages Act 1986*;
- South Australia: *Prices Act 1948*;
- Tasmania: *Flammable Clothing Act 1973, Goods (Trade Descriptions) Act 1971* and *Mock Auctions Act 1973*; and
- The ACT: *Law Reform (Manufacturer's Warranties) Act 1977* and *Law Reform (Misrepresentation) Act 1977.*

The following sections discuss governments' progress in reviewing and reforming miscellaneous fair trading legislation.

New South Wales

New South Wales completed a review of the *Prices Regulation Act 1948* in 1996. The Government approved the review's recommendation that prices regulation powers be transferred to the Independent Pricing and Regulatory Tribunal. The Prices Commission was subsequently abolished and the amendment giving effect to the proposed transfer of powers was enacted in mid-2000.

New South Wales completed a review of the *Retirement Villages Act 1989* in 1998. The Government approved and publicly released the review's final report in late 1998. The review report recommended measures to address industry practices identified as unfair and inequitable. The new *Retirement Villages Act 1999*, which is consistent with the review's recommendations, commenced on 1 July 2000 replacing the earlier Act.

The Council assesses New South Wales as having met its CPA clause 5 obligations for these two Acts.

The final report on the review of the *Funeral Funds Act 1979* was completed in November 2001. The review found that the impact of the legislation on competition was not significant. The proposed new legislation will remove restrictions on funeral directors, however, where these are not justified on public benefit grounds. These restrictions cover:

- minimum and maximum numbers of fund directors and trustees;
- the nomenclature of funeral funds; and
- a cap on management fees and benefits paid.

The final report will soon be publicly released. The Government approved the review's recommendations in February 2002, as well as the preparation of an exposure Bill to facilitate further public consultation. The Council will make a final assessment in 2003.

Queensland

The Government reviewed the *Retirement Villages Act 1988* as part of developing replacement legislation namely, the Retirement Villages Bill 1999. Regulatory alternatives considered by the review comprised deregulation and a mandatory code of practice. The review identified several legislative restrictions on competition but concluded that the benefits of the restrictions outweighed the costs, principally by addressing the information asymmetry that faces retirees, who are a vulnerable class of consumers. Minor amendments were made to the Bill following its introduction to Parliament and these were also assessed for competition impacts. Queensland reviewed its sale of goods legislation in 2001, finding that the Acts did not restrict competition. The Council assesses Queensland as having met its CPA obligations for legislation governing retirement villages and the sale of goods.

A combined review of the *Sale of Goods Act 1896* and the *Sale of Goods (Vienna Convention) Act* 1986 found they did not restrict competition. The Acts have been retained without reform. The Council assesses Queensland as meeting its CPA clause 5 obligations in relation to these Acts

The *Profiteering Prevention Act 1948* introduced powers to control prices in the context of severe shortages of goods and services following World War II. The review of the Act recommended its repeal. Cabinet has approved the preparation of a Bill to repeal the Act and the Government anticipates introducing the Bill in mid-2002. A review of the *Funeral Benefit Business Act 1982* is under way. The Council will make a final assessment in 2003.

Western Australia

A review of the *Retirement Villages Act 1992* was completed in 2002. The review group produced a discussion paper and obtained responses from retirement village residents and associations. In May 2002 the Government endorsed the review's recommendations to amend:

- restrictions on the use of retirement village land by establishing a simpler and more cost-effective process for terminating a village scheme and removing a memorial from the whole or a part of the village land;
- the Code of Fair Practice for Retirement Villages, by incorporating the existing code and Act into a single Act; and
- restrictions on the marketing and price determination rights of residents, by providing residents with the rights to be involved in the marketing of a unit, to receive monthly marketing reports and be involved in price determination.

The Department of Consumer and Employment Protection is preparing the relevant amendments, which means that Western Australia is nearing completion of its review and reform activity for this legislation. The Council will make its final assessment in 2003.

Tasmania

Tasmania completed a review of the *Door to Door Trading Act 1986*. According to the State's 2001 NCP annual report, the review found that restrictions in the Act are justified in the public interest. The Council assesses Tasmania as having met its CPA review and reform obligations for this legislation.

The Northern Territory

The Northern Territory conducted a review of the *Prices Regulation Act*. The Centre for International Economics undertook the review, recommending that the Act's powers to set maximum prices be exercised only in times of natural disaster, that the Act specifies objectives for the regulation and that the Government regulate monopoly behaviour, if necessary, through separate legislation (CIE 2000f). The then Government agreed to the review's recommendations. The current Government was expected to announce its response in mid-2002. The Council will make its final assessment in 2003.

The review of the *Retirement Villages Act* was completed in 2002, finding that the Act's competition restrictions are in the public interest. The Government has endorsed the review's findings. The Council assesses the Northern Territory as having met its CPA obligations for this legislation.

Table 11.1 outlines the progress of jurisdictions' review and reform of their fair trading Acts. Jurisdictions also identified for review a range of miscellaneous fair trading legislation. Table 11.2 outlines jurisdictions' progress with these reviews.

Consumer credit legislation

In 1993 State and Territory governments entered into the Australian Uniform Credit Laws Agreement, which provides for the adoption of a national Consumer Credit Code. The code, which came into effect in November 1996, replaced various State and Territory statutes governing credit, money lending and aspects of hire-purchase.

The code was developed to be applied equally to all forms of consumer lending and to all credit providers in Australia, without restricting product flexibility and consumer choice. It applies rules that regulate credit providers' conduct throughout the life of a loan, generally relying on competitive forces to provide price restraint but providing redress mechanisms for borrowers if credit providers fail to comply with the legislation. Types of credit covered by the code include personal loans, credit cards, overdrafts, housing loans and the hire of goods.

The code is enacted by template legislation, with Queensland being the lead legislator. All jurisdictions except Western Australia and Tasmania have enacted legislation applying the Consumer Credit Code as in force in Queensland. Western Australia has enacted alternative consistent legislation, which will require amendment by the Western Australian Parliament to remain consistent when the code is amended. Tasmania has enacted a modified template system.

State and Territory governments are jointly undertaking an NCP review of the Consumer Credit Code legislation. In addition to this review, several jurisdictions have identified other consumer credit-related legislation for review, possible review or amendment. Table 11.3 outlines the progress of jurisdictions' review of this legislation.

NCP review of the Consumer Credit Code

A draft report of the national NCP review of the Consumer Credit Code was released for public consultation in December 2001 (Uniform Consumer Credit Code Management Committee 2002). The review was undertaken by an independent consultant steered by a working party comprising representatives from each participating jurisdiction.

The key recommendations of the draft review were:

- to maintain the current provisions of the code and review its definitions to bring sale of land, conditional sale agreements, tiny terms contracts and solicitor lending within the scope of the code; and

- to enhance the code's disclosure requirements.

In 2002 the review report was finalised, following the receipt of public comments and examination by CoAG's Committee on Regulatory Reform to ensure NCP review requirements had been met. The report was then forwarded to the Ministerial Council on Consumer Affairs for consideration and in July 2002, Ministers agreed out of session to adopt the recommendations. When all participating jurisdictions have formally endorsed the report, the Ministerial council will refer it to the Uniform Consumer Credit Code Management Committee for implementation.

The NCP review follows a post-implementation review of the code, which was completed in December 1999. The post-implementation report made recommendations for changing the legislation, some of which may have an impact on competition. The Council understands that the NCP review addressed those recommendations and that the Ministerial council considered the two reports together.

NCP reviews of related legislation

In the 2001 NCP assessment, the Council assessed jurisdictions as having met their CPA obligations in relation to the following legislation:

Victoria: *Credit Administration Act 1984*;

Tasmania: *Hire Purchase Act 1959* and *Lending of Money Act 1915*;

ACT: *Credit Act 1985*; and

Northern Territory: *Consumer Affairs and Fair Trading Act*.

The following sections discuss governments' progress in reviewing and reforming miscellaneous consumer credit legislation.

Victoria

Victoria extended certain provisions of its *Hire Purchase Act 1959* — by means of the *Hire Purchase (Amendment) Act 1997* and the *Hire Purchase (Amendment) Act 2000* — until 30 June 2003. These provisions allow the court to re-open hire-purchase agreements and, under certain circumstances, to order the return of goods repossessed from a farmer. The extensions allow time to ensure the unconscionable conduct provisions of the TPA prove adequate to protect farmers and to develop a more comprehensive policy in relation to finance in the rural sector.

Victoria considered that the public interest — providing rural producers with some basic safeguards against insolvency caused by aggressive enforcement of hire-purchase contracts — outweighs the likely costs of preserving this minimal level of market intervention. Extending the application of the Hire Purchase Act provisions again, to post 1 July 2003 contracts, would require further legislation, which would be subject to gatekeeper review. Victoria has provided a public benefit case for restrictions retained in the legislation, so the Council assesses Victoria as having met it CPA clause 5 obligations in this area.

Queensland

After completing reviews of the *Credit Act 1987* and the *Hire Purchase Act 1959*, Queensland indicated that it intends to repeal both Acts. The protection afforded to farmers under the Hire Purchase Act will be continued via amendments to the *Credit (Rural Finance) Act 1996*. The proposed amendments have been found to be in the public interest by a separate review.

Queensland has added the Credit (Rural Finance) Act to its legislation review program because the Act has a relationship with other Acts on the review program. The Act provides for the issue of default notices and relieving orders to protect farmers against the arbitrary enforcement of mortgages over essential farming equipment. Submissions on a publicly released draft review report closed in January 2002 and the review is being finalised.

Queensland is nearing completion of its review and reform activity in this area, so the Council will make a final assessment in 2003.

Western Australia

Western Australia completed departmental reviews of the *Credit (Administration) Act 1984* and the *Hire-Purchase Act 1959*. The review of the Credit (Administration) Act found that the Act's licensing requirement does not provide a net public benefit given safeguards housed in other consumer protection legislation, but that the Act's disciplinary provisions have a public benefit. The review therefore recommended repealing the licensing requirement and the provisions flowing from it, but retaining the disciplinary provisions. The Western Australian Government endorsed the review's recommendations and is drafting corresponding legislative amendments.

The review of the Hire-Purchase Act found that the introduction of the Consumer Credit Code had made most of the Act's provisions redundant. It found that three provisions, however, are justified on public interest grounds: the requirement for credit providers to refund any surplus amount following repossession of goods; the court's power to re-open 'harsh or unconscionable' hire-purchase arrangements; and restrictions on credit providers' ability to repossess farming goods. The review argued that the impact of these restrictions on the cost of providing hire-purchase arrangements is likely to

be minimal. The Western Australian Government has endorsed the review's recommendations, and amendments to the legislation are contained in the Acts Amendment and Repeal (Competition Policy) Bill scheduled for the autumn 2002 Parliamentary session. Western Australia is nearing completion of its review and reform activity for this legislation, so the Council will make its final assessment in 2003.

The ACT

A departmental review of the *Consumer Credit (Administration) Act 1996* concluded in September 2001 that the market suffers from well documented market failures that expose consumers to high levels of financial risk and an inability to discriminate objectively among the providers of services in terms of quality and cost of service. The review recognised the need for government intervention to protect the public interest against potential market failures, and the Government has therefore retained the Act. The Council assesses the ACT as having met it CPA clause 5 obligations in this area.

Trade measurement legislation

Each State and Territory has legislation that regulates weighing and measuring instruments used in trade and provisions for prepackaged and nonprepackaged goods. Regulated instruments include shop scales, public weighbridges and petrol pumps. State and Territory governments (except Western Australia) formally agreed to a nationally uniform legislative scheme for trade measurement in 1990 to facilitate interstate trade and reduce compliance costs. Participating jurisdictions have since progressively enacted the uniform legislation. The legislation places the onus on owners to ensure instruments are of an approved type and maintained in an accurate condition.

Governments have identified that the national scheme involves legislation that may have an impact on competition. As a result, a national NCP review of the scheme for uniform trade measurement legislation is being undertaken. Some jurisdictions have indicated that they will review the Acts that administer the national scheme, in addition to those Acts that apply it.

Victoria's 2001 NCP annual report noted that a scoping paper for the national NCP review of the scheme concluded that restrictions on the method of sale (relating to meat, beer and spirits, and prepackaged goods) appear to have little, if any, adverse impact on competition but provide benefits to consumers. The paper raised concerns, however, regarding the costs of restrictions on the sale of nonprepacked meat. In contrast, the paper found that other restrictions on competition impose few costs while potentially generating widespread and significant benefits. These restrictions relate to the oversight of measurement standards, the prohibition of end-and-end weighing at public weighbridges and the licensing of services organisations and public weighbridges.

A draft report on nonprepacked meat was circulated to jurisdictions during February 2002 and the review's working group is now finalising the report. The Standing Committee of Officials on Consumer Affairs will need to consider the report before it is passed to the Ministerial Council on Consumer Affairs.

Queensland's *Trade Measurement (Administration) Act 1990* is Queensland specific and contains provisions relating to offences, appeals and licensing. As the outcome of the national review will have no impact on this Act, the State's NCP review was able to be completed. The review found that the Act does not restrict competition and recommended that it be retained without change. The review findings were endorsed by the Government in February 2002. The Council assesses Queensland as having met it CPA clause 5 obligations in this area.

The Northern Territory and the ACT have conducted internal reviews of their trade measurement (administration) Acts, finding that the Acts do not contain anticompetitive restrictions. The Northern Territory has undertaken to amend its Act if this is recommended by the national review. South Australia has indicated that it will review the provisions of its trade measurement (administration) Act which apply specifically to South Australia when the national review is completed. Western Australia is drafting new legislation to replace the Weights and Measures Act. The new legislation will apply the uniform national legislation and thereby contribute to national consistency. The Council will make its final assessment in 2003.

Table 11.4 outlines the progress of jurisdictions' progress with review and reform of their trade measurement legislation.

Table 11.1: Review and reform of fair trading Acts

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Fair Trading Act 1987*	Regulation of the supply, advertising and distribution of goods and services and the disposal of interests in land	Combined review with *Door to Door Sales Act 1967* is under way. Terms of reference were approved in 1997 and a steering committee was formed in 1998. Issues paper was released in August 2000, followed by public consultation. Final report has been prepared and will soon be submitted to the Government.		Council to finalise assessment in 2003.
Victoria	*Fair Trading Act 1999*	Requirements imposed on 'Off business premises sales' including a mandatory five-day cooling-off period for contact sales.	Act was assessed against NCP principles at its introduction. Assessment recommended retaining restrictions on the grounds that they are the least restrictive means of achieving the Act's objectives, so are in the public interest.	Restrictive provisions were retained.	Meets CPA obligations (June 2001).
Queensland	*Fair Trading Act 1989*	Quality/technical standards, business conduct restrictions, measures that confer a benefit	Review is under way and was expected to be completed in mid-2002.		Council to finalise assessment in 2003.
Western Australia	*Fair Trading Act 1987*	Regulation of the supply, advertising and distribution of goods and services	Review of the Act and the *Consumer Affairs Act 1971* is under way and is scheduled for completion in December 2002.		Council to finalise assessment in 2003.
South Australia	*Fair Trading Act 1987*		Act was not included in the legislation review schedule. South Australia will undertake a review, but had not done so before June 2002.		Council to finalise assessment in 2003.

(*continued*)

Table 11.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Fair Trading Act 1990* Fair Trading (Code of Practice for Motor Vehicle Traders) Regulations 1996	Code of practice requires manufacturers to provide warranties for motor vehicles and to establish a system for dealing with customer complaints	Minor review of code of practice was completed. Act assessed as not restricting competition.	Restrictive provisions were retained.	Meets CPA obligations (June 2001) in relation to nonmotor vehicle dealer provisions. Motor vehicle dealer provisions are discussed in chapter 8.
ACT	*Fair Trading Act 1992*	Regulation of the supply, advertising and distribution of goods and services	Intradepartmental review completed in 2001 covering the Fair Trading Act, the *Door-to-Door Trading Act 1991*, the *Fair Trading (Consumer Affairs) Act 1973*, the *Lay-by Sales Agreements Act 1963* and the *Sale of Goods Act 1954*. The Fair Trading Act was assessed as not restricting competition.	Act was retained without reform.	Meets CPA obligations (June 2002).
Northern Territory	*Consumer Affairs and Fair Trading Act*	Sundry provisions, including the regulation of advertising and the banning of potentially unsafe goods. Requirement that traders notify consumers where a reporting agency report has been used, and that reporting agencies disclose information relating to a person when requested by that person	The review found that the benefits of the fair reporting provisions have not been demonstrated and that the provisions should be repealed. The review, however, recommended that their repeal be deferred pending resolution of new national issues relating to residential tenancy data bases.	The Government introduced amendments to the Act into Parliament in July 2002 that implement the review recommendations. The Government accepted the recommendation to defer repeal of the fair reporting provisions and stated that it would further consider the issue. Motor vehicle dealer provisions are discussed in chapter 8.	Meets CPA obligations (June 2002).

Table 11.2: Review and reform of other fair trading legislation

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Business Licences Act 1990*	Licensing requirements	Review was completed in 1998.	This Act was repealed by the *Business Licences Repeal and Miscellaneous Amendments Act 2001*.	Meets CPA obligations (June 2001).
	Funeral Funds Act 1979	Controls and regulations on contributory and pre-arranged funeral funds	Review was completed in 2001. It found that the impact of the legislation on competition was not significant, but recommended the removal of some restrictions on funeral funds. The Government is preparing an exposure Bill for public discussion.		Council to finalise assessment in 2003.
	Prices Regulation Act 1948	Regulation of prices and rates for certain goods and services	Review was completed in 1996.	Prices Commission was abolished and prices regulation powers were transferred to the Independent Pricing and Regulatory Tribunal.	Meets CPA obligations (June 2002).
	Retirement Villages Act 1989	Regulates the termination of occupation rights of residents and confers jurisdiction over certain matters to the Residential Tenancies Tribunal	Review was completed in 2001.	Act was repealed. *Retirement Villages Act 1999* was introduced, retaining certain requirements for terminating the occupation rights of residents.	Meets CPA obligations (June 2002).

(*continued*)

Table 11.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Funerals (Pre-Paid Money) Act 1993*		Scoping study showed that the Act does not restrict competition.		Meets CPA obligations (June 2001).
	Retirement Villages Act 1986		Scoping study showed that the Act does not restrict competition.		Meets CPA obligations (June 2001).
Queensland	*Funeral Benefit Business Act 1982*	Limitations on the registration of corporations, business conduct requirements	Review is under way.		Council to finalise assessment in 2003.
	Profiteering Prevention Act 1948	Price controls, restrictions on business conduct	Reduced NCP review was completed. Repeal of the legislation was recommended because it lacks contemporary relevance.	Legislation is expected to be repealed in mid 2002.	Council to finalise assessment in 2003.
	Retirement Villages Act 1988	Entry requirements, statutory charges, reduced requirements for charitable organisations	Reduced NCP review was completed in 1998. New Bill was assessed against NCP obligations.	New Bill was passed in 1999, retaining some restrictions on competition.	Meets CPA obligations (June 2002).
	Sales of Goods Act 1896 *Sale of Goods (Vienna Convention) Act 1986.*	Stipulations relating to the sale or purchase of goods, affecting the rights and remedies of buyers and sellers	Review was completed in 2001. No competition restrictions were identified.	Acts were retained without reform.	Meets CPA obligations (June 2002).

(*continued*)

Table 11.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Retirement Villages Act 1992*	Restrictions on business conduct	Departmental review was completed in 2002. It recommended: changing restrictions on the use of retirement village land; incorporating the Code of Fair Practice for Retirement Villages into the Act; and changing restrictions on residents marketing and price determination rights.	Amendments are being prepared.	Council to finalise assessment in 2003.
South Australia	*Prices Act 1948*	Price controls, restrictions on business conduct	Review completed, recommending the removal of a number of restrictive provisions but the retention of price controls for infant foods, returns of unsold bread, towing, recovery, storage and quoting for repair of motor vehicles and the carriage of freight to Kangaroo Island.	The Government enacted amendments in line with recommendations in 2000.	Meets CPA obligations (June 2001).
Tasmania	*Door to Door Trading Act 1986*	Definition of a prescribed contract, prohibition of contractual terms, requirement for certain information to be incorporated under prescribed contracts, limitation on the hours in which a dealer may call on a person	Minor review of the Act was completed. Restrictive provisions were justified as being in the public interest.	Restrictive provisions were retained.	Meets CPA obligations (June 2002).
	Flammable Clothing Act 1973	Requirement to mark or label prescribed clothing (children's nightwear) with the flammability of the garment	Minor review of the Act was completed. Restrictive provision was justified as being in the public interest.	Restrictive provision was retained.	Meets CPA obligations (June 2001).

(*continued*)

Table 11.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
	Goods (Trade Descriptions) Act 1971	Requirement for manufacturers to disclose the materials from which textile products are made, provisions relating to safety footwear	Minor review of the Act was completed. Requirement relating to textile products was justified as being in the public interest.	Restrictive provision relating to textile products was retained. New regulations were made to replace safety footwear provisions.	Meets CPA obligations (June 2001).
	Mock Auctions Act 1973	Prohibition on auctions where items are sold at a price lower than the highest bid		Act was repealed.	Meets CPA obligations (June 2001).
ACT	*Law Reform (Manufacturers Warranties) Act 1977*		Act was assessed as not restricting competition and was removed from the NCP review timetable.	Act repealed by the Fair Trading (Amendment) Bill 2001 because it duplicates more extensive provisions in the TPA.	Meets CPA obligations (June 2001).
	Law Reform (Misrepresentation) Act 1977		Act was assessed as not restricting competition and was removed from the NCP review timetable.		Meets CPA obligations (June 2001).
Northern Territory	*Prices Regulation Act*	Price controls, restrictions on business conduct	Review was completed, recommending the exercise of restrictions only at times of natural disaster, the specification of objectives and the regulation of monopoly behaviour under separate legislation.		Council to finalise assessment in 2003.
	Retirement Villages Act	Regulation of the operation of retirement villages, the court's powers in respect of certain matters relating to retirement villages	Review was completed in 2002. The restrictions on competition contained in the Act were found to be in the public interest.	Act was retained without reform.	Meets CPA obligations (June 2001).

Table 11.3: Review and reform of legislation regulating consumer credit

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
National	*Review of Consumer Credit Code*	Licensing requirements, restrictions on the conduct of credit providers	Review report was completed in 2002 and considered by CoAG's Committee on Regulatory Reform to ensure NCP review requirements had been met. The report has been forwarded to the Ministerial Council on Consumer Affairs for response by participating jurisdictions.		Council to finalise assessment in 2003.
Victoria	*Credit (Administration) Act 1984*		Scoping study showed that the legislation does not restrict competition.		Meets CPA obligations (June 2001).
	Hire Purchase (Amendment) Act 1997	Retention of the court's ability to re-open hire-purchase agreements and order the return of goods repossessed from a farmer under certain circumstances	Victoria argued that there is benefit in using the restrictions to address rural sector difficulties in relation to hire-purchase, while a more comprehensive policy is developed.	Restrictive provisions were retained.	Meets CPA obligations (June 2002).
	Hire Purchase (Amendment) Act 2000	Retention of the court's ability to reopen hire-purchase agreements and order the return of goods repossessed from a farmer under certain circumstances	Victoria argued that there is continued benefit in the restrictions because further work is required to develop a comprehensive policy.	Restrictive provisions were retained.	Meets CPA obligations (June 2002).
Queensland	*Credit Act 1987*	Restrictions on business conduct	Review of this Act and regulation is being carried out at the same time as the national review of the Consumer Credit Code but under a separate process. Review was due for completion in the third quarter of 2001.	Act is to be repealed.	Council to finalise assessment in 2003.

(*continued*)

Table 11.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
	Credit (Rural Finance) Act 1996	Restrictions on the enforcement of mortgages over essential farm equipment	Submissions on a publicly released draft report closed in January 2002 and the review is being finalised.		Council to finalise assessment in 2003.
	Hire Purchase Act 1959	Restrictions on business conduct	Review was completed in 2001. The protection currently afforded to farmers under the Hire Purchase Act, will be continued via amendments to the Credit (Rural Finance) Act. The proposed amendments have been subject to a separate review of their public benefit	Act is to be repealed.	Council to finalise assessment in 2003.
Western Australia	*Credit (Administration) Act 1984*	Licensing requirements, restrictions on the conduct of credit providers	Departmental review was completed, recommending the repeal of licensing requirements and related provisions but retention of disciplinary provisions on public interest grounds.	The Government agreed to the review recommendations and is drafting legislative amendments.	Council to finalise assessment in 2003.
	Hire Purchase Act 1959	Restrictions relating to surplus from sale of repossessed goods, equitable relief and farm goods purchases	Departmental review was completed, recommending the removal of a number of restrictions but the retention (on public interest grounds) of three provisions aimed at protecting farmers and small businesses.	The Government agreed to the review recommendations and has introduced amending legislation to Parliament.	Council to finalise assessment in 2003.
Tasmania	*Hire-Purchase Act 1959*	Requirements relating to the form and contents of hire-purchase contracts		Act was repealed.	Meets CPA obligations (June 2001).
	Lending of Money Act 1915	Requirement that money lenders be registered		Act was repealed.	Meets CPA obligations (June 2001).

(*continued*)

Table 11.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Consumer Credit (Administration) Act 1996*	Registration and conduct requirements	Departmental review was completed. Restrictions were found to be in the public interest.	Act was retained without reform	Meets CPA obligations (June 2002).
	Credit Act 1985		Act was substantially repealed. Remaining provisions were assessed as not restricting competition.		Meets CPA obligations (June 2001).
Northern Territory	*Consumer Affairs and Fair Trading Act*	Negative licensing requirements, requirement for credit providers to abide by the Consumer Credit Code and to act properly, competently and fairly	Review was completed, recommending retention of the requirement for credit providers to act properly, competently and fairly. The national review is considering the requirement to abide by the Consumer Credit Code in the national review.	The Government agreed to the review recommendations.	Meets CPA obligations (June 2001).

Table 11.4: Review and reform of legislation regulating trade measurement

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
National (except Western Australia)	Review of trade measurement legislation	Restrictions on the method of sale of certain goods	Review is under way. Review report has been prepared and is under consideration by the steering committee. Report is to be considered by relevant official bodies before being forwarded to the Ministerial Council on Consumer Affairs for consideration and response.		Council to finalise assessment in 2003.
Queensland	*Trade Measurement (Administration) Act 1990*		Review was completed in 2002. The review found the Act did not restrict competition.	Act was retained.	Meets CPA obligations (June 2001).
Western Australia	*Weights and Measures Act 1915*	Restrictions on the method of sale of certain goods	The Government is currently drafting new legislation to replace the Weights and Measures Act. The new legislation will apply the uniform national legislation.		
South Australia	*Trade Measurement Administration Act 1993*		Review and reform are contingent on the outcome of national review.		Council to finalise assessment in 2003.
ACT	*Trade Measurement (Administration) Act 1991*		Internal review found that the Act does not contain anticompetitive restrictions.		Council to finalise assessment in 2003.
Northern Territory	*Trade Measurement (Administration) Act*		Internal review found that the Act does not contain anticompetitive restrictions.		Council to finalise assessment in 2003.

12 Social regulation: education, child care and gambling

There are frequently economic aspects to governments' management of social policies and the provision of related services. While decisions about appropriate policy objectives are matters for elected governments, in consultation with their constituents, legislation to achieve those objectives often restricts who can offer particular services, imposes pricing obligations or sets other conditions that affect the competitive environment. The way in which governments seek to achieve particular social objectives therefore falls within the scope of the National Competition Policy (NCP).

Legislation review and reform obligations are relevant for the education, child care and gambling sectors. All governments identified legislation in these areas for review under the NCP. Competitive neutrality issues may also arise, given the involvement of government business activities in service delivery. Competitive neutrality objectives are relevant in the education sector, where State Government business activities are important service providers, and in the child care sector, where local governments are important service providers.

Education

All States and Territories have legislation governing the education sector that restricts competition.

Education legislation may be categorised as:

- general education Acts that relate to the provision of public and private schooling at primary and secondary levels including in relation to the education of overseas students in Australia;
- Acts that establish a system of vocational education and training; and
- Acts that establish the universities of each jurisdiction.

Several jurisdictions have also legislated to regulate the provision of education to overseas students and to regulate specific issues such as the establishment of particular schools. Queensland, South Australia and Tasmania require the registration of teachers in both government and

nongovernment schools and Victoria requires the licensing and registration of teachers in private schools.

Competitive neutrality is also relevant to the education sector with competitive neutrality principles applying to the business activities of government-owned education providers where they compete to earn revenue and profits with private sector providers. As public educational institutions increasingly seek to supplement government funding through commercial activity, issues of competitive neutrality are assuming increased significance.

Restrictions on competition

Education legislation predominantly restricts competition via requirements for the registration of nongovernment education/training providers and the accreditation of their courses.[1] Nongovernment providers must meet requirements that specify the nature and content of the instruction offered, ensure students receive education of a satisfactory standard and provide protection for the safety, health and welfare of students. Nongovernment providers may also be required to demonstrate their financial viability.

Regulating in the public interest

The principal argument for competition restrictions in education is that they ensure education providers meet minimum standards. The achievement of prescribed education standards enables the community in general and employers in particular to attach more easily a consistent meaning to various education awards. Consumers of education are also provided with some degree of certainty about the nature of courses. The increasing importance of international student enrolments in Australian educational institutions provides a further argument for maintaining high quality standards.

The requirement that education providers demonstrate a measure of financial viability may be justified as a way of avoiding the significant disruption and potential monetary losses to students that would follow from the forced closure of an educational provider. The need for adequate health, safety, and welfare safeguards for students is self-evident, but measures to achieve these outcomes – registration, accreditation and financial viability – create a barrier to entry which may reduce the range of available courses and subjects and reduce the pressure on existing providers to offer high quality courses. In particular, a reduction in potential competition may reduce the incentive to existing providers to develop innovative courses and modes of delivery.

[1] In relation to higher education, accreditation has been defined as a process of assessment and review that enables a higher education course or institution to be recognised or certified as meeting appropriate standards (Department of Education, Training and Youth Affairs 2000, p. 4).

Review reports have stressed the need to maintain educational standards. Ideally, regulation that is in the public interest should not restrict providers that clearly meet required educational, student welfare and financial standards from offering education services. Tables 12.1–12.3 summarise State and Territory governments' progress in reviewing and reforming legislation regulating general education, vocational education and training, and universities.

General education provisions

Review and reform activity

Victoria, South Australia and Tasmania have completed their review and reform of general education legislation that establishes the government school system, accredits nongovernment schools and accredits the providers of education to fee-paying overseas students. In the 2001 NCP assessment, the Council assessed these jurisdictions as having met their Competition Principles Agreement (CPA) clause 5 obligations in this area. The Council also assessed Queensland's review and reform of the *Education Capital Assistance Act 1993* and the *Education (Overseas Students) Act 1996* as having met CPA clause 5 obligations.

New South Wales

New South Wales did not include education legislation in its legislation review program. The *Education Act 1990* establishes conditions for the registration of nongovernment schools and accreditation procedures these schools must follow when presenting candidates for education certificates.

In the 2001 NCP assessment, the Council asked New South Wales to either explain why it is not reviewing apparently restrictive legislation or add the legislation to its review program. New South Wales has advised the Council that it does not intend to review its education legislation under the NCP program at this time because other review processes are underway or have been completed. In support of its position, New South Wales cites the 1995 review of the State's curriculum, assessment and reporting arrangements (the Eltis Review) and a review focusing on reforms to the Higher School Certificate conducted in the same year (the McGaw Review). The Government is currently reviewing the funding, regulation and accountability arrangements for nongovernment schooling and the review may recommend changes to the Education Act. In addition, New South Wales is leading a national process on the funding and accountability of government and nongovernment schools across Australia through the Schools Resourcing Taskforce of the Ministerial Council on Education, Employment, Training and Youth Affairs. A major part of this work will be to achieve national legislative consistency across all jurisdictions.

Given this review activity and that reviews in other jurisdictions have found similar restrictions to those of New South Wales to be in the public interest, the Council assesses New South Wales as having met its CPA clause 5 obligations in this area.

Queensland

The review of the *Education (General Provisions) Act 1989* was expected to be completed by the end of March 2002, with any reforms then to be soon implemented. The review is addressing the registration of overseas curriculum and the ability to prohibit the sale of certain items from government school tuckshops. The review of the *Grammar Schools Act 1974* is also nearing completion. The Council will make a final assessment in June 2003.

Western Australia

Western Australia is reviewing the *Education Service Providers (Full Fee Overseas Students) Registration Act 1992* under the NCP. Western Australia has advised that its review is near completion although it has yet to provide any details of the review outcome. The Council will make a final assessment in 2003 when it will look for Western Australia to provide full information on its review process and outcome and reform response.

The ACT

The Statute Law Amendment Bill 2001 repealed the *Education Services for Overseas Students (Registration and Regulation of Providers) Act 1994*. The ACT thereby meets its CPA obligations for this legislation. The ACT has also completed reviews of the *Education Act 1937*, the *Free Education Act 1906* (NSW), the *Public Instruction Act 1880* (NSW), and the *Schools Authority Act 1976*. The review involved extensive consultation and made 23 recommendations, including:

- establishing a single Act for schooling in the ACT;
- giving consideration to teacher registration for professional enhancement of teachers in the ACT;
- retaining current legislative provisions for the establishment and re-registration of nongovernment schools; and
- reviewing the licensing arrangements for independent preschools that are attached to registered nongovernment schools.

The review recommendations were to be given effect in the Education Bill 2000, but the Bill did not come before the Legislative Assembly for the second reading before the ACT election in October 2001. The Bill is being updated to

incorporate the new Government's views. It was to be issued as an exposure draft in June 2002 and the new legislation is unlikely to be completed until the end of 2002. The Council will make a final assessment in June 2003.

The review also considered the applicability of the *Board of Senior Secondary Studies Act 1997*. The legislation was found to maintain uniform standards for senior secondary courses and certification, so has been retained. The Council assesses the ACT as having met its CPA clause 5 obligations in relation to this Act.

The Northern Territory

The Northern Territory did not include education legislation in its legislation review program. The Education Department, however, conducted a preliminary review of the *Education Act*, finding that the Act's restrictions on competition are demonstrably for the community benefit. Arising from the review, the Northern Territory foreshadowed passing regulations to clarify the requirements for registration of nongovernment schools and universities, and for the accreditation of university courses.

The course of action being adopted by the Northern Territory is consistent with the Territory's obligations under CPA clause 5. The Council will make a final assessment of the Northern Territory's review activity and reform implementation in 2003.

Table 12.1 summarises the progress of governments' review and reform of legislation that regulates general education.

Vocational education and training

In July 1992 the States and Territories agreed to implement a national vocational education and training strategy through their own legislation. The agreement required legislative amendment in a number of jurisdictions to establish nationally consistent arrangements. Legislation in all States and Territories restricts competition by requiring the registration of training providers and the accreditation of training courses and by specifying arrangements for training agreements and vocational placements.

Review and reform activity

In the 2001 NCP assessment, the Council assessed Victoria, Queensland, Western Australia, South Australia and the ACT as having met their CPA clause 5 obligations. These jurisdictions have completed their review and reform activity, finding that legislative restrictions in this area provide a net public benefit, and thus retaining the legislation without change.

New South Wales

New South Wales did not include education legislation in its legislation review program. The *Vocational Education and Training Act 1990* establishes conditions for the registration of training providers and accreditation of training courses.

In the 2001 NCP assessment, the Council asked New South Wales to either explain why it is not reviewing apparently restrictive legislation, or add the legislation to its review program. New South Wales advised the Council that the Act has been recently amended following a review that involved extensive consultations with external stakeholders, including private providers and the university sector. Given this review activity and that reviews in other jurisdictions have found similar restrictions to be in the public interest, the Council assesses New South Wales as having met its CPA clause 5 obligations in this area.

Tasmania

The *Vocational Education and Training Act 1994* restricts competition by establishing conditions for the registration of training providers and accreditation of training courses. Tasmania completed a review of the Act in 2001 that published an issues paper and a regulatory impact statement, and involved extensive public consultation. The Tasmanian Government is considering its response to the review. The Council will make a final assessment in June 2003.

The Northern Territory

The Northern Territory did not include the *Northern Territory Employment and Training Act* in its legislation review program. In the 2001 NCP assessment, the Council asked the Northern Territory to either explain why it is not reviewing apparently restrictive legislation or add the legislation to its review program. The Northern Territory advised the Council that although its legislation does require registration private providers and accreditation of their courses, the legislation is consistent with that of other jurisdictions in which reviews have found that restrictions provide a net public benefit. While it is preferable that Governments conduct their own reviews to ensure appropriate consideration of local factors, the Council acknowledges that the NCP provides scope for Governments to develop regulatory arrangements on the basis of the relevant experience of other jurisdictions. Such an approach, assuming it originates from objective analysis, will at least enhance the prospects for national consistency in jurisdictions' regulation. The Council therefore assesses the Northern Territory as having met its CPA clause 5 obligations in this area.

Table 12.2 summarises the progress of governments' review and reform of legislation that regulates vocational education and training.

Universities

Review and reform activity

Universities are generally established by a separate Act that provides for their governance. A further category of legislation provides for the accreditation of new universities or other tertiary education providers wishing to operate within the jurisdiction. In addition, Western Australia reviewed the University Colleges Act. 1926 and the ACT reviewed the Canberra Institute of Technology Act 1987. Both these Acts were retained without reform on the recommendation of their respective reviews.

Legislation that establishes universities

In the 2001 NCP assessment, the Council assessed the ACT as having met its CPA clause 5 obligations in this area. New South Wales, Victoria, South Australia, Tasmania and the Northern Territory did not include this legislation in their NCP legislation review programs. The legislation of these jurisdictions does not contain significant restrictions on competition and thus does not require review under the NCP.

Queensland

The review of legislation governing public universities in Queensland included considered the following legislation:

- *University of Southern Queensland Act 1998*;
- *University of Queensland Act 1998*;
- *James Cook University Act 1997*;
- *Queensland University of Technology Act 1998*;
- *Griffith University Act 1998*;
- *Central Queensland University Act 1998*; and
- *University of the Sunshine Coast Act 1998*.

The review identified in each Act a potential restriction on the ability of each university to apply revenue, in that revenue must be applied solely for university purposes. The review found that this restriction does not have a significant adverse impact on competition in the market and is not onerous. Accordingly, the existing legislation has been retained in the public interest. The Council assesses Queensland as having met its CPA clause 5 obligations in this area.

Western Australia

Western Australia completed legislation reviews of its universities' enabling Acts in 1999. The reviews concluded that most restrictions are minor and in the public interest, while recommending that the investment powers of Edith Cowan University be aligned with those of other universities. The State's Repeal and Amendment (Competition Policy) Bill is progressing the necessary amendments to the *Edith Cowan University Act 1984*. The Council will make a final assessment in 2003.

Registration of universities and accreditation of university courses

The Ministerial Council on Education, Employment, Training and Youth Affairs endorsed the National Protocols for Higher Education Approval Processes on 31 March 2000. (Department of Education Training and Youth Affairs 2000). The protocols have been designed to ensure consistent criteria and standards across Australia in matters such as the recognition of new universities, the operation of overseas higher education institutions in Australia and the accreditation of higher education courses to be offered by providers that are not self accrediting. It is desirable that legislation relevant to these aspects of higher education complies with the protocols developed by the Ministerial council and meets the CPA test.

In the 2001 NCP assessment, the Council assessed South Australia, Tasmania and the ACT as having met their CPA clause 5 obligations in this area. These jurisdictions had reviewed legislation requiring registration of universities and accreditation of university courses and retained restrictions in the public interest.[2] Western Australia does not have this type of legislation.

New South Wales

New South Wales did not include the *Higher Education Act 1988* in its NCP legislation review program. The Act establishes procedures for the approval of courses as advanced education courses. In the 2001 NCP assessment, the Council asked New South Wales to either explain why it is not reviewing apparently restrictive legislation, or add the legislation to its review program. New South Wales has advised the Council that the Act has been recently amended following a review that involved extensive consultations with external stakeholders, including private providers and the university sector. Given this review activity and that reviews in other jurisdictions have found similar restrictions to be in the public interest, the Council assesses New South Wales as having met its CPA clause 5 obligations in this area.

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[2] The relevant South Australian and ACT provisions are contained in their respective vocational education Acts. The previous section of this chapter discusses the review and reform of this legislation.

Victoria

Victoria completed a review of the *Tertiary Education Act 1993* in 1997. The Department of Education oversaw the review having engaged Victoria's Office of Regulation Review to ensure the independent conduct of the review. The review recommendations were that:

- Ministerial guidelines should be developed to make the process of approval of private universities to conduct courses leading to higher education awards more transparent;
- that the requirement for applicants seeking approval to demonstrate 'the need in Victoria for the course of study' be removed, as it has the potential to be used in an anti-competitive manner by preventing the entry of an institution that wants to compete directly with universities by offering similar courses;
- the current system restricting the delivery of higher education awards to recognised universities should be retained because the benefits outweigh the costs
- universities should be endorsed as providers of higher education courses for overseas students in place of endorsement of higher education courses

The Government accepted the review recommendations and Parliament passed the reforms to legislation in 1997. In 2001 the Victorian Parliament enacted the *Post Compulsory Education Acts (Amendment) Act 2001* for the principal purpose of amending the *Tertiary Education* Act 1993 so that it provided for the full implementation of the Ministerial Council protocols. The Council assesses Victoria as having met its CPA clause 5 obligations in this area.

Queensland

The *Higher Education (General Provisions) Act 1989* imposes restrictions and accreditation procedures on nonuniversity providers and foreign universities that seek to provide higher education courses leading to higher education awards in Queensland. A review of the Act was completed in 2001. The review identified sections of the legislation which are restrictive because they:

- impose a limitation on the operation of foreign universities in Queensland;
- impose a limitation on the use of the title 'university'
- impose a limitation on the conferring and use of higher education awards;
- provide for the Minister to accredit courses offered (or proposed to be offered) by nonuniversity providers; and
- provide for the examination of the operations or recognition of universities.

The review recognised the value of accreditation provisions being nationally uniform. The review found that accreditation contributed to overcoming information asymmetry – that in the absence of accreditation, potential students would have difficulty in assessing the merits of particular providers. The review also recognised the social benefits generated by education. The Government retained the Act in its current form in accordance with the review recommendations.

The Council assesses Queensland as having met its CPA clause 5 obligations in this area.

The Northern Territory

The Northern Territory did not include its *Education Act* which regulates higher education, on its original NCP legislation review program. The Northern Territory has advised the Council, however, that it intends to review and, if necessary, amend the relevant section of the *Education Act* in 2002 to ensure it reflects the protocols endorsed by the Ministerial Council on Education, Employment, Training and Youth Affairs. The Council will make a final assessment in 2003.

Table 12.3 summarises the progress of governments in review and reform of legislation that regulates universities.

Teachers

When the NCP legislation review program commenced (1996), both Queensland and South Australia required all teachers in government and non-government schools to be registered. Victorian legislation required nongovernment teachers to be registered. It also required teachers with interstate qualifications taking up a job in government schools to have their qualifications assessed and to undergo a 'good character' check. In 2000 Tasmania passed legislation requiring all government and nongovernment teachers to be registered (to commence during 2001). These Governments have all reviewed legislation requiring the registration of teachers under the NCP program. Each review found that registration was in the public interest. Governments argue that regulation of teachers is generally beneficial in that it ensures teachers have minimum qualifications and a minimum level of competence, and prevents persons who are not of good character being employed by schools. Tasmania also argues that registration is important in raising the status of the teaching profession. In the 2001 NCP assessment, which considers this area in more detail, the Council assessed Victoria, Queensland, South Australia and Tasmania as having met their CPA clause 5 obligations in this area.

Competitive neutrality

In 2001 Queensland endorsed the application of competitive neutrality principles to TAFE Queensland institutes where they compete directly with private providers on price, and the implementation of a full cost pricing model for competitive purchasing and fee-for-service programs by February 2002. All jurisdictions, except Western Australia, now apply competitive neutrality principles to the business activities of their TAFE institutions. Western Australia has deferred matters relating to local council rates, State taxes and land tenure arising from the review of its universities' legislation to competitive neutrality reviews of the universities, which are now almost complete. An interagency working group has been established in order to finalise the implementation of the competitive neutrality review of universities.

In 1999, the Council of Australian Governments (CoAG) Committee on Regulatory Reform examined whether a cross-jurisdictional approach would be appropriate for applying competitive neutrality to the higher education sector. The committee considered, given that the majority of university business activities are local and regional in their operation and impact on private sector businesses, that few issues would have a cross-jurisdictional impact and that these could be dealt with on a case basis. In 2000 the committee referred the matter of competitive neutrality to the Australian Vice Chancellors' Committee which advised that universities have continued to work individually to ensure they comply with competitive neutrality principles. This compliance effort has involved drawing on available material such as State-based guidelines.

For businesses not subject to Executive control (which include university businesses), CoAG has stated that assessment of a government's compliance with competitive neutrality requirements should look for a 'best endeavours' approach. Under this approach, the relevant government must at least provide a transparent statement of competitive neutrality obligations to the business entity concerned. Jurisdictions' NCP annual reporting indicates that they are complying with the CoAG suggested approach.

Competitive neutrality complaints concerning the business activities of education institutions have been made in two jurisdictions. In the period 1996–99, Victoria investigated seven complaints concerning the commercial activities of TAFE institutions and universities, upholding two. In 1999, South Australia upheld one of two complaints concerning the nonapplication of competitive neutrality to courses conducted by the Department of Education, Training and Employment. Where these jurisdictions did not uphold a complaint, it was because either the business that was the subject of the complaint was not required to apply competitive neutrality principles, or that competitive neutrality principles had been correctly applied.

Table 12.1: Review and reform of legislation regulating general education

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Education Act 1990*	Sets conditions for the registration of nongovernment schools. Prescribes accreditation procedures for registered nongovernment schools wishing to present candidates for education certificates.	Act was not included on legislation review schedule. New South Wales has advised the Council that the legislation was the subject of two reviews in 1995 and that a review of the funding, regulation and accountability arrangements for non-government schooling is under way.		Meets CPA obligations (June 2002).
Victoria	*Education Act 1958*	Provides for the registration of non-government schools and endorsement of schools as suitable for overseas students.	Review was completed in May 2000 and recommended less restrictive criteria for the registration of nongovernment schools and a differential fee structure for overseas students attending government schools.	The Government rejected some of the review recommendations, but provided a public benefit case to support its position.	Meets CPA obligations (June 2001).
Queensland	*Education Capital Assistance Act 1993*	Limits the provision of certain funding assistance to schools affiliated with two nominated capital assistance authorities. Also includes limitations on the type of financial institutions that can receive deposits/investment of capital assistance funds.	A formal review was not undertaken.	The restriction related to affiliation was resolved through an amendment to legislation that requires schools to be listed (but not affiliated) with a group. The issue related to financial institutions was subjected to further analysis and determined not to be restrictive.	Meets CPA obligations (June 2001).

(*continued*)

Table 12.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Education (General Provisions) Act 1989* and Regulations		This review is focusing on the issues of the registration of overseas curriculum and the ability to prohibit the sale of certain items from State school tuckshops. Review of proposed new legislation relating to the establishment, registration and accountability of nongovernment schools will be completed as a separate exercise. The final public benefit test report is being developed.		Council to finalise assessment in 2003.
	Education (Overseas Students) Act 1996	Requires registration of providers of education to overseas students.	Review was completed in January 2000. NCP justification was provided for 1999 amendments.	Existing regulatory regime was retained in the public interest, as decided at June 2000.	Meets CPA obligations (June 2001).
	Grammar Schools Act 1975	Regulates the establishment of new public grammar schools.	Review has been re-opened (the original report was completed in September 1997) and is being done in accordance with revised public benefit test guidelines. The review is close to completion.		Council to finalise assessment in 2003.
Western Australia	*Education Service Providers (Full Fee Overseas Students) Registration Act 1992*	Requires registration of providers of education to overseas students.	Review is under way.		Council to finalise assessment in 2003.

(*continued*)

Table 12.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Education Act 1972* and Regulations	Identifies barriers to market entry and restricts market conduct in for teachers and nongovernment schools.	Review was completed in July 2000. It found that restrictions on competition were justified in the public benefit.	Act was retained without reform.	Meets CPA obligations (June 2001).
Tasmania	*Christ College Act 1926*	This Act was originally thought to provide a possible advantage not given to other schools. The Education Department now considers that this is not the case and will provide reasons for its position.			Council to finalise assessment in 2003.
	Education Act 1994	Requires nongovernment schools to be registered.	Review completed in December 2000. The review found that restrictions on competition were justified in the public benefit.	Act was retained without reform.	Meets CPA obligations (June 2001).
	Education Providers Registration (Overseas Students) Act 1991	Requires registration of providers of education to overseas students.	As above.	As above	As above.
	Hutchins School Act 1911	Provides a possible advantage not given to other schools.		Act was repealed in 2001.	Meets CPA obligations (June 2002).
ACT	*Board of Senior Secondary Studies Act 1997*	Establishes accreditation procedures for courses.	Intradepartmental review was completed in 1999. The review found that the legislation maintained uniform standards for senior secondary courses and certification.	Act was retained without reform.	Meets CPA obligations (June 2002).

(*continued*)

Table 12.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT (continued)	*Education Act 1937* *Schools Authority Act 1976* *Public Instruction Act 1880* *Free Education Act 1906*	Requires registration of schools.	Review completed.	The Government is proceeding with new school education legislation accounting for the findings and recommendations of the review.	Council to finalise assessment in 2003.
	Education Services for Overseas Students (Registration and Regulation of Providers) Act 1994	Requires registration of providers of education to overseas students.		Act was repealed.	Meets CPA obligations (June 2002).
Northern Territory	*Education Act*	Requires registration of nongovernment schools and a framework for the operation of higher education institutions.	Departmental review found restrictions were in the public interest.	Additional regulations were foreshadowed to clarify the requirements for registration of private schools and accreditation of higher education providers.	Council to finalise assessment in 2003.

Table 12.2: Review and reform of legislation regulating vocational education and training

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Vocational Education and Training Accreditation Act 1990*	Requires registration of training providers and accreditation of training courses.	Act was not included in legislation review schedule. New South Wales has advised the Council that the Act has been recently amended following a review that involved extensive consultations with external stakeholders, including private providers and the university sector.		Meets CPA obligations (June 2002).
Victoria	*Vocational Education and Training Act 1990*	As above.	Review was completed in 1998.	Act retains restrictions relating to accreditation, registration of private providers and Ministerial setting of fees as being in the public interest.	Meets CPA obligations (June 2001).
Queensland	*Vocational Education, Training and Employment Act 1991*	As above.	Minor review was carried out in 1997 on the then proposed new Bills (a Vocational Education and Training Bill and an Institute Bill) to replace this Act. A further minor review was undertaken of proposed Training and Employment Bill that replaced the above two Bills. This Bill was considered to impose fewer restrictions on providers than imposed by the 1991 Act that it replaces. It also delivered greater flexibility for employers, registered training bodies and trainees.	Training and Employment Bill (which implemented a national scheme of training and is less restrictive than the previous Act) was assented to in June 2000.	Meets CPA obligations (June 2001).

(*continued*)

Table 12.2 continued

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Vocational Education and Training Act 1996*	As above.	Review was completed in 1999, concluding that the restrictions on competition are minimal and that public benefits arising from the restrictions outweigh the costs.	Act was retained without reform.	Meets CPA obligations (June 2001).
South Australia	*Vocational Education, Employment and Training Act 1994*	Requires registration of training providers and accreditation of training courses, including courses leading to the conferring of a degree.	Review was completed in April 2000, concluding that public benefits of restrictions outweigh costs.	Act was retained without reform	Meets CPA obligations (June 2001).
Tasmania	*Vocational Education and Training Act 1994*	Requires registration of training providers and accreditation of training courses.	Review completed in 2000. The Government is considering the review's recommendations.		Council to finalise assessment in 2003.
ACT	*Vocational Education and Training Act 1995*	As above.	Intradepartmental review concluded that public benefit of restrictions outweighs costs.	Act was retained without reform. Amendments were proposed to meet national requirements for mutual recognition of training providers.	Meets CPA obligations (June 2001).
Northern Territory	*Northern Territory Employment and Training Authority Act*	As above.	Act was not included in legislation review schedule. The Northern Territory has advised the Council that its legislation is consistent with that of other jurisdictions in which reviews have found that restrictions provide a net public benefit.		Meets CPA obligations (June 2002).

Table 12.3: Review and reform of legislation regulating universities

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Higher Education Act 1988*	Provides for the approval of courses of study as advanced education courses.	Act was not included in NCP legislation review program. New South Wales has advised the Council that the Act has been recently amended following a review that involved extensive consultations with external stakeholders.		Meets CPA obligations (June 2002).
Victoria	*Tertiary Education Act 1993*	Requires courses to be accredited.	Review was completed in 1998. Accreditation procedures were found to be in the public interest. The review recommended removal of the requirement that applicants, seeking approval to conduct courses leading to higher education awards, should demonstrate the need in Victoria for the course of study	The Government accepted the review recommendations and Parliament passed the reforms to legislation in 1997. In 2001 Victoria enacted the *Post Compulsory Education Acts (Amendment) Act 2001* for the principal purpose of amending the Tertiary Education Act so that it provided for the full implementation of the Protocols.	Meets CPA obligations (June 2002).

(*continued*)

Table 12.3 continued

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	Various Acts establishing universities in Queensland.	Potentially restricts the ability of each university to apply revenue, in that revenue must be applied solely for university purposes.	Review was completed in 2001 and found that the restriction did not have a significant impact on competition.	Act was retained without reform.	Meets CPA obligations (June 2002).
	Higher Education (General Provisions) Act 1989	Establishes accreditation and monitoring procedures for higher education providers that wish to establish in Queensland.	Review completed in 2001. The review recognised the value of accreditation provisions being nationally uniform. It found that the restrictions were justified on a number of public benefit grounds.	The Treasurer endorsed the review recommendations in August 2001. Existing regulatory regime was retained in the public interest	Meets CPA obligations (June 2002).
Western Australia	*Curtin University of Technology Act 1966* *Edith Cowan University Act 1984* *Murdoch University Act 1973* *University of Notre Dame Australia Act 1989* *University of Western Australia Act 1911*	Governs the investment of university funds (with variation between universities).	Review was completed in 1998, concluding that most restrictions were minor and in the public interest and that investment provisions for Edith Cowan should be aligned with other universities.	Review recommendations have been endorsed by the Government. The amendments to the Edith Cowan University Act are being progressed through the State's Repeal and Amendment (Competition Policy) Bill.	Council to finalise assessment in 2003.
	University Colleges Act 1926	Restrict access to university lands, controls the use of land and provides for the transfer vested land to freehold land.	Review was completed in 1998. Restrictions were assessed as being in the public interest.	Act was retained without reform.	Meets CPA obligations (June 2001).

(*continued*)

Table 12.3 continued

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*University of Adelaide Act 1971* *Flinders University of South Australia Act 1966* *University of South Australia Act 1990*	Acts were assessed as not restricting competition.	Review was not required.	Acts were retained without reform.	Meets CPA obligations (June 2002).
Tasmania	*Universities Registration Act 1995*	Requires institutions wanting to operate as universities to be registered and enables conditions to be imposed on their conduct.	Minor review was completed. Restrictions relating to the registration and accreditation of private universities were retained in the public interest.	Act was retained without reform.	Meets CPA obligations (June 2002).
ACT	*Canberra Institute of Technology Act 1987*	Provides an exemption from ACT taxes and charges. Cabinet decided that the ACT Revenue Office would review the institute's taxation liability in the second half of 1998.	Review was completed in 1999. Act was assessed as not restricting competition.	Act was retained without reform.	Meets CPA obligations (June 2001).
	University of Canberra Act 1989	Act assessed as not restricting competition.	Review was not required.	Act was retained without reform.	Meets CPA obligations (June 2001).

Child care

Child care generally refers to arrangements for the care of children (usually under 12 years of age) by people other than their parents. It can be formal child care — such as preschool, a child care centre, family day care and before and after school care — or informal care, which is care that is nonregulated and includes care by family members, friends and paid babysitters. According to the Australian Bureau of Statistics, 51 per cent of children under 12 years of age used some kind of child care in 1999 (ABS 2000a).

Legislation to regulate child care services exists in all jurisdictions. Regulation usually requires the operator of a child care business to hold a licence. Other requirements relate to matters such as health and safety considerations and the meeting of staff/child ratios. NCP issues arise in the regulation of formal child care, usually with licensing requirements that are linked to funding arrangements. In addition, competitive neutrality issues may arise because local government-owned businesses often provide formal child care services in competition with private providers.

Review and reform activity

State and Territory governments are considering legislation regulating child care under the NCP program. In the 2001 NCP assessment, the Council assessed the ACT as having met its CPA clause 5 obligations in relation to legislation that regulates child care. The ACT repealed the *Children's Services Act 1986*, replacing it with the *Children and Young People Act 1999*.

Commonwealth

While legislation review obligations are not relevant in this case, the Commonwealth provides financial assistance for child care users for both approved and registered care. More assistance is available to families who use approved care because these services meet the government's accountability requirements. Approved child care is care provided by a service that complies with Commonwealth accountability requirements and has been approved to receive Child Care Benefit on behalf of families. Registered child care is generally care that is provided on a more informal basis and where the service does not meet the requirements for 'approved' care.

A New Tax System (Family Assistance) Act 1999 and *A New Tax System (Family Assistance Administration) Act 1999* prescribe eligibility conditions for child care providers who wish to receive financial assistance through the Child Care Benefit. Assistance varies depending on whether the service is part of a scheme that meets the Commonwealth Government's accountability

requirements and/or receives government funding from other sources. Services that are approved for Child Care Benefit are increasingly required to participate satisfactorily in formal quality assurance systems – the Quality Improvement and Accreditation System for long day care centres and Family Day Care Quality Assurance for family day care services. In the future, services that provide outside school hours care services will be required to participate in a formal quality assurance system.

The process of gaining approval for Commonwealth funding is open and information for applicants is readily available. The Department of Family and Community Services produces a guide for existing and potential investors in child care, and direct assistance is also available from the department's offices in States and Territories. The available information covers a national planning system which builds on existing partnerships with State and local governments, as well as information on what needs to be done to succeed in a child care venture (including details about the operating requirements and approval processes for the different types of child care).

The Acts were assessed under the Commonwealth's legislation gatekeeper process and accompanied by a regulation impact statement. The Council assesses the Commonwealth as having met its CPA clause 5 obligations in this area.

New South Wales

New South Wales is planning to replace the *Children (Care and Protection) Act 1987*, which regulates commercial child care services, with a regulation in the *Children and Young Persons (Care and Protection) Act 1998* and has undertaken to consider NCP principles when preparing the regulatory impact statement for the new regulation. New South Wales will release the regulatory impact statement for consultation. New South Wales anticipates the new regulations, which are intended to remove unnecessary prescription, will be introduced before 1 September 2002.

New South Wales is close to finalising reform in this area consistent with CPA clause 5. The Council will make a final assessment in June 2003.

Victoria

Victoria's *Children's Services Act 1996* was subject to the State's legislation gatekeeper process when introduced into Parliament. The Act required service providers to be licensed. It also involved individual regulations that may limit who can provide services and increase costs to service providers. Key examples include:

- more stringent assessment of the fitness and propriety of licensees and their nominees;

- the required payment of licensing fees;
- introduction of pre-employment criminal record checks of staff and others who directly care for children;
- qualified staff be employed in all services;
- the requirement for a minimum two-year early childhood qualification for staff;
- the requirement that staff be trained in first aid.

Victoria considers that there is a clear public benefit in restricting the market through licensing, which safeguards the care and protection of preschool children (Department of Treasury and Finance 2002, p. 147). It also considers that the provisions stimulate, rather than limit, competition. The Government argues that the Act:

- enhances standards that are critical in ensuring the protection and care of children;
- promotes competition among operators, as families will access services that emphasise quality service provision and the accountability of service users;
- ensures market entry of commercial and not-for-profit operators occurs on the same basis as that of public operators;
- brings Victoria into line with other States and Territories and, by implementing a minimum two-year early childhood qualification for staff, promotes the development of training courses by the tertiary sector; and
- increases market opportunities for proprietors through incentives to provide a wider range of children's services by increasing the commonality of requirements for restricted and standard children's services.

The Council agrees there is a case for ensuring a high quality of care for children using child care services. The Council assesses Victoria as having met its CPA clause 5 obligations in this area.

Queensland

A major review of Queensland's child care legislation and its NCP implications has been under way since 1999. The review is examining the impact of licensing fees and the costs of meeting licensing requirements. These costs arise from the requirements to employ qualified staff and meet building and facility standards. The review is also examining the impact of regulating different service types within the child care sector that previously have not been regulated.

Queensland released the public benefit test report for the review for public consultation in December 2001 with comments received until 31 January 2002 used to finalise the report. Queensland anticipates that legislative amendments implementing the final policy approach will be made during 2002. Queensland is nearing completion of its review and reform in this area. The Council will make a final assessment in 2003.

Western Australia

The *Community Services Act 1972* and the Community Services (Child Care) Regulations 1988, which regulate child care and the registration of child carers in Western Australia, are not included in the State's legislation review program. A Bill to replace this and other legislation is being developed. Western Australia has advised the Council that the drafting of this Bill now appears unlikely to be finalised until the second half of 2002, so the Government has commenced a legislation review of the existing child care legislation, to be completed before July 2002. The new Bill will also be checked to ensure compliance with clause 5 of the CPA. The Council will make a final assessment in 2003.

South Australia

The South Australian review of the *Children's Services Act 1993* recommended no change to the legislation. The legislation contains some restrictions on competition, but the review found these to be justified because they seek to ensure the health, safety and welfare of the children and the maintenance of a healthy environment. The review considered the financial and administrative burdens of complying with the Act to be less than the benefits of ensuring required service standards are met. The Government has accepted the report recommendation.

The review of the *Children's Protection Act 1985* found that that restrictions in the Act are unjustified and may limit the ability to appoint an officer best suited to needs of the child. Cabinet has approved draft amendments to the Act.

The Council assesses South Australia as having met its CPA clause 5 obligations in this area.

Tasmania

Tasmania transferred the child care provisions of the *Child Welfare Act 1960* to new child care legislation: the *Children, Young Persons and Their Families and Youth Justice (Consequential Repeals and Amendments) Act 1998* and the *Child Care Act 2001*. The legislation, like that of other jurisdictions, provides for the licensing of child care providers and establishes standards of care. The new legislation was assessed under the State's legislation gatekeeper

requirements. The Department of Education prepared a regulatory impact statement in respect of the proposed legislation and made this available for public comment in September 2000 to facilitate gatekeeper assessment of the new legislation.

The Council assesses Tasmania as having met its CPA clause 5 obligations in this area.

The Northern Territory

The Northern Territory review of the *Community Welfare Act* was completed in April 2000. The review recommended: to the extent possible, expressing standards for child care in terms of outcomes to be achieved rather than prescribed practices; clarifying conditions for granting a child care centre licence; and giving consideration to including all purchased child care within the scope of the legislation. The then Government noted the review's comments that the public benefits of restrictions generally outweigh any costs. It also noted that some review recommendations will require legislative change. It delayed any decisions on alternative methods for achieving the voluntary care-related objectives of the Act, pending the development of broader proposals on voluntary care and support services for young children. The current Government indicated that it will consider the review outcomes in 2002.

The Northern Territory is progressing its review and reform in this area. The Council will make a final assessment in 2003.

Table 12.4 summarises the progress of governments' review and reform activity relating to the regulation of child care.

Competitive neutrality

Significant government-owned businesses providing child care services (usually local government), need to apply competitive neutrality principles. All jurisdictions except Queensland, require government-owned child care businesses to set prices that reflect the full cost of production. This means ensuring pricing is based on the costs incurred in providing the service, as well as appropriate adjustments to prices to remove any advantage of public ownership.

Queensland's competitive neutrality policy means that government businesses that provide child care services are not generally of a size that ensures the automatic application of competitive neutrality principles (that is, income in excess of $5 million per year). Queensland encourages smaller government businesses to apply a voluntary code of conduct, based on competitive neutrality principles. Some Queensland local governments choose to apply the voluntary code. Other local governments, however, have chosen

not to apply the code, so child care provision in these areas is not subject to competitive neutrality principles.

Under Victoria's competitive neutrality policy, Government businesses may choose not to apply competitive neutrality principles if they can show that this would compromise the business's broader social, environmental and public policy objectives. Victoria considers the availability of child care services to be an important social policy objective, so a public interest test may be necessary before competitive neutrality pricing is applied. The public interest test requires a transparent exploration by government child care providers of approaches to providing the service, including competitive neutrality pricing, to ascertain which option provides the greatest community benefit. Victoria requires that any subsidy provided child care provision to be transparent and publicly documented.

Table 12.4: Review and reform of legislation regulating child care

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*A New Tax System (Family Assistance) Act 1999* *A New Tax System (Family Assistance Administration) Act 1999*	The Child Care Benefit is provided to families using 'approved' child care services.	The Commonwealth has provided the Council with a public benefit case for the legislation. Approval is necessary to maintain the quality of services. The conditions for approval are not unduly onerous and do not discriminate among providers.		Meets CPA obligations (June 2002).
New South Wales	*Child Care and Protection Act 1987* *Children and Young Persons (Care and Protection) Act 1998*	Licensing	Provisions arising from the Child Care and Protection Act are to be transferred to the Children and Young Persons (Care and Protections) Act. The new provisions are to be subject to gatekeeper provisions. In drafting amendments to the regulatory provisions, New South Wales will release a regulatory impact statement for consultation. It expects that this process, which addresses NCP principles will lead to the removal of unnecessary prescription in the regulations.	New South Wales anticipates that the new regulations will be introduced before 1 September 2002.	Council to finalise assessment in 2003.
Victoria	*Children's Services Act 1996*	Licensing, operating requirements, standards setting	Act was reviewed as part of the gatekeeper process when introduced. Victoria considers that the provisions of the Act are necessary to ensure appropriate standards of child care and will stimulate competition in the industry.		Meets CPA obligations (June 2002).
Queensland	*Child Care Act 1991* Child Care (Child Care Centres) Regulation 1991 Child Care (Family Day Care) Regulation 1991	Licensing, operating requirements, standards setting	The public benefit test report for the review was released for public consultation in December 2001 with comments received until 31 January 2002. The report is being revised based on feedback received during the consultation process.	Queensland anticipates that legislative amendments implementing the final policy approach will be made during 2002.	Council to finalise assessment in 2003.

(*continued*)

Table 12.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Community Services Act 1972* and the Community Services (Child Care) Regulations 1988	Licensing, standards, operating procedures	A Bill to replace this and other legislation is being developed but is unlikely to be finalised until the second half of 2002. A legislation review of the Act has been commenced and will be completed before July 2002. The new Bill will comply with the CPA.		Council to finalise assessment in 2003.
South Australia	*Children's Services Act 1985*	Licensing, standards. operating procedures	Review was completed in 2000.	Act was retained without reform.	Meets CPA obligations (June 2002).
	Children's Protection Act 1993	As above	Review was completed in 2000. It found that that restrictions in the Act may limit the ability to appoint an officer best suited to needs of the child.	Cabinet has approved drafting amendments.	Council to finalise assessment in 2003.
Tasmania	*Child Welfare Act 1960*		The child care provisions of the Act were transferred to new child care legislation, the *Children, Young Persons and Their Families and Youth Justice (Consequential Repeals and Amendments) Act 1998* and the *Child Care Act 2001*. A number of anticompetitive elements were identified in the gatekeeper process. A regulatory impact statement was made available for public comment in September 2000.		Meets CPA obligations (June 2002).

(*continued*)

Table 12.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Children's Services Act 1986*	Licensing, standards setting	Public review was completed in 1999.	Act was assessed as not restricting competition. The Legislative Assembly passed the replacement Act, the *Children and Young People Act 1999*, on 21 October 1999.	Meets CPA obligations (June 2001).
Northern Territory	*Community Welfare Act*	Licensing, standards setting	Targeted review completed in 2000 and is awaiting the Government's response. It recommended: expressing standards for child care in terms of outcomes to be achieved rather than prescribed practices; clarifying conditions for granting a child care centre licence; and giving consideration to including all purchased child care within the scope of the legislation.		Council to finalise assessment in 2003.

Gambling

Gambling has been part of Australian life since European settlement. The industry grew at an unprecedented rate in the last decade, with the greatest expansion occurring in the jurisdictions that allow most liberal access to modern gaming machines and casinos. Government revenues have grown significantly as a result of this expansion in gambling, rising from $1.8 billion in 1989-90 to over $4.3 billion in 1999-2000 (Tasmanian Gaming Commission 2001). In real terms, this is an average annual growth of around 7 per cent .

Gambling encompasses a wide range of activities, including:

- gaming machines and keno;
- casino games;
- TABs and other betting on horse racing, other racing and sporting events;
- lotteries;
- interactive gambling; and
- other forms of betting such as raffles and bingo.

Legislative restrictions on competition

Gambling activity has long been subject to government regulation. Many of these regulations are aimed at achieving governments' social objectives — for example, seeking to ensure the probity of gambling operators and the integrity of gambling products, minimising harm and protecting consumer rights. Achieving these objectives can sometimes involve restricting competition. Regulations that restrict competition include those governing:

- the operation of different types of venue, including the distribution of gaming machine licences;
- access to gaming machine licences (for example, quantity restrictions);
- ownership structures;
- the monitoring of gaming machines;
- the operation of casinos and lotteries, particularly exclusive licences;
- the conditions attached to the privatisation of TABs, particularly exclusive licences;

- betting, including restrictions on the types of event on which betting can be conducted, the treatment of on-course and off-course betting services, advertising and accessibility to interstate gambling services; and
- internet gambling.

Regulating in the public interest

In considering governments' legislation review and reform activity, the Council focused on the CPA clause 5 tests of whether restrictions provide a net community benefit and whether restricting competition is the only way of achieving a government's objectives. Given the reliance of some governments on revenue from gambling activity, it is important to ensure regulatory arrangements focus on addressing public interest objectives, such as minimising gambling-related harm and ensuring the probity of gambling operators and the integrity of gambling products. The Productivity Commission's 1999 inquiry into the economic and social impacts of gambling (PC 1999a) made an important contribution to the development of the principles for regulating gambling in the public interest. Further work on these principles is under way following CoAG's decision in November 2000 to develop a national strategic framework aimed at minimising problem gambling.

Productivity Commission inquiry

At the direction of the Federal Treasurer, the Productivity Commission reviewed the economic and social impacts of gambling, reporting in November 1999. While this inquiry was not an NCP review, the Productivity Commission used an NCP framework to examine the effects of the different regulatory structures that surround Australia's gambling industries. The Productivity Commission considered the relative harm from different types of gambling and examined regulatory measures, providing general guidance to policy-makers on the broad nature of regulations that best address public interest objectives.

The Productivity Commission inquiry found, in broad terms, that lotto and lotteries are least harmful while wagering, gaming and casino table games are more harmful. It also found that certain restrictions aimed at minimising harm, ensuring probity and protecting consumers are in the public interest. Such restrictions include probity measures with appropriate risk management,[3] requirements for operators to provide consumer information

[3] These include measures that are related to the level of risk involved, so they would be more stringent in a casino than for a local bingo night, and where government oversight is necessary for consumer protection. Operators should be responsible for managing the risk to their operations.

on the nature of the games and the likelihood of receiving large payouts, and codes of conduct. The inquiry found these measures provide a net community benefit and also meet the second CPA guiding principle — that is, that the restriction on competition is the only way in which to achieve the policy objective.

The Productivity Commission also examined other measures aimed at harm minimisation, probity and consumer protection, including exclusive licences, requirements based on venue type and restrictions on supply or access. The Productivity Commission questioned whether such restrictions are justifiable in terms of meeting these objectives. It argued, for example, that offering exclusive casino licences is a very indirect way of tackling accessibility and harm minimisation, and that there is little evidence that such licences lead to good social outcomes overall. It also noted:

> … *uncertainty justifies a cautious approach to liberalisation, but it does not justify protecting the interests of entrenched gambling providers (for example, by long-term exclusivity arrangements …).* (PC 1999a, p. 12.12)

The Productivity Commission's work helps define the NCP task for governments. Regarding those measures directly aimed at harm minimisation, probity and consumer protection, the Productivity Commission inquiry found that they satisfy both elements of the CPA clause 5 guiding principle: that is, they provide a net community benefit and are the least restrictive way of meeting those aims. The less direct measures identified by the Productivity Commission — such as exclusive licences, discrimination based on the type of venue and limits on gamblers' access to facilities or on operators' capacity to supply gambling facilities — do not satisfy the second element of the guiding principle. For these types of legislative restrictions, governments must show that there is no less restrictive way in which to achieve the objective of the legislation.

Governments sometimes also impose restrictions for reasons other than harm minimisation, probity or consumer protection — for example, to generate government revenue, to provide special treatment for certain industries or to promote economic development and tourism. For restrictive measures imposed for these other reasons, NCP compliance requires governments to meet both CPA clause 5 tests. Governments thus need to consider any pro-competitive alternatives. The Council has published an analysis of its approach to considering review and reform of gambling legislation, taking account of the Productivity Commission findings (NCC 2000).

CoAG agreement on gambling

On 3 November 2000 CoAG discussed gambling as a matter of national interest, focusing on problem gambling. CoAG agreed that the Ministerial Council on Gambling would develop a national strategic framework (to be implemented by the State and Territory governments) aimed at prevention,

early intervention and continuing support, effective partnerships, and national research and evaluation.

CoAG identified measures to begin the process, including specific ones to apply to gaming machine venues. These include measures that require operators to display warnings about the risks of problem gambling, to enable patrons to be aware of the time spent gambling, and to display information on the chances of winning a major prize. Because the Productivity Commission inquiry established a net public benefit case for these measures, the Council considers that government action to implement them is consistent with CPA clause 5 obligations.

At its meeting in September 2001, the Ministerial Council on Gambling identified five key areas for national research:

- a national approach to definitions of problem gambling and consistent data collection;
- the feasibility and consequences of changes to gaming machine operation;
- the best approaches to early intervention and prevention to avoid problem gambling;
- a longitudinal study of problem gamblers and policy measures that would work for them; and
- benchmarks and ongoing monitoring studies to measure the impact and effectiveness of strategies to reduce the extent and effect of problem gambling.

The research priorities identified by the Ministerial council will assist governments to develop practical policy tools for reducing the negative social impacts of gambling, and will help to distinguish which of those tools are relatively more effective.

Review and reform activity

All States and Territories scheduled NCP reviews of their gambling legislation. Most reviews are completed and governments have yet to act on only a few, mainly complex reviews. Many governments also have new legislation that restricts gambling activity. Clause 5(5) of the CPA obliges them to have evidence to demonstrate that the new legislative restrictions are in the public interest.

- All jurisdictions except New South Wales, South Australia and the Northern Territory[4] have completed reviews of legislation regulating casinos and have announced their policy approaches.

- Victoria, Western Australia and the ACT have reviewed their TAB legislation. New South Wales, Queensland, South Australia and the Northern Territory have repealed TAB legislation and enacted new legislation to privatise their TABs. New South Wales has reported on its clause 5(5) obligations for some of this new legislation. Tasmania has enacted new legislation to corporatise its TAB.

- Victoria, Queensland, Tasmania and the ACT have reviewed lotteries legislation and announced policy responses. Queensland is further reviewing its lotteries legislation in its omnibus review of gambling legislation which is under way. Western Australia has reviewed its legislation, but has not responded to the review recommendations. New South Wales and South Australia are reviewing their legislation.

- Victoria, Tasmania and the ACT have reviewed gaming machine legislation. Victoria and Tasmania have announced their policy responses. The ACT Gaming and Racing Commission is conducting a further review of the ACT's legislation. The other jurisdictions have not finalised their reviews.

- In New South Wales, Victoria and the ACT reviews of racing legislation are complete, and the Governments have announced their responses to the review recommendations. Queensland has reviewed elements of its legislation and announced its response. Western Australia and Tasmania have reviewed their racing legislation but are yet to announce their responses. South Australia is reviewing its racing legislation as part of an omnibus review of gambling legislation, which is still under way.

Table 12.5 summarises the progress of governments' review and reform activity relating to the regulation of gambling.

Casinos

All Australian casinos, except Burswood Casino in Western Australia, operate with some form of exclusive licence. That is, the casinos have exclusive rights to supply casino games within some geographic boundary.

In Western Australia, the exclusivity period for the Burswood Casino has expired, but the legislation still provides considerable protection by restricting casino games to licensed casinos and requiring that persons wishing to establish another casino within 100 kilometres must, among other requirements, house the casino in a complex of similar magnitude to that of

[4] In the Northern Territory, casino regulation is included in the *Gaming Control Act*.

the existing casino. Western Australia's review recommended that the Government consider negotiating with the Burswood Casino operators to remove or relax remaining restrictions, but only after undertaking a full public benefit assessment.

Victoria and Queensland cited the costs of compensating casino operators as the reason for not revoking their exclusive licences. While neither quantified the compensation that may be necessary to revoke the exclusive licences, the prices paid for the licences suggest that compensation may need to be substantial.

The ACT's NCP review found no public interest justification for the exclusive licence held by Casino Canberra but, like Victoria and Queensland, considered compensation for early revocation would be prohibitive. The review recommended that the Government signal that it will not extend the licence. The ACT Government has now stated that it will not extend the exclusivity of the current Casino Canberra licence beyond the current licence period.

The New South Wales Treasury reviewed the exclusive casino licence for Star City Casino in 1998. The review recommended retaining the exclusive licence. It noted that the tender process, the upfront fee and the special casino taxation regime minimise the anticompetitive effects of the licence. The review report also highlighted the ease of monitoring for illegal activity and promoting and monitoring product integrity in a single venue, and considered that the Government is better able to manage social problems if there is only one venue. The Government signalled its support for these conclusions but has asked the Treasury to consider further material in developing the review recommendations. This work is under way. The probity, consumer protection and harm minimisation measures favoured by New South Wales are not among the policy measures for which the Productivity Commission found a net public benefit. New South Wales reported that it expects the revised report to address these issues.

Following a review, South Australia decided that the exclusive casino licence in that State is justified by the casino's contribution to regional development and Government revenue, and by the ease of monitoring gaming activity and implementing harm minimisation strategies in a single venue. South Australia is further reviewing all gambling matters (including its approach to the casino licence) following the 3 November 2000 CoAG meeting and the 1999 Productivity Commission inquiry. This review has not yet reported.

Tasmania repealed the *Casino Company Control Act 1973*, which restricted the ownership of the Wrest Point casino to Australian citizens. Other controls on casino operations arise from provisions in the *Gaming Control Act 1993*. The review of this latter Act did not include the Deed between the Government and Federal Hotels, Australian National Hotels and the Tasmanian Country Club-Casino. [The Deed provides for an exclusive licence for the signatories to operate casinos and machines in Tasmania until 2008. Tasmania has stated that it does not intend extending or renewing the licence

once it as expired. In addition, any new restrictions would be subject to the gatekeeping process.

The Northern Territory is reviewing casino restrictions in the *Gaming Machine Act* and Regulations, and the *Gaming Control Act*. A full public review of these Acts is under way.

Assessment

The Productivity Commission inquiry questioned many of the arguments that governments raised to support exclusive casino licences, including that the casinos contribute to regional development and government revenue, and that monitoring costs are less for a single facility. The Productivity Commission found that a single venue reduces people's access to table games, which may reduce gambling-related harm, but it also considered that more direct measures — such as harm minimisation programs, including promotion of a greater understanding of the risks in gambling, self-exclusion procedures, mandatory codes of conduct for operators, and restrictions on access to funds from ATMs at gambling venues — are likely to be more effective in reducing gambling-related harm. Moreover, the Productivity Commission's suggested measures for improving probity — whereby the type and level of measure are matched to the activity, and the gambling operator meets the costs — are unlikely to significantly increase the monitoring costs faced by government, even if there are multiple venues. Queensland, Tasmania and the Northern Territory have multiple casinos, yet the cost to government of ensuring probity has not been raised as an issue in these jurisdictions.

The Council accepts that the cost of compensating licence holders where exclusive licences are revoked may justify a decision not to revoke current licences. It considers that governments meet CPA clause 5 obligations when they show, through rigorous analysis, that the cost of compensation outweighs the benefit from removing exclusive casino licences. Governments that have decided to retain exclusive licences can facilitate the removal of those licences. As periods of exclusivity shorten, governments may be able to encourage casino operators to relinquish their exclusive licences earlier than the date in the contract agreement. The Northern Territory Government, for example, truncated the exclusive licences held by Northern Territory casinos for the operation of gaming machines. It negotiated early termination (by one year for the Alice Springs casino and by three years for the Darwin casino) by providing a more advantageous tax regime for the casinos compared with that for the other venues with gaming machines. Governments can also decide not to renew exclusive casino licences when they expire, as the ACT Government has done.

The Western Australia Government did not renew the exclusive licence for the Burswood Casino on expiry and it has not issued any other exclusive licences. Exclusive licences are no longer a barrier to entry in Western Australia, although the *Casino (Burswood Island) Agreement Act 1985* contains other significant barriers to entry (see above) which can be removed

only via negotiation with the Burswood Casino. The Western Australian Government is negotiating with Burswood Casino on these matters.

The Council considers that Victoria, Queensland, Tasmania and the ACT have met their CPA clause 5 obligations relating to casino regulation. Western Australia no longer has an exclusive licence provision and is negotiating with the casino operator to remove other barriers to entry. New South Wales, South Australia, Western Australia and the Northern Territory are progressing their CPA review and reform obligations, but did not conclude their work by the 30 June 2002 target set by CoAG.

For the 2003 NCP assessment, New South Wales, South Australia and the Northern Territory will need to demonstrate that their casino licensing arrangements meet the CPA clause 5 obligations. Given the public interest evidence from the 1999 Productivity Commission inquiry, approaches such as not providing new exclusive casino licences, announcing that the Government will not be renewing existing exclusive licences on expiry, and removing any other legislative barriers that forestall new entry and/or favour incumbents would be likely to meet CPA principles, as would the harm minimisation, probity and consumer protection measures identified by the Productivity Commission. The Council will finalise its assessment of CPA compliance in 2003, when it will look for:

- New South Wales to provide the public benefit arguments supporting its favoured approaches to probity, consumer protection and harm minimisation; and

- South Australia and the Northern Territory to complete review and reform activity.

TABs

TAB legislation in every jurisdiction provides an exclusive licence to operate off-course totalisator betting.[5] New South Wales, Victoria, Queensland, South Australia and the Northern Territory have privatised their TABs. New South Wales, Queensland and the Northern Territory reviewed their TAB exclusive licences in the context of their privatisations. While the Council has previously reported that it considers that the clause 4(3) structural reform obligations do not apply to TABs, clause 4(2) does apply. The privatisation process should have addressed the issue of separating industry regulation from the TAB, if there was any such regulation.

The NSWTAB has an exclusive licence to monitor gaming machines (the centralised monitoring system — CMS) and provide linked jackpots, in addition to its exclusive licence to operate as a totalisator. The NSWTAB also

[5] TABs also offer other gambling products, such as fixed-odds betting on sporting events.

has an exclusive investment licence to supply, finance and share the profits from gaming machines in hotels.

New South Wales stated that the State's racing industry[6] would not be viable without the exclusive betting licence. The findings of the Productivity Commission inquiry appear to cast some doubt on this claim. The Productivity Commission argument is that granting the exclusive licence, while providing a means of raising funds (which are then made available to the racing industry), is not guaranteed to result in the 'right' amount of funds or the 'right' number of races. Further, the Productivity Commission considered that the exclusive licence would offer little protection to the NSWTAB (and therefore to racing industry funding) if alternative providers offer home gambling and sports betting services.

New South Wales also argued that the exclusive betting licence ensures at least two totalisators operate and compete in Australia, with the NSWTAB acting as a counter to the large, privatised Victorian TAB. The New South Wales report noted, however, that both totalisators face competition, not just from each other but also from interstate and international wagering operators. Further, the validity of the argument for at least two totalisators rests on the definition of the market they service. If this market is defined narrowly (as pari-mutuel betting), then competition will be lessened if there is only one service provider. The market is broader, however, with pari-mutuel betting being only part of a larger gambling services market where close substitutes for totalisator betting include betting with bookmakers and betting via the internet or the telephone with other betting service providers both in Australia and overseas.

New South Wales further argued that the cost of breaking the exclusive licence agreement (which does not expire until 2012) would more than outweigh any benefits. It explained that after the licence expires, it may consider introducing multiple wagering licences. In the meantime, New South Wales stated that:

> … *[it] will continue to work with other jurisdictions through the Australian Racing Ministers' Conference and the CoAG Committee on Regulatory Reform to minimise any adverse cross-border impacts.* (New South Wales Government 2002, p. 31)

Potential competition questions also arise from the NSWTAB's exclusive investment licence. Because it both monitors the use of gaming machines across all venues and profits from the use and supply of gaming machines through the investment licence, the NSWTAB may face a conflict of objectives as it seeks to both ensure probity and maximise returns. The New South Wales Government reported that controls and procedures within the NSWTAB adequately address this matter. The Government stated that the

[6] In this context, the 'racing industry' refers to thoroughbred, harness and greyhound racing.

NSWTAB 'appears to be diligent in ensuring that staff throughout its CMS and non-CMS operational units are aware that CMS data about club and hotel gaming operations must remain confidential to the CMS unit' (New South Wales Government 2002, p. 32). The Council has no reason to doubt the probity of the NSWTAB, but nevertheless observes that a more structured ringfencing arrangement would give greater assurance on probity matters. The New South Wales Government did not offer any public benefit argument in support of the exclusive investment licence.

Victoria's privatised TAB, TABCORP, has an exclusive 18-year licence for off-course pari-mutuel betting. Victoria reviewed this licence as part of its NCP review of racing and betting. Although not clearly stated in the review report as a net benefit, the exclusive licence is considered to:

> *... guarantee an adequate prize pool. This is largely due to the reality that betting resources can be mobile and will move to a more attractive pool size if one is not available locally. The existence of licensing arrangements in New South Wales which ensure a large pool size is of particular concern. The main issue on which to assess the conditions of TABCORP's exclusive licence therefore lies in the extent to which they are necessary to shore up an adequate prize pool size in Victoria.* (CIE 1998, p. 66)

Victoria's rationale for TABCORP's exclusive licence is similar to that of New South Wales for the NSWTAB exclusive licence: that is, that the exclusive licence is necessary to generate adequate funds for the racing industry. The 1999 Productivity Commission inquiry found that government-enforced exclusivity is not needed to achieve a large betting pool, and the inquiry report does not support the Victorian view. Carrying the Victorian and New South Wales argument to a logical conclusion would mean that a national betting pool is preferable to separate State-based pools because the national pool would be larger and would generate a larger prize pool.

Other governments are at varying stages of their review and reform activity relating to the operation of TABs. Some governments have completed reviews but are still to announce their response to the review recommendations, often because related reviews affecting the racing industry are not yet complete.

- Queensland's omnibus review of gambling regulation includes a review of the new legislation that provides an exclusive licence to the TABQ. This review has not yet reported.

- Western Australia's review of its TAB legislation recommended that the legislation should allow the Minister to grant additional off-course totalisator licences. Western Australia is considering this recommendation now it has completed its review of the governance structure of the racing industry.

- South Australia is reviewing its TAB arrangements in the context of its overall approach to regulating gaming following the 1999 Productivity

Commission inquiry and CoAG's national approach to problem gambling. South Australia sold its TAB in August 2001.

In Tasmania, the *Racing Regulation Act 1952* regulates the operation of totalisator betting and the relationship of the TAB (now the TOTE) with the racing industry. (The Tasmanian Government repealed the minor gaming provisions from the *Racing and Gaming Act 1952* in 2001, and introduced new minor gaming provisions in the Gaming Control Act. The Racing and Gaming Act was renamed the *Racing Regulation Act 1952* as all gaming provisions have been repealed from that Act leaving the regulation of racing and race betting only.) Tasmania is reviewing the elements of the Act together with the *Racing Act 1983*. Tasmania's intends to develop new legislation to replace both Acts, and to review this legislation under the State's legislation gatekeeper process. Tasmania has not scheduled an NCP review of the legislation governing the operation of the TOTE. As part of developing legislation to replace the *Racing Regulation Act 1952*, Treasury is considering options for the future regulatory framework for TOTE Tasmania. This has included discussions with TOTE about possible regulation under the Gaming Control Act on a non-exclusive basis.

- The ACT review recommended that the Government allow new licences for TABs operating wholly within the ACT, but not allow interstate totalisators until systems are in place to extract racing turnover taxes (and any other turnover taxes and licences) from wagers that originate in the ACT. The Government announced partial support for these recommendations. It did not support the recommendation to allow fixed odds betting on racing at venues other than licensed racecourses. It also noted that care needs to be exercised in assessing the social impacts of opening up the totalisator market. Further, the Government noted that loss of TAB revenue from clients who do not live in the ACT has implications for ACTTAB, the Government and the industry, and needs to be addressed.

- The Northern Territory Government reviewed its new TAB legislation but has not yet announced its response. The Northern Territory Government advised that it has accepted the review recommendations, although these have not been given to the Council. The Northern Territory has undertaken to supply the Council with a copy of the review and the Government's response.

Assessment

The governments that have reviewed legislation governing the operations of their totalisators have generally argued that the jurisdiction-based exclusive licence held by the totalisator is warranted. Most jurisdictions consider that the exclusive licence is required to safeguard the totalisator prize pool and, consequently, the funding provided to the racing industry. This view is at odds with the Productivity Commission inquiry finding that while there is a the case for government intervention to overcome the market failures in the

racing industry,[7] TAB exclusivity does not appear necessary to ensure adequate funding for the racing industry.

Given the findings by the Productivity Commission inquiry, the Council's view is that governments that retain exclusive TAB licensing arrangements as being necessary to ensure adequate funding of the racing industry have not satisfactorily addressed their obligations under CPA clause 5. The Council concedes, however, that the cost of compensating some TABs for revoking their exclusive licence is likely to be high (as New South Wales has argued) and may be a reason for retaining exclusive licences until their expiry dates.

The review outcomes in Western Australia and the ACT, along with the New South Wales Government's suggestion that it may consider multiple wagering licences after the current NSWTAB licence expires in 2012, indicate scope for removal of exclusive TAB licences in those jurisdictions. Governments' concern about shoring up prize pools and the cross-border questions (including revenue and taxation sharing arrangements) raised by New South Wales and the ACT suggest that an interjurisdictional approach may be needed to consider the future of exclusive TAB licences. Governments have not yet proposed considering TAB licensing issues in this way.

In the 2003 NCP assessment, the Council will review governments' compliance with CPA clause 5 in relation to TAB exclusive licences. While acknowledging that exclusive licences are unlikely to be removed during the life of the NCP legislation review and reform program, and that arguments such as the cost of compensating TABs for the loss of their exclusive licences may be relevant, the Council will look for governments to consider this issue further, perhaps through an intergovernmental process. Also in the 2003 NCP assessment, the Council will consider remaining legislation review and reform matters relevant to TABs, including:

- the outcome of the Queensland review of the TABQ licence;
- the regulation of TAB operations in South Australia following that State's new review;
- the outcome of Tasmania's review and reform activity, as well as its proposals for reviewing legislation regulating the operation of the TOTE; and
- the Northern Territory's response to the review of its new TAB legislation, including the public benefit reasoning for any restrictions on competition.

[7] Market failure arises because, in the absence of industry regulation, providers of wagering services could avoid contributing to the costs of supplying the racing industry product on which bets are placed. If the providers of the wagering services did not contribute to the racing industry, then the racing industry would decline and would provide too few races.

Lotteries

Like TAB legislation, lotteries legislation is characterised by exclusive licences. Governments usually justify exclusive licences for lotteries on the basis that the licence is necessary to ensure a large enough prize pool to make the lottery sufficiently attractive. The Productivity Commission inquiry did not support this argument, concluding that governments do not need to legislate exclusive arrangements to achieve a large prize pool.

Most governments have reviewed their legislation regulating lotteries. Some jurisdictions have introduced or are considering arrangements providing for more than one lottery provider. Several governments have commenced broad reviews of their gambling regulation, which include lotteries regulation.

- In New South Wales, the *Public Lotteries Act 1996* governs lotteries and other games such as lotto and soccer pools. This Act provides for the licensing of operators of commercial lotteries and the regulation of such games. When NSW Lotteries was corporatised under the *NSW Lotteries Corporatisation Act 1996*, it was granted an exclusive licence for its existing games until July 2007. New South Wales will conduct statutory five-year reviews of these Acts before November 2002, in which it will consider NCP issues.

- After reviewing the *Tattersall Consultations Act 1958* Victoria repealed this Act and replaced it with the *Public Lotteries Act 2000*. The new legislation allows for multiple lotteries licences from 2004, when the Tattersall's exclusive licence expires. Victoria has committed to actively seeking the cooperation of New South Wales in facilitating a national market, once the exclusive licence in that State lapses in 2007. It has also stated that it intends to issue public lottery licences after July 2007 through a transparent, contestable, competitive tender.

- Following its NCP review, the Queensland Government revoked the statutory monopoly provisions applying to the Golden Casket Corporation and replaced them with a limited duration exclusive licence, to allow the corporation to adjust to the commercial environment following its corporatisation. Queensland is now conducting a broad inquiry into gambling regulation, which includes lotteries regulation. This inquiry is due to report in 2002.

- Western Australia's NCP review of its *Gaming Commission Act 1987* concluded that the existing regulatory regime is overly inflexible because it does not allow the Government to appoint a lotteries supplier other than the Lotteries Commission. The review recommended a less restrictive regulatory framework which provides for the Government to license operators other than the Lotteries Commission if it is in the public interest. The Government is considering its response to the review.

  Western Australia also reviewed the *Lotteries Commission Act 1990* and associated rules. This Act provides for the powers and rights of the

Lotteries Commission, including: allowing the commission to enter into agreements with other State lotteries agencies to jointly conduct lotto and soccer pools; allowing it to use trading names and symbols; allowing it to obtain permits directly from the Minister; making it an offence for a person, without the commission's approval, to derive a fee or reward for promoting or forming a syndicate to purchase a ticket in a game conducted by the commission; and allowing the commission to enjoy the status, immunities and privileges of the Crown. The review recommended retaining the restrictions in the Act. The Council has not been able to establish yet whether the current powers of the Lotteries Commission are consistent with a more competitive lotteries market in the State. Competitive neutrality obligations (CPA clause 3) will be relevant if Western Australia introduces a competitive lotteries market that includes the Government-owned Lotteries Commission. The Council will finalise its assessment of Western Australia's compliance with CPA clauses 3 and 5 in relation to lotteries in 2003.

- South Australia has a review of lottery legislation under way as part of its omnibus review of gambling legislation.

- Tasmania completed a review of its gaming legislation in 2000. This review considered the Gaming Control Act, which regulates lotteries in the State. The Tasmanian Government amended the Act in 2001, to provide for the February 2002 expiration of the Tattersall's exclusive licence to sell lottery tickets over the counter, and again in 2002, to extend until 2010 Tattersall's authority to sell lottery tickets in the State. The Gaming Control Amendment (Foreign Games Permit) Bill 2002, when enacted, will provide for the granting of permits (to sell lottery tickets over the counter) to any lottery or gaming operator licensed outside Tasmania.

- The ACT reviewed the *Lotteries Act 1964* as part of its NCP review of gaming and betting legislation. The review found that the current duopoly in the ACT lotteries market derives from the characteristics of the market rather than any legislative restrictions. It found there is no barrier to new entrants. The review recommended no change to the legislation and the Government accepted this recommendation.

- Lotteries in the Northern Territory are regulated under the *Gaming Control Act*, which is currently under review).

Assessment

- The New South Wales Government's statutory five-year review in 2002 will need to show that the exclusive licence is warranted. If it cannot, the Government will need to at least discontinue the licence on expiry.

- Victoria has established the conditions for multiple provision of lottery services after the Tattersall's exclusive licence expires in 2004, so it complies with CPA clause 5.

- Queensland and South Australia need to complete their broader gambling reviews and determine outcomes for lotteries.

- Western Australia's review provides a regulatory framework to address the State's CPA obligations. The Council will look for Western Australia to implement the review recommendations.

- Tasmania now has competing suppliers of over-the-counter lottery services, so it complies with the CPA clause 5.

- The restrictions in the ACT legislation are aimed at probity and do not limit the number of lottery providers. The ACT legislation complies with the CPA clause 5.

- The Northern Territory complies with the CPA clause 5.

Racing and betting

All States and Territories have legislation regulating the racing industry. This legislation restricts competition, typically by providing for the types of race meeting that can be held, the conduct of bookmakers (including licensing), the governance of the racing codes, restrictions on who may participate in race meetings, restrictions on betting on other sports events, and so on.

New South Wales, Victoria, Western Australia and the ACT have completed reviews of all their racing and betting legislation. All other States and Territories, except Tasmania, had reviews under way at 30 June 2002. Tasmania has restructured its racing industry and is drafting new legislation, which it will assess via its legislation gatekeeping process.

The New South Wales review recommended only minor changes to the State's racing and betting legislation. The New South Wales Government accepted the review recommendation to allow bookmakers to operate as proprietary companies with the directors being licensed bookmakers and the shareholders being directors, close family members or associate bookmakers.[8] New South Wales has retained a requirement in the *Racing Administration Act 1998* that a $200 minimum apply to bets placed over the telephone with a New South Wales bookmaker. The minimum bet provision limits competition by restricting the bets that New South Wales bookmakers can accept over the telephone. Similar restrictions do not necessarily apply to telephone bets with other betting operators. In particular, they do not apply to telephone bets taken by the NSWTAB or bookmakers in Queensland, Victoria and the ACT.

The Council raised the matter of the $200 minimum telephone bet with New South Wales during the 2002 NCP assessment. The Council's concern is that

[8] Bookmakers had been restricted to operating only as sole traders.

the measure restricts competition, albeit to a limited degree, while not appearing to contribute to harm minimisation objectives. The review noted that lowering the $200 limit would:

> *... provide greater accessibility to the betting public of bookmaker services, and hence the potential for an expansion of gambling .... increased competition between licensed bookmakers (whether in New South Wales or interstate) and TABs for the off-course market would ensue. Logically, such action would tend towards increasing gambling activity overall.* (Department of Gaming and Racing 2001, p. 99)

The restriction is anticompetitive because it applies differently to different providers of gambling services, in this case only to New South Wales licensed bookmakers. Because interstate bookmakers and the TABs do not face the $200 minimum bet restriction, removing the limit may not increase the level of betting but merely redistribute the bets from those currently able to offer this service, such as the NSWTAB, to the bookmakers. Further, it could be argued that the $200 limit may encourage people to place larger bets than they would otherwise, and thus it may not contribute to harm minimisation.

Licensed bookmakers are a small but significant sector, accounting for around 15 per cent of betting in New South Wales in 1997-98 (Department of Gaming and Racing 2001, p. 31). The impact of the $200 limit on them is not readily apparent; the Council has no access to data that could be used to gauge the value of the bets which may otherwise have been made with New South Wales bookmakers. It is too early to gauge the extent of any redistribution of bets among the TABs and bookmakers in those jurisdictions which have removed the minimum bet requirement. Anecdotal evidence suggests that smaller wagering may be considerable, implying there is some impact on New South Wales bookmakers. The extent to which there is an impact on competition is unclear, however, particularly if the effect is to redistribute wagering to other providers of gambling services.

The review report also considered the current cross border restrictions on providers of gambling services for thoroughbred, harness and greyhound racing. The Racing Administration Act prevents advertising in New South Wales by betting operators not licensed in New South Wales. While it is not illegal to place or accept bets with the betting operators not licensed in New South Wales, the legislation is anticompetitive because it allows one sector of the industry — the New South Wales licensed betting operators — to carry on an economic activity while preventing another sector of the industry — those offering betting services licensed outside New South Wales — from engaging in the same activity. The report states that one of the objectives of this restriction is to 'minimise the opportunity to use New South Wales racing as a betting platform without contributing to its costs' (Department of Gaming and Racing 2001, p. 86). The report considered that the restriction is justified

because it meets this objective.[9] The Government accepted this recommendation.

The review report considered three less restrictive approaches to ensuring adequate funding for the racing industry proposed by the Productivity Commission inquiry and by a submission to the New South Wales NCP review by Jupiters. These options are; an interjurisdictional tax-sharing arrangement; a levy on bets (although the review report does not specify whether this would apply to all bets or only some bets, such as those made with interstate bookmakers); and allowing the racing industry to enter contractual arrangements with interstate bookmakers who use its products. Each of these options was dismissed by the New South Wales review.

The review report does not present convincing public interest evidence to support its approach or for disregarding the three Productivity Commission inquiry proposals. It implies that the revenue sharing proposal is impractical because telephone betting (both with TABs and bookmakers) is not a new betting option, and because smaller jurisdictions may be disadvantaged by tax sharing. The review does not discuss the nature of the issues relating to telephone betting or recognise that it is the smaller jurisdictions which are removing restrictions (or considering doing so). It also states that for the ACT and the Northern Territory bookmakers 'there is insufficient margin to support a viable bookmaking business and tax sharing' (Department of Racing and Gaming 2001, p. 83). It does not explain why this is the case.

The review report does not support a levy to fund the industry, arguing that the United Kingdom racing industry, which is funded by a levy, is not in a good financial position. The review does not draw out the link between a levy on licensed bookmakers and the position of the United Kingdom racing industry.

The review report dismisses contractual arrangements with interstate bookmakers arguing that New South Wales racing already has complex arrangements with interstate racecourses, TABs, clubs and hotels for the use of the racing image, and that New South Wales racing reached these on the understanding that bookmakers are sole traders. The review report considers that the new corporate bookmakers can free ride on these arrangements and that it would be difficult, if not impossible, to 'segregate the bookmakers from existing avenues of broadcast of the racing image without adversely impacting on the existing arrangements' (Department of Racing and Gaming 2001, p. 83). The review report does not explain why this is the case.

The review report considers that in addition to achieving the funding objective, the advertising restriction also prevents a significant increase in

[9] The revenue streams for the New South Wales racing industry are overwhelmingly derived from the payments from the NSWTAB to the industry bodies under the Racing Distribution Agreement. Local licensed bookmakers and on-course totalisators also make a contribution

advertising of betting products, and consequential adverse social impacts from increased gambling. The Council considers that restrictions on advertising aimed at harm minimisation comply with the CPA obligations. Concerns about competition issues arise, however, when restrictions are applied in a discriminatory manner, without justification, as in this case. The review report does not consider the option of applying the advertising restriction more generally.

New South Wales reviewed the *Sydney Turf Club Act 1943*, finding no restrictions on competition. It also reviewed the *Australian Jockey Club Act* 1873, which extends to 2042 the period for which the trustees of the Randwick Racecourse are enabled to grant leases. The Government did not change the Australian Jockey Club Act, considering that the cost of breaking the leases would outweigh any benefits. The Government will the review the Act again after 10 years, consistent with the CPA clause 5(6).

Victoria has accepted all the recommendations of its racing industry review, except for expanding sports betting (because it considered more outlets would encourage problem gambling and lead to difficulties in ensuring probity). Reform is mostly complete, and some outstanding issues on bookmakers' operations which were the subject of consultation with the industry, have been resolved and will be implemented in 2002-2003. Victoria removed the previous requirement that telephone bets with Victorian bookmakers be a minimum of $200.

The Queensland Government has conducted an NCP review of the racing and betting legislation and consequently removed some restrictions on bookmakers, including the $200 minimum bet limit. The Government now has no direct involvement in the racing industry except to ensure probity and integrity. Bookmakers are now licensed by their racing industry controlling bodies. As noted in the 2001 NCP assessment, the Council remains concerned that this arrangement could result in a conflict of interest for the industry bodies, because allowing gamblers greater access to bookmakers potentially reduces TAB revenue and, ultimately, the revenue available to the racing codes. The Queensland Government is planning further changes to the racing and Betting Act, including implementing the remaining recommendations and some new proposals. It will undertake a public benefit test on these changes in accordance with CPA obligations.

Western Australia has completed a review of its racing industry legislation, and Bills to amend the legislation are before the Parliament. These Bills will:

- repeal the *Racing Restriction Act 1927* and the *Western Australian Greyhound Racing Authority Act 1981*;
- amend the *Racing Restriction Act 1917* to remove the prohibition of horse racing other than thoroughbred and trotting racing, delete obsolete controls over charity race meetings and remove restrictions on individuals and organisations that can undertake betting activities;
- reduce costs to individuals or organisations engaged in betting activities;

- improve competitive neutrality among businesses engaged in different forms of betting, and between the betting industry and other gambling industries; and

- remove commercial constraints on the TAB.

Western Australia has not acted to implement all the review recommendations. It has undertaken to provide the public interest case for the nonimplementation to the Council (Department of Treasury and Finance 2002 p. 24).

South Australia has repealed the *Racing Act 1976* and developed replacement legislation (*Authorised Betting Operations Act 2000*) which is being considered as part of the State's omnibus gambling legislation review. South Australia has also legislated to allow proprietary racing with the introduction of the *Racing (Proprietary Business Licensing) Act 2000*. This Act allows the conduct of race meetings (where betting is allowed) by bodies other than the racing codes.

The ACT reviewed its legislation regulating bookmakers in conjunction with the review of its TAB legislation. It repealed the *Bookmaker's Act 1985* and replaced it with the *Race and Sports Bookmaking Act 2001*. The new Act implements a number of reforms in line with the review recommendations, including transferring responsibility for licensing bookmakers from the racing clubs to the ACT Gaming and Racing Commission, and removing the limits on telephone betting and the number of sports betting licences. A handful of recommendations are still to be implemented, including allowing more flexibility in the location of sports bookmaking offices and in betting security guarantee arrangements.

The ACT also repealed the *Racecourses Act 1935*. Racing clubs are now regulated by the *Racing Act 1999*, which provides for other racing organisations also to conduct races for the purpose of betting. In addition, the Act establishes the independent ACT Gambling and Racing Commission, thus removing direct Ministerial control of the industry. The ACT review of this legislation found that the regulation is necessary to maintain public confidence in the ACT racing industry — by ensuring product quality, protecting consumers and minimising the potential for criminal activity — and to minimise problem gambling and the associated social costs.

Tasmania is preparing new legislation following a restructure of its racing industry. It intends to review this legislation via its new legislation gatekeeping process. The Northern Territory has a review of the *Racing and Betting Act* and Regulations and the *Unlawful Betting Act* under way.

Assessment

No government had completed review and reform activity relating to racing and betting legislation at 30 June 2002. Victoria and the ACT are both significantly advanced in their activity, with only a small number of review

recommendations still to implement. The reform being undertaken in these jurisdictions adequately addresses competition questions, and the Council considers that both will comply with their CPA clause 5 obligations relating to the regulation of the racing industry once all the reforms have been implemented.

New South Wales has completed its NCP review and reform activity relating to the racing industry. The Council considers that New South Wales has not met its obligations under the CPA clause 5. In relation to the Racing Administration Act provision that requires a minimum telephone bet of $200, the Council cannot see a public interest rationale for imposing a minimum bet requirement, although it concedes that the $200 minimum may have at most a small impact on competition in gambling services in New South Wales. The Council also has concerns that the review conclusion on advertising restrictions is not supported by convincing public interest reasoning. The review's argument that the restriction is necessary to safeguard the funding base of the New South Wales racing industry is difficult to reconcile with the findings of the Productivity Commission inquiry into gambling. Certainly, the review does not provide convincing evidence for rejecting the Productivity Commission inquiry findings relating to racing industry funding. As previously discussed, the Council accepts that limiting the marketing and advertising of gambling products may reduce the adverse social impacts of gambling and so may be consistent with the CPA clause 5. In this case, however, the public interest rationale for discriminatory treatment of different providers is not well founded.

Western Australia and Tasmania are also well advanced in their review and reform activity. Western Australia has completed its NCP review and drafted legislation which, when enacted, will satisfactorily address competition issues, subject to the public benefit arguments for not implementing some review recommendations. Tasmania has prepared new legislation, which it will review via its legislation gatekeeping process. The Council will finalise its assessment of Western Australia's and Tasmania's compliance with the CPA clause 5 in 2003.

Queensland, South Australia and the Northern Territory each had reviews of their racing industry legislation under way at 30 June 2002. The South Australian review is part of a broader omnibus review of gambling. The Council will finalise its assessment of these jurisdictions' compliance with the CPA clause 5 in 2003.

Gaming machines

All States and Territories, except Western Australia, have completed reviews of gaming machine legislation or have reviews under way. In Western Australia, gaming machines are located only in the Burswood Casino. The Western Australian Government considered the regulation of gaming machines when reviewing its casino legislation.

In New South Wales, the *Liquor Act 1982* and the *Registered Clubs Act 1976* regulate gaming machine activity. A joint review of these Acts has been under way since 1999. Since the NCP review began, the Government has implemented changes to gaming machine regulation, including a freeze on the number of machines in hotels and clubs. On 26 July 2001, the New South Wales Government announced a package of gaming reforms, including caps on machine numbers (both in total and by venue type), markets for existing licences, limits on operating hours for gaming machines, restrictions on advertising and other harm minimisation measures. The harm minimisation reforms announced by New South Wales (such as the requirement for clubs and the casino to establish links with problem gambling counselling services, restrictions on advertising and restrictions on hours of opening) fall within the range of those measures endorsed by the Productivity Commission and CoAG, so meet the CPA clause 5 guiding principle. New South Wales is preparing a report on the public benefit arguments for other restrictions, including the caps on machine numbers in total (104 000) and at venues, the different cap for different types of venue (450 for clubs and 30 for hotels), and the effects of allowing a transferable gaming machine permit scheme.

In Victoria, two operators (Tattersall's and TABCORP) own the gaming machines in all venues. The Victorian review of the *Gaming Machine Control Act 1991* found the two-operator structure to be anticompetitive and not justified on public interest grounds. Recognising that the structure is embedded in the contract arrangements with the two suppliers, the Government has undertaken to address this matter when the licences expire in 2012. Most of the other competitive restrictions in the Act are the result of the two-operator structure.

Victoria also regulates the gaming industry through measures such as Statewide and regional caps, advertising restrictions and requirements to provide consumer information on gaming machine operations. The Productivity Commission inquiry's public benefit analysis provides a case for some of these restrictions, such as those requiring operators to provide consumer information. These restrictions therefore meet the CPA clause 5 guiding principle. For the other restrictions, Victoria argued that:

> *As a broad principle, the Government believes that the costs of a state-wide cap on recreational gamblers must be assessed against potential positive benefits of restricting access to problem gamblers. Given the nature and magnitude of negative impacts of gambling, the public interest favours a continuing cap in the absence of alternative and proven strategies.*
>
> *In particular, as the evidence is conflicting and not clear on this policy issue, it is preferable this time to employ the precautionary principle and retain the cap on gaming machines.* (Department of Treasury and Finance 2002, p. 137)

Victoria noted that the Productivity Commission's observations about caps being blunt policy instruments related to the effectiveness of caps in reducing harm. It argued that it introduced regional caps to:

> *... address the adverse consequences arising from disproportionate levels of gambling expenditure in disadvantaged regions.* (Department of Treasury and Finance 2002, p. 137)

Tasmania also completed a review of its gaming machine regulation, finding that the restrictions on gaming machine operations should be retained on the grounds of probity. The ACT completed an initial review of its *Gaming Machine Act 1987* but subsequently referred the Act for review by the new ACT Gambling and Racing Commission. The review report is due in mid-2002. Queensland and South Australia are reviewing their gaming machine legislation as part of the omnibus gambling reviews under way in each State. The Northern Territory also has a review of its gaming legislation under way.

Assessment

Only Victoria and Tasmania have completed reviews of gaming machine regulation. All others still had reviews under way at 30 June 2002. Several jurisdictions have re-submitted their gaming machine regulation for review as part of broader omnibus reviews of gambling regulation.

The Council considers that Victoria has met its CPA clause 5 obligations relating to gaming machine legislation. The Victorian Government has imposed regional caps on machine numbers. While the Productivity Commission inquiry did not provide strong support for caps as a means of reducing the harm from problem gambling, the interjurisdictional work being undertaken through CoAG is researching the effectiveness of a number of harm minimisation measures, including caps on machine numbers. The Council acknowledges also that Victoria has indicated its willingness to address the gaming machine supply duopoly when the current licences expire.

Tasmania's legislation contains some significant restrictions on competition, most notably the exclusive Deed between Tasmania and the Federal Hotels group for the operation of gaming machines for 15 years from 1 January 1994, with the introduction of gaming machines into hotels and clubs from 1997.Tasmania has stated that it has no intention, of entering into any more exclusive arrangements in the gaming area, at this stage. The Government has stated that while it is not possible to predict future circumstances, if a future Government were to enter into any form of exclusive arrangement, this would only occur if such a policy was found to be fully justified in the public interest. Any new restrictions on competition would be subject to the gatekeeper process. The Government noted that breaking the Deed would potentially expose Tasmania to large compensation payments. All other jurisdictions have not completed their review and reform activity, so are yet to meet their CPA clause 5 obligations. Each is progressing its review, however, and the Council will finalise its assessment of CPA compliance in 2003.

Internet gambling

The Commonwealth, Victoria, Queensland and the ACT have enacted legislation governing internet gambling providers.

The Commonwealth has passed legislation to ban the issue of internet gambling licences that would provide gambling services to Australian players. The Council reported on this matter in the 2001 NCP assessment, finding that the Commonwealth was still to provide a net public benefit argument supporting its legislation. In particular, the Commonwealth did not demonstrate that it could meet its objectives only by restricting competition. The Commonwealth has replied that its objective is to minimise the opportunity for problem gamblers to extend their problems to online gambling. It has not, however, addressed the issue of whether banning internet gambling is the only way of achieving this objective.

Victoria enacted the *Interactive Gaming (Player Protection) Act 1999* to enhance consumer protection. The measures in Victoria's Act are consistent with those endorsed by the Productivity Commission inquiry. The Council considers that the Victorian legislation complies with the CPA clause 5.

Queensland is reviewing the *Interactive Gaming (Player Protection) Act 1998* as part of its omnibus review of gambling legislation. The Council will finalise its assessment of Queensland's review and reform activity in 2003.

The licensing provisions of the ACT's *Interactive Gambling Act 1998* are aimed at ensuring the probity of gaming suppliers and the integrity of their operations in the interests of consumer protection. The granting of licences is subject to criteria designed to ensure the probity of the applicant and the integrity of the games on offer. The Minister also has a discretionary power to grant licences, which the ACT believes is necessary 'to give a further assurance that the provider of the licence will be of good character and possess the capacity to run a gambling operation in accordance with regulations' (ACT Government 2002, p. 49).

The Council is wary of licensing processes that provide entities, including Ministers, with discretionary powers where the criteria for applying the discretion are not defined. At a minimum, the lack of criteria creates a perception that the power may be used, for example, to exclude new entrants to an industry. In this case, a related question concerns the reason that the licensing body would fail to fulfil its obligations. To avoid these dangers, the Council considers objective public criteria should be specified to guide the Minister's application of the discretion. Objective criteria would focus on probity and consumer protection objectives, and would avoid the protection of incumbent service providers. The Council would consider the ACT to have met its CPA clause 5 obligations if the Government develops such criteria. The Council will review the ACT's progress on this matter in 2003.

Minor and other gambling

The category of minor and other gambling encompasses games such as keno, charitable fundraising and trade promotions. The incidence of problem gambling with these activities is usually low and probity hurdles are often lower, reflecting the nature of the activities and their operators, and the low level of funds involved.

New South Wales repealed the *Gaming and Betting Act 1912* and replaced it with three Acts: the *Gambling (Two Up) Act 1998*, the *Unlawful Gambling Act 1998* and the Racing Administration Act. It is reviewing the Racing Administration Act in the general racing legislation review. The Gambling (Two Up) Act is new legislation which New South Wales reported was reviewed before Parliamentary debate. As well as providing for the rules of the game, protection to minors and other probity and harm minimisation measures, the Act restricts the lawful playing of Two Up to games played in accordance with the Act on Anzac Day and to games played in Broken Hill. The Government is still to provide the public benefit evidence in support of these restrictions. New South Wales reported that the Unlawful Gambling Act is not for NCP review.

New South Wales is undertaking a combined review of the *Lotteries and Art Unions Act 1901* and the *Charitable Fundraising Act 1911*. It has not completed its review and reform activity by the CoAG deadline of June 2002 so has not met its CPA clause 5 obligations. It is progressing these matters, however, and the Council will finalise its assessment in 2003.

The Victorian review of the *Club Keno Act 1993* reported in September 1997. The Victorian Government has not responded to the review recommendations. It advised the Council in 2002, that its priority is problem gambling and that club keno does not generate significant problem gambling concerns. Further, the Government intends to review its entire gambling legislative framework within the next 12 months and will consider the Club Keno Act as part of that review.

The Club Keno Act includes two restrictions on competition: these are who may conduct the game and where the game may be played. Only the holders of the gaming licences under the Gaming and Betting Act may supply keno games. This operates as a barrier to entry and means that only Tattersall's and TABCORP can supply these games. The Council understands that in practice, the two operate as one through a joint venture. Club Keno can only be played at licensed gaming venues, thus precluding other venues from offering this game. Club keno might therefore be less popular because its growth is limited and the incentives on the suppliers for innovation and promotion are limited.

The Council notes that club keno is a minor game in the overall gambling market and the Government's failure to act on this matter might therefore have had only minor consequences. It considers, however, that the Government has had the opportunity to respond to this review and has not

done so by the 30 June 2002 deadline. It has therefore not met its CPA clause 5 obligations. The Council notes, however, that the Government intends to conduct a review of gambling legislation which will allow it to address this matter. The Council will finalise its assessment in 2003.

Queensland is considering its keno and charitable and nonprofit gambling legislation as part of its omnibus gambling legislation review. The Council will finalise its assessment in 2003 when the review is complete.

Tasmania has drafted new legislation covering minor gambling, including charitable and nonprofit gambling. The Government has considered this legislation under its legislation gatekeeper provisions.

Table 12.5: Review and reform of legislation regulating gambling

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Australian Jockey Club Act 1873*	Lease arrangements for crown land	Review was completed in 1999.	Restrictions in the Jockey Club Act (lease arrangements for Crown land) were found to be in the public interest and retained because the potential cost of breaking the lease would outweigh the benefits. Review found that the Turf Club Act does not restrict competition.	Meets CPA obligations (June 2002).
	Sydney Turf Club Act 1943	Constitutes and incorporates the Sydney Turf Club			
	Liquor Act 1982 *Registered Clubs Act 1976*	Market conduct, operations	Public benefit issues for reforms not related to harm minimisation are being addressed in a report being prepared for Government consideration.		Council to finalise assessment in 2003.
	Gaming and Betting Act 1912	Licensing, market conduct	Not for review.	Act repealed and made into three parts for separate review (*Unlawful Gambling Act 1998*, *Gambling (Two Up) Act 1998* and *Racing Administration Act 1998*).	Meets CPA obligations (June 2001).
	Unlawful Gambling Act 1998		Act is exempt from review.		Meets CPA obligations (June 2001).
	Gambling (Two Up) Act 1998	Market conduct, rules	Review was completed in 1998.	No change.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales (continued)	*Racing Administration Act 1998* *Greyhound Racing Authority Act 1985* *Harness Racing Act 1977* *Bookmakers Taxation Act 1917* *Thoroughbred Racing Board Act 1996*	Market conduct, operations, licensing	Review was completed in 2001. It recommended retaining existing restrictions on the conduct of racing and betting, with the exception of a relaxation on some operating structures for bookmakers.	The Government accepted the review recommendations.	Does not meet CPA obligations (June 2002).
	Lotteries and Art Unions Act 1901 *Charitable Fundraising Act 1991*	Conduct, operations	Review is under way.		Council to finalise assessment in 2003.
	Lotto Act 1979 *NSW Lotteries Act 1990* *Soccer Football Pools Act 1975*		Review was not required.	Acts were repealed and replaced by the *NSW Lotteries Corporatisation Act 1996* and the *Public Lotteries Act 1996*.	Meets CPA obligations (June 2001).
	Totalizator Act 1916 *Totalizator (Off-Course Betting) Act 1964*	Market conduct, rules, establishment of TAB	Review was not required.	Acts were repealed and replaced by the *Totalizator Act 1997*.	Meets CPA obligations (June 2001).

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales (continued)	*Totalizator Act 1997* (and amendments)	Licensing, exclusive licences	New legislation CPA clause 5(5) applies. Review of some restrictions and exclusive licences found a net public benefit.		Council to finalise assessment in 2003.
	NSW Lotteries Corporatisation Act 1996 *Public Lotteries Act 1996*	Licensing, exclusive licences	New legislation CPA clause 5(5) applies. Statutory five-year reviews are to be completed by November 2002.		Council to finalise assessment in 2003.
	Casino Control Act 1992	Exclusive licence, market conduct	Review was completed in 1998. Updated review is to be submitted to Government in 2002.		Council to finalise assessment in 2003.
Victoria	*Tattersall Consultations Act 1958*	Legislated monopoly	Review was completed in 1997.	*Public Lotteries Act 2000* repealed this Act. New Act allows for multiple suppliers.	Meets CPA obligations (June 2002).
	Gambling Legislation (Responsible Gambling) Act 2000 *Gambling Legislation (Miscellaneous Amendments) Act 2000*	Caps, regional caps, advertising restrictions, conduct.	Gatekeeper provisions apply.	New legislation was accepted. These amendment Acts introduced responsible gambling initiatives and key restrictions such as regional caps and advertising controls in all gambling-related legislation in Victoria.	Meets CPA obligations (June 2002).
	Gaming No. 2 (Community Benefit) Act 2000	Operations, conduct	Act revised the *Gaming No. 2 Act 1997*. Gatekeeper provisions apply.	New legislation. Protects minors and reduces market power of bingo venues, to enhance charitable and community organisations' fundraising abilities.	Meets CPA obligations (June 2001).

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Club Keno Act 1993*	Rules, conduct	Review was completed in 1997, but report has not been released. Review is under consideration by Government.		Council to finalise assessment in 2003.
	Interactive Gaming (Player Protection) Act 1999	Conduct, operations, licensing	Gatekeeper provisions apply.	New legislation was accepted. It provides for the protection of consumers by regulating the provision of interactive gaming services.	Meets CPA obligations (June 2001).

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Gaming and Betting Act 1994* as it relates to betting *Racing Act 1958* *Lotteries Gaming and Betting Act 1966* *Casino Control Act 1991,* part 5A	Licensing, legislated monopoly, market conduct, operations, funding for the racing industry	Review was completed in 1998. It recommended the expansion of sports betting and found a public benefit argument for retaining monopoly and funding arrangements.	The Government response was released in August 2000. The Government supported recommendations on other codes of racing and proprietary racing, minimum phone bets, incorporation and partnerships, 24-hour internet race betting and tipping services. It rejected proposals on expanded sports betting other than issuing an additional football tipping competition licence. It noted reform of interstate advertising restrictions were best promoted at the national level and undertook to promote deregulation through the Australian Racing Ministers' Conference. *Racing and Betting Acts (Amendment) Act 2001* was enacted in May 2001. The Act deregulates mixed sports gatherings, including removing the prohibition on personnel licensed by the Victorian Racing Club and Harness Racing Victoria from competing at these meetings, and deregulates betting information services in accordance with the NCP review. The removal of restrictions on bookmakers' operating structure and hours of trading was accepted and the Government has agreed to the options agreed by the Government-industry working party.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Gaming Machine Control Act 1991* *Gaming and Betting Act 1994* as it relates to a gaming operator's licence and relevant regulation	Licensing, ownership, number of machines	Review was completed in 2000. It recommended: • Ending current licences as soon as possible (noting that they expire in 2012); • Re-negotiating the Agreement Act be to ensure ongoing support for the racing industry, independent of the existing duopoly and financing arrangements; • Removing the licence requirement for monitoring and control; • Removing the restriction that at least 20 per cent of gaming machines be allocated to nonmetropolitan Victoria; • Retaining the 50:50 club:hotel split; • Implementing a package of measures to regulate quasi-clubs;	Review and Government response was released 18 July 2001. The Government accepted most of the review recommendations.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)			• Retaining venue limits on machine numbers; • Retaining 24-hour gaming restrictions; • Restricting gaming to licensed hotels and clubs; • retaining Ministerial ability to set betting limits; • retaining restriction on an operator having two venues within 100 kilometres of each other; • retaining existing probity restrictions; and • giving more explicit guidance to the Victorian Casino and Gaming Authority on its role and responsibilities.		

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Casino (Management Agreement) Act 1993* *Casino Control Act 1991*	Exclusive licence, conduct, operations	NCP review did not proceed because preliminary investigations indicated that the compensation required to remove the exclusive licence outweighs any benefits to be gained.		Meets CPA obligations (June 2002).
Queensland	*Jupiters Casino Agreement Act 1983* *Breakwater Island Casino Agreement Act 1984* *Brisbane Casino Agreement Act 1992* *Cairns Casino Agreement Act 1993*	Exclusive licences, conduct, operations	Review was completed in 1998.	Provisions were retained.	Meets CPA obligations (June 2002).
	Lotteries Act 1994	Exclusive licence	Review completed.	Statutory monopoly of Golden Casket Corporation was replaced with a limited-duration exclusive licence. Act was repealed and replaced with *Lotteries Act 1997*, which is to be reviewed as part of the omnibus review of gambling in Queensland.	Meets CPA obligations (June 2001).
	Art Unions and Public Amusements Act 1992			Act was repealed and replaced with the *Charitable and Non-profit Gaming Act 1999*.	Meets CPA obligations (June 2001).

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Racing and Betting Act 1980* and associated rules and regulations (as they relate to the Queensland TAB)	Exclusive licence, market conduct, operations		Act was repealed and replaced by the new *Wagering Act 1998*, which is to be reviewed as part of the omnibus review of gambling in Queensland.	Meets CPA obligations (June 2001).
	Racing and Betting Act 1980 and associated rules and regulations (as they relate to bookmakers and the Queensland racing industry)	Licensing, market conduct, operations	Review was completed in 2000. Government endorsed review recommendations in November 2000.	A Bill to enact recommendations, including removing the majority of nonprobity-based restrictions on bookmakers (particularly those relating to minimum phone betting, betting type and recording of betting) is to be introduced in 2002.	Council to finalise assessment in 2003.
	Keno Act 1996 *Casino Control Act 1982* *Gaming Machine Act 1991* *Wagering Act 1998* *Interactive Gambling (Player Protection) Act 1998* *Charitable and Non-profit Gambling Act 1999* *Gaming Legislation Amendment Bill* *Lotteries Act 1997*	Exclusive licences, other licences, market conduct, operations, rules	Omnibus public benefit test review is under way.		Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	Instant lottery and lotto rules *Lotteries Commission Act 1990*	Market conduct, operations, licensing	Review completed. It recommended retaining restrictions.	The Government is considering its response.	Council to finalise assessment in 2003.
	Betting Control Act 1954 *Totalisator Agency Board Betting Act 1960*	Market conduct, operations, licensing	Review was completed in 1998.	Betting Legislation Amendment Bill 2001 and the Acts Amendment and Repeal (Competition Policy) Bill will implement a number of the review recommendations. These include: • relaxing restrictions on the operation of totalisators other than by the Totalisator Agency Board; • relaxing restrictions on bookmakers and their operations; • removing limits on bets in the regulations, leaving the racing clubs to set limits as they see fit; and • relaxing some restrictions on the operations of the Totalisator Agency Board.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Racing Restrictions Act 1917*	Licensing, differential treatment	Review was completed in 1998 It recommended that: • the Act provisions that establish centralised control of horse racing are in the public interest and should be retained; • s. 2(1) of the Act should be amended to limit the authority of the Western Australian Turf Club to thoroughbred racing; • a provision should be inserted to allow the licensing by the Minister (or other authority) of alternative forms of horse racing where such action can be demonstrated to be in the public interest; • the establishment of a single independent regulator should be considered if it is demonstrated that the Western Australian Turf Club has improperly used its power as controlling authority to favour its own club activities over other clubs under its control;	Legislation is to be amended through the Acts Amendment and Repeal (Competition Policy) Bill 2002.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)			• the provisions contained in s. 3(1) of the Act that establish centralised control of trotting and vest control in the Western Australian Trotting Association are in the public interest and should be retained; • the provisions applying where the Western Australian Turf Club or the Western Australian Trotting Association proposes to make a change in the program of race meetings customarily held in the metropolitan area, and this change may necessitate a reduction or change in the program of races customarily held outside the metropolitan area be retained and any dispute arising in relation to the matter may be referred to the Minister and the Minister may give such directions to the WATC or WATA as the Minister thinks fit (ss. 2(2) and 3(2)); and		

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)			• with the removal of the restriction on the number of permissible race meetings and the abolition of oncourse betting taxes, the restriction on holding a limited number of race meetings in aid of any public hospital or other charitable or patriotic purpose is no longer relevant and should be repealed.		
	Racing Restrictions Act 1927	Conduct	Review was completed in 1999.	Act is to be repealed by the Acts Amendment and Repeal (Competition Policy) Bill.	Council to finalise assessment in 2003.
	Casino (Burswood Island) Agreement Act 1985 Casino Control (Burswood Island)(Licensing of Employees) Regulations 1985 *Casino Control Act 1984*	Licensing, market conduct, operations	Review was completed in 1998.	Exclusive licence has expired and not been renewed. Other barriers to entry that are not in the public interest have been removed. The Government is negotiating with the casino operator on remaining exclusivity provisions.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Gaming Commission Act 1987*	Licensing, market conduct, operations	Review was completed in 1998. It recommended no change to most restrictions, including licensing and the availability of gaming machines. It recommended removing restrictions on casino games for community gaming, two-up and bingo prize pools, subject to necessary changes being negotiated in the Casino (Burswood Island) Agreement Act. It recommended removing or reducing lotteries restrictions, including: allowing for the licensing of suppliers of State lottery products by State agreement; making lawful the lotteries conducted by organisations the subject of such an agreement; allowing for licensing of professional fundraisers; removing the definition of 'foreign lottery' from the legislation; and making related amendments.	Government considering full response, amendments will affect *Lotteries Commission Act 1990*.	Council to finalise assessment in 2003.
	Western Australian Greyhound Racing Association Act 1981	Registration, conduct	Review completed. It recommended repealing provisions that limit the number of meetings that the Western Australian Greyhound Racing Authority may hold.	Acts Amendment and Repeal (Competition Policy) Bill is before Parliament to enact the review recommendations.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Casino Act 1997* *Lottery and Gaming Act 1936* *State Lotteries Act 1966* *Gaming Machines Act 1992* *Gaming Supervisory Authority Act 1995* *Authorised Betting Operations Act 2000* *TAB Disposal Act 2000*	Exclusive licences, operations, barrier to entry, licensing, market conduct	Omnibus review is under way. All gambling legislation, including Bills before the Parliament, are to be reviewed.		Council to finalise assessment in 2003.
	Racing Act 1976	Barrier to entry, market conduct	Review was completed in 2000.	Act has been repealed.	Meets CPA obligations (June 2002).
Tasmania	*Tasmanian Harness Racing Board Act 1976*	Registration, conduct	Review completed.	Act was repealed and replaced by the *Racing Amendment Act 1997*.	Meets CPA obligations (June 2001).
	Casino Company Control Act 1973	Ownership	Minor review completed.	Act was repealed.	Meets CPA obligations (June 2001).
	Racing and Gaming Act 1952 (as it relates to minor gaming)	Licensing, conduct, operations	Minor review completed.	Gaming components of this Act are to be transferred to the *Gaming Control Act 1993* and assessed under gatekeeper requirement.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Racing Act 1983* *Racing and Gaming Act 1952* (except as it relates to minor gaming) which has been replaced by the *Racing Regulation Act 1952*	Licensing, conduct, operations	Review completed.	New racing legislation is being drafted following the restructure of the racing industry in 2000. The new legislation will be assessed under the gatekeeper provisions.	Council to finalise assessment in 2003.
	Gaming Control Act 1993	Exclusive rights, conduct and operations	Review completed. It recommended retaining restrictions.	The Government agreed with the recommendations. Recent amendments to the Act removed Tattersall's exclusive lottery licence in Tasmania from 2002 and further amendments will permit the sale of other lottery tickets.	The decisions on lotteries meet CPA obligations (June 2002). Council to finalise assessment of other matters in 2003.
	TT-Line Gaming Act 1993	Licensing, market conduct, operations	Review completed. It recommended retaining restrictions.	The Government accepted the recommendations.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Betting (ACTTAB Limited) Act 1964* *Betting (Corporatisation) (Consequential Provisions) Act 1996* *Bookmakers Act 1985*		Review was completed in 1999.	The Government is implementing reforms including: removing the requirement for racing club approval before granting bookmakers' licences; removing racing club-specific restrictions on bookmakers' licences; allowing an independent authority (the ACT Gambling and Racing Commission) to assess licence applications; removing limitations on phone betting limits; removing the requirement for sports bookmakers licence-holders (or agents licence-holders) to first obtain a standing bookmaker's licence; removing the limit on the number of sports betting licences granted; allowing flexibility in the locations where betting offices can operate; and relating the size of the betting security guarantee to the amount of risk.	Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT (continued)	*Casino Control Act 1988* *Gaming Machine Act 1987* *Games Wagers and Betting-houses Act 1901* *Gaming and Betting Act 1906* *Lotteries Act 1964* *Pool Betting Act 1964* *Unlawful Games Act 1984*	Licensing, conduct, operations	Review was completed in 1998. It recommended no change to the *Games Wagers and Betting-houses Act 1901,* the *Gaming and Betting Act 1906,* the *Lotteries Act 1964,* the *Pool Betting Act 1964 and* the *Unlawful Games Act 1984.* A Select Committee of the Legislative Assembly further examined the social and economic impacts of gambling undertaken by. The committee did not consider all the recommendations of the original review. The *Gaming Machine Act 1987* is subject to a separate review by the ACT Gaming and Racing Commission. That review is due for completion mid-2002.	The Government decided not to extend the life of the casino licence beyond the current period. Gaming machines are not allowed in the casino. In-principle support was given for removing restrictions on the types of gaming machines permitted in hotels.	Council to finalise assessment in 2003.
	Racecourses Act 1935 *Racing Act 1999*	Approvals, conduct, licensing	Review was not required for the Racecourses Act. Gatekeeper provisions applied to the Racing Act.	*Racecourses Act 1935* was repealed and in part replaced by the *Racing Act 1999*. The new legislation assessed under the gatekeeper provisions of clause 5(5).	Meets CPA obligations (June 2002).
Northern Territory	*Gaming Control Act* and regulations *Gaming Machine Act* and Regulations	Licensing, operations, conduct	Review is under way.		Council to finalise assessment in 2003.

(*continued*)

Table 12.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory (continued)	*Racing and Betting Act* and Regulations *Unlawful Betting Act* and Regulations	Licensing and registration	Review is under way.		Council to finalise assessment in 2003.
	Totalisator Administration and Betting Act	Exclusive licence	Review was not required.	Act was repealed and replaced with the *Totalisator Licensing and Regulation Act* and the *Sale of NT TAB Act*.	Meets CPA obligations (June 2001).
	Totalisator Licensing and Regulation Act *Sale of NT TAB Act*		Review was completed in 2001.	The Government approved the review recommendations in February 2002.	Council to finalise assessment in 2003.

13 Planning, construction and development services

Planning, planning approvals, and building and construction regulations and approvals can have a significant impact on building costs. Occupational licensing of building service providers has benefits, but also can have an impact on building costs. Legislation in all of these areas can have anticompetitive effects. This chapter discusses planning and approval, building regulations and approval, and regulation of building service providers (architects, engineers, surveyors, valuers, and building and related trades).

Planning and approval

Planning legislation establishes planning schemes for regulating land use. The schemes typically divide land into zones and set out the uses and developments that do not require a planning permit, those that are allowed subject to permit approval with or without conditions, and those that are prohibited. The legislation generally requires planning approval before development or building commences, which is given at either local or State/Territory level. Approval involves considering various aspects of a specific proposal (including specific site characteristics, the proposed site use, the impact on surrounding occupiers, traffic and design issues) in the context of the general zoning of the land and the applicable planning instruments, with a view to protecting community amenity.

Legislative restrictions on competition

Legislative restrictions on competition in planning, development and construction services occur in the following ways.

- Planning legislation has the potential to impede the entry of new competitors into a market by limiting or preventing commercial development in an area.

- Competition may be inhibited by (avoidable) delays in planning approval. Such delays may be a result of the regulatory system. The University of Tasmania estimated that delays in development approval may add 5–10 per cent to the cost of development projects and that around one third of these delays may be attributable to regulatory delays. The study

estimated that eliminating regulatory delays would save $350–450 million per year (Industry Commission 1995).

- The planning process can allow existing businesses to stop or at least delay the entry of new competitors to the market by objecting to the proposal because they are concerned about commercial competition.

- Most jurisdictions' legislation has traditionally restricted competition by reserving planning approval to government. More recently, New South Wales and Queensland opened up parts of planning approval to private certifiers. In New South Wales, accredited private certifiers are able to issue certificates for development that requires consent but can be certified as meeting predetermined development standards (referred to as 'complying development'). An accreditation body accredits private certifiers, who must have relevant qualifications or experience, and compulsory insurance. In Queensland, assessable development may require code and/or impact assessment. Private certifiers are able to conduct code assessments, and inspect and certify certain works. They require relevant qualifications, necessary experience or accreditation and compulsory insurance.

Regulating in the public interest

Planning legislation regulates the use and development of land to achieve broad social, economic and environmental objectives. Such regulation can maximise positive externalities (by conserving historical buildings or applying urban design principles for example) and minimise negative externalities (such as adverse effects on public health where housing is too close to a hazardous industry). Planning legislation can also increase the provision of desirable public goods, such as open spaces and protected floodways.

Under National Competition Policy (NCP), governments are broadly responsible for balancing objectives in developing planning schemes that are in the public interest. In its role of assessing compliance with NCP legislation review and reform obligations, the National Competition Council looks for appropriate regulatory outcomes. In particular, it looks at whether planning processes minimise opportunities for existing businesses to inappropriately prevent or delay participation by new competitors. Governments can prevent this restriction on competition, including by limiting the time available for appealing decisions and ensuring appeal opportunities are open to only those with a legitimate and substantive interest in the potential development. Good regulation principles suggest planning schemes should also be developed with community involvement and be transparent and accessible.

Planning schemes may unnecessarily add to business costs by involving unwarranted delays. The Council considers that planning approval processes should aim to minimise these delays. The Council's assessment also looks for jurisdictions to have considered and, where appropriate, provided for competition between government and private providers in planning approval

processes. It may be inappropriate for private certifiers to be involved in all planning assessments, but a general model would involve differentiating development proposals by the level of assessment required and who undertakes that assessment.

Private certification generally involves a registration scheme, entry requirements and compulsory insurance. The Council accepts that these requirements are generally in the public interest but, as with other occupations with entry restrictions, looks for jurisdictions to have only the minimum entry restrictions necessary to achieve the objectives of the legislation. Other strategies for achieving effective planning approval legislation include simplifying the approval process and reducing duplication with other approval processes. Statutory time limits are one way in which to reduce unnecessary delays.

The Council used these broad principles to assess jurisdictions' review and reform activity against Competition Principles Agreement (CPA) obligations. Where legislative restrictions reflect these principles, the Council assesses the jurisdiction as having met its CPA obligations. Where legislation contains restrictions on competition in addition to those consistent with the principles of effective regulation, the Council assesses NCP compliance on the basis of whether public benefit arguments justify the additional restrictions.

Review and reform activity

New South Wales, Victoria, Queensland, South Australia, Tasmania, the ACT and the Northern Territory have completed NCP reviews of planning and approvals legislation. Western Australia consolidated its land use and planning legislation into the Urban and Regional Planning Bill 2000. The Government has recently commenced public consultation on the Bill

New South Wales

The New South Wales Government originally identified 30 projects reviewing competition restrictions in its planning, land use and natural resource approvals systems. It advises that 19 projects are complete (with a number of resulting reforms) and 11 are under way.

New South Wales reformed its development assessment system in 1998 to integrate development consents, provide appropriate assessment and increase competition in compliance functions. There is now a 'one-stop shop' system for the development, building and subdivision approvals under the *Environmental Planning and Assessment Act 1979* (removing the need for subsequent local government approvals). The level of complexity of the approvals process is streamlined to reflect the complexity and the likely environmental impact of a development. Accredited certifiers can compete with councils in the assessment of compliance functions and technical

standards (Government of New South Wales 2000). The Independent Pricing and Regulatory Tribunal also reviewed development assessment and related fees and recommended: deregulating fees subject to competition, regulating fees for noncontestable development assessment, and allowing qualifying consent authorities to set their own fee policies subject to certain conditions (New South Wales Government 2001). The Government agreed in principle to the Tribunal's recommendations.

The New South Wales Government is undertaking a review of plan-making. A White Paper released in February 2001 proposed a new system of planning with the key features of: whole-of-government strategic planning; greater community involvement in plan-making; greater accessibility to planning information and the availability of a variety of planning tools. The White Paper proposed integrating all policies and plans for environmental and land use issues into one instrument for each local government area, one regional strategy for each region and one State planning document. (Department of Urban Affairs and Planning 2001).

The State's review of planning and reform of planning and land-use have already yielded significant improvements. Further reforms based on the Government White Paper are contained in legislative amendments to be introduced into Parliament in 2002. New South Wales considers that local planning provisions can best deal with inappropriate use of planning processes to prevent entry by new competitors and it has advised of changes to the planning process to prevent its potential misuse.

While not yet complete, review and reform activity relating to planning and land use continues to progress. The Council will make a final assessment in 2003.

Victoria

Victoria completed its review of the *Planning and Environment Act 1987* in early 2001. The review found that Victoria's planning legislation mostly achieves its objective in an effective and efficient manner, and that the competition restrictions identified are in the public interest. The review recommendations aimed to improve the manner in which the Act is administered to enhance planning effectiveness and efficiency. The Government is yet to respond to the review's recommendations but has reported that its response (including any legislative amendment considered necessary) will be finalised by June 2002. The Council will make a final assessment in 2003.

Queensland

Queensland's review of the *Integrated Planning Act 1997* found that the Act is far less prescriptive than the Act it replaced (the *Local Government (Planning and Environment) Act 1990*) in that it merely sets up a planning framework.

The review reported that the Act does not restrict competition (Queensland Government 2001), so the Government proposed no change to the legislation. The Act allows private certifiers to conduct code assessments and to inspect and certify certain works, and it streamlines development approvals by implementing a process under which development applications are considered by a single assessment manager (usually the local government) rather than several State and local government agencies. The planning assessment system has been designed to remove the arbitrary barriers to the submission and assessment of applications, which were a common feature under the previous system.

Queensland has reviewed its planning legislation and implemented significant reforms. It therefore complies with its CPA clause 5 obligations

Western Australia

Western Australia listed several planning Acts for review under its NCP program, including the *Town Planning and Development Act 1928*, the *Metropolitan Region Town Planning Scheme Act 1959* and the *Western Australian Planning Commission Act 1985*. The previous Western Australian Government developed the Urban and Regional Planning Bill, which consolidated this legislation. It had put the Bill (as a Green Paper), together with a review of the Bill, out to public consultation.

The current Government is reconsidering its overall approach to planning legislation. It has reactivated the Bill and has commenced a new public consultation process. The Government advised that it will further develop the Bill following consultation with the community and will assess the new Bill against NCP principles via its legislation gatekeeping process. The Government's gatekeeper assessment of the Planning Appeals Amendment Bill 2001 concluded that the requirement that parties to a minor appeal use legal practitioners is in the public interest.

Although Western Australia has not completed the review and reform of its planning legislation by the Council of Australian Governments (CoAG) target date of 30 June 2002, its review activity appears considerably advanced. The Council will make a final assessment in 2003.

South Australia

South Australia completed a review of the *Development Act 1993* in July 1999. The review report made several recommendations for change or further investigations that may lead to change. The Government has implemented a majority of these recommendations. The recommendations which are still to be implemented or not supported by the Government are discussed below.

- *Application of the same development assessment processes to government business enterprises which engage in business activities for profit and compete directly with the private sector and to the private sector.*

The Government supports the retention of the separate Crown development assessment process on the ground that the process enables the efficient provision of public infrastructure. In response to the review recommendation, however, the Government included two new requirements for the assessment of Crown developments (similar to those imposed on the private sector) in the *Development (System Improvement Program) Amendment Act 2000* effective 2 April 2001.

- *In relation to the application of the Building Rules to Crown development, the principle of occupant safety should not be compromised by exemptions to the Act.*

Crown-owned buildings built before the operation of the Development Act are exempt from the fire safety provisions of the Act. Cabinet is to consider, however, a Cabinet Directive that requires State agencies to upgrade safety and access to all Crown buildings including older buildings exempt from the fire safety provisions. Were Cabinet to support the directive, the outcome would be broadly similar to the review recommendations.

- *The application of private certification to provisional Development Plan consents in the case of complying kinds of development.*

The Government convened a working party to determine the response to this recommendation and now is considering its recommendations. The working party recommended against the immediate use of private certifiers for complying kinds of development. It considered that the arguments for private certification should be reviewed in two years time, when the Government has implemented other recommendations relating to development assessment processes.

- *The removal of the requirement in Regulation 86 of the Development Regulations 1993 for a person with recognised planning qualifications to provide a report on a noncomplying development application, and on an amendment to a development plan.*

On 15 March 2001, the Government amended Regulation 86 to delete the requirement for a report from a qualified planner on noncomplying development applications.

The Government will not, however, delete the requirement for professional planning advice on amendments to development plans. It considers the retention of this requirement is justified by the potentially wide impact of zoning decisions. Councils bear the cost of compliance in relation to Plan amendments so the direct impacts on competition are minimal.

- *The examination of the 8 year period of post graduate experience required to act as a private Building Rules certifier, in the light of lesser periods required in other jurisdictions.*

The Australian Building Codes Board is considering the formulation of a nationally agreed level of experience for private Building Rules certifiers. When the board adopts a nationally agreed position, the Government will amend the Development Regulations in accordance.

Other amendments to the Act are designed to deter the initiation of or financial support for the initiation of court proceedings aimed at delaying a potential competitor's approved development.

South Australia has completed the review of its planning legislation and implemented most review recommendations. Where it does not intend to implement recommendations or where implementation has been delayed, the Government has taken alternative action which delivers a similar outcome to the course of action recommended by the review, or has provided a public benefit case to support its position. South Australia therefore complies with its CPA clause 5 obligations.

Tasmania

Tasmania completed a review of the *Land Use Planning and Approvals Act 1993*. The review recommended greater use of performance-based regulatory approaches, measures to accelerate planning processes and measures to expose developments on Crown land to the same planning requirements as private sector developments. The Government made the recommended amendments through the *Land Use Planning and Approvals Amendment Act 2001*.

Tasmania has completed its review and implemented reform in this area and therefore complies with its CPA clause 5 obligations.

The ACT

The ACT released a discussion paper in April 2000 on a review of private certification in the building industry in April 2000 (Purdon Associates 2000). The discussion paper suggested extending private certification into selected development approvals for development proposals that comply with planning guidelines.

The ACT review of parts V and VI of the *Land (Planning and Environment) Act 1991* was completed in August 2000. This legislation relates to grants of leases (particularly concessional grants) and the development approval process. The review recommended improving transparency in the provision of direct grants, and considering introducing a notification scheme for developments that are relatively minor and unlikely to be opposed by the

Government agency or to require conditions. The review considered a contestable approvals process for minor developments, but concluded that the ACT may be too small to sustain a viable, competitive and impartial development certification market. The review also concluded that the relevant department is unlikely to have adequate resources to properly audit private certifications (Allen Consulting Group 2000a). The ACT Government issued a formal response to the review, agreeing to most recommendations in principle (Government of the ACT 2001a). An amending Regulation was signed on 25 January 2001.

ACT planning legislation addresses potentially inappropriate use of planning processes by existing business to delay or prevent market entry by new competitors. There is an open process (via auctions or tenders) for the granting of some leases and also an open process for variations of the Territory Plan. Only people who are affected by the approval of a development may object to the development, with appeals heard by the Administrative Appeals Tribunal. The tribunal does consider commercial matters but places a greater focus on planning considerations.

The ACT has completed its review and implemented reform in this area and therefore complies with its CPA clause 5 obligations.

The Northern Territory

The Northern Territory's Act was the result of an independent review of the previous legislation. The NCP review considered land use and development restrictions, powers to revoke or modify an approved land use or development, and development contributions. It noted that the Act does not require determinations of development applications to account for market effects. The policy of the consent authority is to consider applications on the basis of planning merit only and not to consider arguments about the commercial aspects of applications (Department of Lands, Planning and the Environment 2000). The review concluded that the restrictions in the Act deliver a net benefit, a finding which was endorsed by the previous Northern Territory Government (Northern Territory Government 2002a).

The review did not consider whether private agents in competition with Government should undertake the approval process. In its 2002 NCP annual report, the Government states that the Territory's small and isolated market means that the potential administrative costs would be likely to undermine any public benefits of introducing contestable development approval processes. The Council accepts the Government's view that the current regulatory approach — whereby minor development proposals require no formal approval, and the Development Consent Authority undertakes all other development approval functions — maximises the public benefit in achieving the objectives of the legislation.

The Northern Territory has completed its review and reform in this area and has retained anticompetitive restrictions on the recommendation of its legislative review. It therefore complies with its CPA clause 5 obligations.

Table 13.1 lists the progress of each jurisdiction's review and reform of planning and approval legislation.

Table 13.1: Review and reform of legislation regulating planning and approval

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Environmental Planning and Assessment Act 1979*	Controls land use. Sets procedures for the issue of planning permits and approval.	Legislation is being reviewed in stages. Review of part IV of the Act (integrated development assessment) has been completed. Review of plan-making underway, with a White Paper released in February 2001 proposing integration of all policies and plans for environmental and land use issues into one instrument for each local government area, one regional strategy for each region and one State planning document.	Act was amended in 1997 and 1999 to streamline its approval system and allow accredited certifiers to compete with councils for part of planning approval. Further amendments are planned for introduction into Parliament in 2002.	Council to finalise assessment in 2003.
Victoria	*Planning and Environment Act 1987*	Controls land use. Sets procedures for the issue of planning permits and approval.	Review was completed in 2001. Recommendations are aimed at improving the manner in which the Act is administered, to enhance planning effectiveness and efficiency.	The Government response to the review recommendations is expected by mid-2002.	Council to finalise assessment in 2003.
Queensland	*Integrated Planning Act 1997* (replaces *Local Government [Planning and Environment] Act 1990*)	Controls land use. Sets procedures for the issue of planning permits and approval.	Review was completed in October 1997. It found the Integrated Planning Act to be far less prescriptive than the Act it replaced and merely sets up a planning framework. Review reported that the Act does not restrict competition.		Meets CPA obligations (June 2002).

(*continued*)

Table 13.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Town Planning and Development Act 1928* *Western Australian Planning Commission Act 1985* *Metropolitan Region Town Planning Scheme Act 1959*	Controls land use via town planning schemes and for regional areas.	Legislation was consolidated into the Urban and Regional Planning Bill 2000. A review of the Bill has been drafted for consideration by the Minister for Planning.		Council to finalise assessment in 2003.
South Australia	*Development Act 1993* and Development Regulations 1993	Controls land use. Sets procedures for the issue of planning permits and approval.	Review was completed in July 1999. Its recommendations included: requiring Crown developments to be subject to building rules and fire safety requirements consistent with those for private buildings; allowing private certification of private development; and removing the obligation for planning authorities to obtain independent advice for noncomplying developments.	Reform was implemented in 2001.	Meets CPA obligations (June 2002).
Tasmania	*Land Use Planning and Approvals Act 1993*	Controls land use. Sets procedures for the issue of planning permits and approval.	Review was completed.	Recommended amendments were made through the *Land Use Planning and Approvals Amendment Act 2001*.	Meets CPA obligations (June 2002).

(*continued*)

Table 13.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Land (Planning and Environment) Act 1991* — parts V and VI (grants of land and development approval processes)	Controls concessional grants of land and development approval processes.	Review issued its final report in May 2000. Its recommendations included improving transparency in the provision of direct grants; and considering introducing a notification scheme for developments that are relatively minor and unlikely to be opposed by the Government agency or to require conditions.	The Government issued a formal response to the review, agreeing to most recommendations in principle. An amending regulation was signed on 25 January 2001.	Meets CPA obligations (June 2002).
Northern Territory	*Planning Act* (1999 Act replaced 1993 Act)	Controls land use. Sets procedures for the issue of planning permits and approval.	Review of 1999 Act was completed in September 2000. Review report is not public. Review concluded that the anticompetitive provisions deliver a net benefit to the community and recommended no amendments to the Act.	The Government endorsed the outcome of the review.	Meets CPA obligations (June 2002).

Building regulations and approval

State and Territory building regulations cover a range of technical provisions governing the way in which builders and developers operate. The regulations are aimed at ensuring buildings meet certain health, safety and amenity objectives. Each State and Territory has enacted building legislation, with associated regulations containing the administrative provisions to give effect to the legislation.

Building approvals involve inspection and approval at specific stages of the construction process, in accordance with the relevant State or Territory building legislation. Building certifiers, who may be employed by government authorities or privately employed, generally undertake the inspection and approval.

There has been a high level of coordination across governments in this area. The Australian Building Codes Board and its predecessor, the Australian Uniform Building Regulations Co-ordinating Council, developed a model Building Act and the Building Code of Australia. Consequently, there is a high degree of commonality in the legislation to be assessed.

The Australian Building Codes Board sets national standards such as the Building Code of Australia, so it has national standard-setting obligations under the CPA (see chapter 15). These obligations require standards-setting bodies to show that an appropriate regulatory impact statement has been conducted for the national standards that it sets.

Legislative restrictions on competition

Building regulations may restrict competition by specifying a standard of product that suits a particular raw material, production method or production plant (ABCB 1997). Imposing a particular standard can increase costs and reduce the scope for innovation. More broadly, building regulations affect business costs. The former Industry Commission estimated in 1995 that reform of government building regulations could lead to an annual saving of around $350 million, equivalent to some 1.5 per cent of total building activity (then valued at around $25 billion) each year (Industry Commission 1995, p. 134). This estimate was based on lowering stringent standards without reducing safety or amenity.

A significant change since the Industry Commission's 1995 report is that all jurisdictions' legislation now provides for (but does not necessarily mandate) the incorporation of the Building Code of Australia. This performance based code, introduced in 1996 contains technical provisions for the design and construction of buildings and other structures, covering matters such as structure, fire resistance, access, fire-fighting equipment, mechanical

ventilation, lift installations and certain aspects of health and safety. The code is designed to achieve cost savings in building and construction by allowing flexibility and innovation in the use of materials, forms of construction and design.

Building regulations continue to vary across jurisdictions for a number of reasons.

- Although the Building Code of Australia is the main incorporated document in the State and Territory building regulations, there may be other relevant documents such as planning codes.
- Jurisdictions have the opportunity to introduce some regional variations to account for climate and the building environment.
- Local governments may make laws that have the same power as a building regulation but apply only within the local government area.

Building approvals also affect business costs. The University of Tasmania estimated that reducing delays in building approvals could save $300–400 million per year (Industry Commission 1995). Introducing competition in building approvals pre-dates the NCP. A recommendation of the 1991 Building Regulation Review Taskforce (quoted in Department of Infrastructure, Energy and Resources 1999) was that State and Territory governments make legislative and administrative provisions for private certification. As well, the model Building Act developed by the Australian Uniform Building Regulations Co-ordinating Council in 1991 includes provisions for removing the local government monopoly in the technical assessment and administration of building regulations.

Private certification was introduced first by Victoria in 1994 and more recently by other States and Territories. Suitably qualified and appropriately insured private certifiers are now able to provide building approvals in all jurisdictions except Tasmania and Western Australia. Tasmania passed new building legislation in 2000, which includes provisions for private certification. This legislation has not yet commenced. Private certification has led to the establishment of competitive markets for these services, with the private sector now accounting for a large proportion of total inspection/approval activity.

Regulating in the public interest

Building regulations have benefits in terms of public health, safety and amenity. The Industry Commission found that most aspects of building regulations meet the public interest test, although some regulations and the way in which they are applied are unnecessarily stringent, reduce the competitiveness of the industry and serve no safety or other public interest objective (Industry Commission 1995, p. 134).

The new Building Code of Australia appears to have reduced building sector costs. One recent review, while noting that it is difficult to quantify the benefits from the new code, estimated that its adoption would lead to savings of 0.5–3 per cent of capital costs (ABCB 2000). This review supported simplifying State-based exceptions in the code and ultimately replacing State-based Acts and regulations with a truly national system.

The Council considers that many aspects of building regulations and approvals are, in principle, justified in the public interest. In assessing NCP compliance — whether restrictions provide a net community benefit and there is a need to restrict competition to achieve the objective of the legislation — the Council looked for the following outcomes:

- Governments should ideally adopt the Building Code of Australia and minimise variations from that code. While the code has been developed to permit State-based variations, excessive variation can increase costs. Where significant State-based variations exist, the Council looked for jurisdictions to have provided a public benefit case for these variations.

- Building approval processes should aim to minimise unwarranted delays. The Council's assessment looks for jurisdictions to have considered introducing competition in the building approval and certification processes, given the likelihood that this will reduce approval times.

- Governments should have only the minimum necessary entry restrictions to private building certification to achieve the objectives of the legislation. Private building certification typically involves a registration scheme, entry requirements and compulsory insurance. The Council accepts that these requirements are generally in the public interest.

Review and reform activity

New South Wales, Victoria, South Australia and the ACT have completed NCP reviews of aspects of building legislation. Tasmania completed a regulatory impact statement for new building legislation. The Queensland and Northern Territory reviews are nearing completion, and Western Australia is developing new legislation that it will examine under gatekeeper provisions.

NCP reviews of legislation in the building area have tended to focus on building certification and occupational licensing more than on building regulations. All States and Territories, however, have adopted the Building Code of Australia with regional variations (ABCB 1999). Victoria and the ACT have provided public interest arguments for regional variations to the code. Other jurisdictions have provided little information about variations in their building regulations from the code but the Council has no evidence to suggest any more than minor variations.

In the 2001 NCP assessment the Council found that New South Wales, Victoria, Tasmania and the ACT had met their CPA clause 5 obligations in relation to building regulations. New South Wales and Tasmania were also assessed as meeting CPA clause 5 obligations in relation to building approvals.

Victoria

Victoria completed its review of the *Building Act 1993*. (Freehills Regulatory Group 1999). The Act allows competing public and private agents to certify building work. A private building surveyor may issue building permits, carry out inspections of building and building work, and issue occupancy permits and temporary approvals. Private building surveyors must meet entry requirements (qualifications and experience), be registered, have professional indemnity insurance and not act as a building surveyor if there is a conflict of interest.

The Government is considering the review in conjunction with its assessment of the *Architects Act 1991*. Victoria is currently considering its response to the review of architect's legislation, focussing on the Victorian review but also taking into account the Inter-Governmental Working Party's response to the Productivity Commission inquiry. The Government reported that its response (including any amendments to legislation) is on target for completion by mid-2002. The Council will make a final assessment in 2003.

Queensland

Queensland's review of the *Building Act 1975* is being undertaken by independent consultants under the supervision of an interdepartmental committee. The review is being undertaken in conjunction with a review of Sewerage and Water Supply Act 1949 and the joint review is expected to be completed by mid-2002. The Council will make a final assessment in 2003.

Western Australia

Western Australia has reported that new legislation is currently being drafted to replace the *Local Government (Miscellaneous Provisions) Act 1960* and the Building Regulations 1989. The new legislation will establish building regulations and specify building approval procedures. Western Australia proposes to review the legislation when drafting is near completion. The Council will make a final assessment in 2003.

South Australia

South Australia completed a review of its *Development Act 1993* in 1999. The Act allows private and public certification of building work against the provisions of the Building Rules. A private certifier must meet entry requirements (qualifications and experience), be registered, have professional indemnity insurance and not act as a private certifier if there is a conflict of interest.

As discussed in the previous section, the review recommendations include reducing the postgraduate experience requirements for private certifiers and requiring Crown developments to be subject to building rules and fire safety requirements consistent with those for private buildings. The Government has agreed to implement the national framework for private certifiers when this is developed, and it is consulting government agencies on a draft directive in relation to fire safety in Crown buildings.

South Australia has committed to action that will meet review recommendations The Council assesses South Australia as having met CPA clause 5 obligations in this area.

The ACT

In January 1999, the ACT introduced private certification of building approvals and inspections by changing the *Building Act 1972* and introducing the *Construction Practitioners Registration Act 1998*. The portions of the Building Act that deal with these matters were rewritten as part of the change, and a regulatory impact statement was produced. Private registered building certifiers must meet entry requirements, be registered, have an approved form of professional indemnity insurance and meet conflict-of-interest criteria.

The ACT completed a general review of private certification in the building industry in November 2000. While the report and government response have not yet been released, a discussion paper for the review stated that the private certification arrangements appear to be working satisfactorily and have broad support from industry groups. The discussion paper also highlighted suggested improvements, including potentially extending private certification into selected development approvals that comply with planning guidelines (Purdon Associates 2000).

However, given that the introduction of private certification was accompanied by a regulatory impact statement and that the system had a positive preliminary assessment by the review, the Council assesses the ACT as meeting CPA clause 5 obligations in regard to private certification.

The Northern Territory

The Northern Territory has completed a review of its *Building Act*. The Territory Government initially delayed implementation of the legislative amendments resulting from the review pending broader amendments to the Act. The Government has decided subsequently, because the broader amendments are yet to be finalised, to proceed with the amendments arising from the NCP review. It estimates that the NCP-related legislative amendments should proceed by mid-2002. The Council will make a final assessment in 2003.

Table 13.2 lists the progress of each jurisdiction's review and reform of its building regulations and approval legislation.

Table 13.2: Review and reform activity of legislation regulating building

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Environmental Planning and Assessment Act 1979* *Local Government Act 1993*	Sets building regulations and specifies building approval procedures and accreditation of building certifiers.	Review of assessment procedures in both Acts was completed.	The Acts were amended in 1997 and 1999 to simplify development procedures and allow for certification of development by accredited certifiers. The State has adopted the 1996 Building Code of Australia.	Meets CPA obligations (June 2001).
Victoria	*Building Act 1993*	Sets building regulations and specifies building approval procedures and accreditation of building surveyors.	Review was completed in 1998. It focused on occupational regulation of building practitioners, including building surveyors.	The Government is considering the review report.	Building regulations — meets CPA obligations (June 2001). Building approvals — Council to finalise assessment in 2003.
Queensland	*Building Act 1975* and Standard Building Law and Building Regulation 1991	Sets building regulations and specifies building approval procedures and accreditation of building certifiers.	The review is being undertaken in conjunction with review of *the Sewerage and Water Supply Act 1949* by independent consultants under the supervision of an interdepartmental committee. The review is expected to be completed by first half of 2002. .		Council to finalise assessment in 2003.
Western Australia	*Local Government (Miscellaneous Provisions) Act 1960* and Building Regulations 1989	Sets building regulations and specifies building approval procedures.	Not for review. The Government is developing a Bill to replace the Act. The Bill is to be examined under gatekeeper provisions.		Council to finalise assessment in 2003.

(*continued*)

Table 13.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Development Act 1993* and Development Regulations 1993	Sets building regulations and specifies building approval procedures and accreditation of building certifiers.	Review was completed in July 1999. Its recommendations included: requiring Crown developments to be subject to building rules and fire safety requirements consistent with those for private buildings; allowing private certification of private development; and removing the obligation for planning authorities to obtain independent advice for noncomplying developments.	Majority of recommendations implemented. A public interest justification was provided where recommendations were not accepted	Meets CPA obligations (June 2002).
Tasmania	*Local Government (Building and Miscellaneous Provisions) Act 1993* (part III subdivisions)			Legislation was replaced by the *Building Act 2000*, which was assessed under the gatekeeper requirements.	Meets CPA obligations (June 2001).
	Local Government (Building and Miscellaneous Provisions) Act 1993 (health issues)			Relevant provisions were transferred to the *Public Heath Act 1997,* which was assessed under the gatekeeper requirements.	Meets CPA obligations (June 2001).
	Local Government (Building and Miscellaneous Provisions) Act 1993 (except health issues and part III)	Sets building regulations and specifies building approval procedures.		Building provisions were replaced by the *Building Act 2000* which was assessed under the gatekeeper requirements	Meets CPA obligations (June 2001).
	Building Act 2000	Sets building regulations and specifies building approval procedures and accreditation of building certifiers.	New legislation. The regulatory impact statement on the Building Bill 1999 was released in August 1999. The Act provides a framework for regulation of the building industry and details of the framework are being developed in consultation with the building industry.	The Act received Royal Assent in December 2000, and is expected to commence from 1 January 2003, following the completion of industry consultation.	Meets CPA obligations (June 2001).

(*continued*)

Table 13.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Building Act 1972*	Sets building regulations and specifies building approval procedures. Also sets building practitioners licensing.	Targeted public review was completed in August 2000. Review focused on the regulation of building occupations and did not review building regulations. Public benefits for building regulations cover amenity, the safety and health of people who use buildings, and community expectations.		Meets CPA obligations (June 2002).
	Construction Practitioners Registration Act 1998	Registration, entry requirements, disciplinary processes, business conduct (professional indemnity insurance with approved insurer, no conflict of interest).	New legislation to introduce private certification of building work. Review was completed in November 2000.		Meets CPA obligations (June 2002).
Northern Territory	*Building Act*	Sets building regulations and specifies building approval procedures and building practitioners licensing.	A review was undertaken in 1999. The results will be incorporated into a general review of the Act, which is under way.		Council to finalise assessment in 2003.

Service providers

A number of professions, occupations and trades service the construction and planning industry. Architects, engineers, surveyors, builders and valuers are just some of the building industry workforce. Key restrictions in legislation regulating these vocations include licensing requirements, entry requirements (rules or standards governing who may provide services), the reservation of practice (where only certified practitioners are allowed to perform certain areas of practice), ownership and other commercial restrictions. A Council staff paper sets out how these measures restrict competition and explores issues raised by professional regulation (Deighton-Smith, Harris and Pearson 2001). It also highlights principles for regulating professions and occupations, including the desirability of:

- regulatory objectives being clearly identified;
- links between specific restrictions and the reduction of harms being identifiable;
- regulations and other rules of conduct being transparent and public;
- restrictions being consistently applied, with a presumption against 'grandfather clauses';
- enforcement actions being open, accountable and consistent;
- regulatory bodies having broad representation, with strong community involvement; and
- regulation being the minimum necessary to achieve the government's objectives.

Architects

Review and reform activity

Individual States and Territories are responsible for the various legislative instruments regulating architects. The Productivity Commission completed a national review of architecture legislation on behalf of all States and Territories except Victoria (PC 2000c), finding that the costs of current regulation outweigh the benefits. It found no net community benefit from the registration of architects and recommended repeal of the various architects Acts in all jurisdictions (with an appropriate notification period of, say, two years to consult with domestic and overseas consumers on the changes). The Productivity Commission found:

> *Statutory certification restricts competition to some degree, imposing costs on consumers, architects and non-architects. As the practice of architecture is not restricted by Architects Acts, such costs are unlikely to be large. Nonetheless, evidence suggests they are positive.*
>
> *… On balance, in the Commission's assessment, the costs of current regulation outweigh its benefits because claimed benefits of Architects Acts could be achieved more effectively by a self-regulating profession and other existing legislation.* (PC 2000c, p. xiv–xv)

The Productivity Commission highlighted two possible grounds for intervention in the building design market: spillover effects (where building design affects neighbours and possibly the wider community) and asymmetric information (where consumers have less information than the provider of the building design does). It noted that the harms caused by poor quality architecture could be more effectively addressed through other regulatory mechanisms, particularly fair trading legislation and building codes. The Productivity Commission stated:

> *Self-regulation would involve the repeal of Architects Acts but, importantly, this would not leave the profession and the services it provides unregulated. Architects and other providers of building design are subject to a range of regulations designed to address consumer protection and spillovers related to the building industry, and the business community in general. In many cases, these general laws were not in place when Architects Acts were first introduced.* (PC 2000c, p. xxxvi)

The Productivity Commission's alternative approach was to apply the following principles to those States and Territories that require registration of all building practitioners who act as principals (including all building design practitioners):

- that architects be incorporated under general building practitioners boards which have broad representation (including industry-wide and consumer representation);
- that there be no restrictions on the practice of building design and architecture;
- that the use of a title such as 'registered architect' be restricted to those registered but that there be no restrictions on use of the generic title 'architect' and its derivatives;
- that only principals (persons, not companies) to contracts be required to be registered;
- that there be provision for accessible, transparent and independently administered consumer complaints procedures, and transparent and independent disciplinary procedures; and

- that there be scope for contestability of certification (that is, that architects with different levels of qualifications and experience be eligible for registration).

A working party, with a representative from each State and Territory, was established to develop a national response to the review. This group presented its proposed response to Heads of Government for consideration, recommending the adoption of the alternative approach via amendment of existing legislation to remove elements deemed to be anticompetitive and not in the public interest.

The working party recommended that:

- regulatory boards be constituted with broad industry-wide and consumer representation;
- legislation providing for the regulation of architects not include restriction on practice;
- restriction on the use of the titles 'Architect' and 'Registered Architect' remain;
- where an organisation offers the services of an architect, an architect must supervise and be responsible for those services;
- complaints and disciplinary procedures be made more transparent and provide avenues for appeal; and
- architectural boards be encouraged to identify (and implement) means of broadening current certification channels.

Queensland's 2002 NCP annual report advises that the working group response has received broad acceptance from all jurisdictions, although the ACT and the Northern Territory are yet to advise of their formal endorsement. While no government has yet passed legislation to give effect to the reforms proposed by the working party, each has committed to the reform agenda developed by the working party. The Council will make a final assessment of review and reform activity in June 2003.

Table 13.3 lists the progress of each jurisdiction's review and reform of legislation regulating architecture.

Engineers

Queensland is the only State that legislates for the registration of all professional engineers. Queensland's *Professional Engineers Act 1988* includes restrictions on entry, a requirement to register, the reservation of title and practice, a disciplinary process, commercial restrictions and business licensing. Several jurisdictions require professional engineers to be registered for specific areas of work, such as building work (Victoria and South Australia) and

certification (New South Wales and the Northern Territory). Generally, jurisdictions use the National Professional Engineers Register (managed by the Institution of Engineers, Australia) as the benchmark criteria for qualifications and experience required to practice as a professional engineer. Jurisdictions also rely on quality standards (such as building codes) to protect the public from harm.

Queensland has completed its review of the *Professional Engineers Act 1988*. An independent consultant conducted the review, under the auspices of a steering committee of department officers, a consumer representative and a professional engineer. The review recommended a co-regulatory approach, whereby the regulatory environment and market outcomes would be largely unchanged. Under the proposed approach, the profession would take responsibility for assessing applicants for registration and the Government would be responsible for administration of the legislation, including accreditation of professional bodies and disciplinary action where misconduct is identified. The current business licensing of units and associated professional indemnity insurance requirements would remain.

The Government has considered the review report and submissions and proposed a Bill for introduction during 2002 to amend the Act in line with review recommendations. The Council will make a final assessment in 2003.

Surveyors

Cadastral (land and property) surveyors have an important role in affirming property rights. Each State and Territory requires surveyors to be licensed and registered with the jurisdiction's surveyors' board.

Legislation regulating surveyors includes entry standards, the reservation of title and a requirement to register. There are also disciplinary processes, reserved areas of practice and business conduct restrictions in all jurisdictions. In New South Wales, surveyors cannot advertise in a way that is false, misleading or deceptive, claims or suggests superiority to other surveyors or is likely to bring the surveying profession into disrepute. In addition to restrictions imposed on surveyors, some legislation grants the right to surveyors to access property in any manner necessary to conduct a survey.

Regulation of surveyors aims to maintain the integrity of the land tenure system supporting the land and property markets. Accordingly, the Council considers there are public benefit arguments to support, in principle, licensing and registration of cadastral surveyors.

Review and reform activity

The ACT completed a review of the *Surveyors Act 1967* and passed a new Act in 2001. In the 2001 NCP assessment, the Council assessed the ACT as having met

review and reform obligations in this area. Western Australia was also assessed as meeting CPA obligations for the *Strata Titles Act 1985* in June 2001 NCP assessment.

New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania have completed reviews of legislation regulating surveyors but have yet to pass legislation to implement the review recommendations. Details are provided below. Although these jurisdictions are yet to pass new legislation arising from their reviews, all have indicated their commitment to reform. The Council will make a final assessment of these jurisdictions in connection with surveyors in June 2003. The Northern Territory has completed a review of the *Licensed Surveyors Act* and retained restrictions in accordance with review recommendations.

New South Wales

The review of the *Surveyors Act 1929* was completed in August 2001. It recommended that the Government clarify the objects of the Act and retain the system of registration of surveyors and the Board of Surveyors. It also recommended that current standards and requirements be substantially retained but subject to ongoing review; that the Government consider deregulating restrictions on the naming and ownership of surveying firms and on advertising; and that the Government change the Surveyors (Practice) Regulation 2001 to make it less prescriptive about the methods of surveying.

In October 2001, the Government accepted the review's recommendations, in principle and approved the preparation of amending legislation. It has also undertaken further public consultation on these reforms.

Victoria

Victoria's review of the *Surveyors Act 1978* was completed in July 1997. The review recommended:

- retaining restrictions on entry;
- altering the composition of the Surveyors Board so it is not dominated by surveyors;
- changing entry requirements to:
  - allow surveyors to gain practical training through course work as an alternative to training under a supervising surveyor;
  - make integrity criteria specific;
- reducing some commercial restrictions to:

  - remove the requirement for surveyors or related professions to form a majority of members/directors of a firm engaging in cadastral survey work;

  - remove the power of the Surveyors Board to set fees; and

- reducing barriers to the interstate mobility of surveyors.

The Victorian Government has substantially accepted the recommendations of the review. Amending legislation was introduced into Parliament in 2001 but is yet to be passed by Parliament.

Queensland

Queensland completed a review of the *Surveyors Act 1977* in 1997. The review supported retaining the licensing system for cadastral surveyors and the requirement for consulting surveyors to hold insurance. The Government accepted this recommendation, considering that licensing helps maintain the stability and integrity, and public confidence in, the land title system. The review recommended removing a number of restrictions on competition — namely business name approval, fee setting by the Surveyors Board of Queensland and removing the requirement that the majority of directors of bodies corporate must be registered surveyors. The Government endorsed these review recommendations and announced that it plans to introduce legislation into Parliament in 2002. The Government also endorsed scope to move to a co-regulatory model in the future.

Western Australia

The Western Australian review of the *Licensed Surveyors Act 1909* and the *Strata Titles Act 1985* was completed in 1998. The review concluded that licensing of surveyors is in the public interest and generally set at the minimum level necessary to address the community's lack of awareness of procedural and technical surveying knowledge. The review recommended:

- re-composing the Land Surveyors Licensing Board to have equal numbers of members who are licensed surveyors and members of consumer/user groups;

- clarifying entry standards — that is, more rigorously defining good fame and character with regard to a previous criminal record (including business fraud and/or dishonest business practices), and changing the competency requirements from practical field training of 24 months and an exam to practical field training of at least 12 months and an exam;

- maintaining the requirement for continuing professional development;

- removing the restriction on the number of graduates that a licensed surveyor is permitted to supervise;

- retaining the requirement for professional indemnity insurance, but removing the power of the board to approve insurers and prescribe the form of insurance certificates; and

- retaining the reservation of practice in relation to strata titles.

The review also concluded that the restrictions in the Strata Titles Act were in the public interest and should be retained. The Government of Western Australia endorsed the recommendations of the review and it has reported that these reforms are being implemented in the Acts Amendment and Repeal (Competition Policy) Bill. The Bill has yet to be introduced to Parliament.

South Australia

The *Survey Act 1992* contains competition restrictions that relate to the licensing, registration, entry requirements, reservation of title (and derivatives), reservation of practice, disciplinary processes, business conduct (including ownership restrictions) and business licensing of surveyors. A review was completed in 1999 and the report was released in 2002. The review supports the retention of licensing and entry requirements and recommended reforms to company and partnership controls. The Government is considering the review recommendations.

Tasmania

The Tasmanian review of the *Land Surveyors Act 1909* was competed in July 1999. It recommended retaining the restrictions in relation to registration, annual licensing, disciplinary processes, experience and minimum standards. It also recommended replacing the requirement for two years of supervised training with an appropriate course of postgraduate training, developing less prescriptive and more output focused standards, removing restrictions on the number of graduates under supervision and on the power of the board to set fees.

The Tasmanian Government released its draft response to the review recommendations, proposing an alternative, less restrictive, competency-based co-regulation model. The model involves a single public register of all surveyors, with mandatory registration of land surveyors, voluntary registration of surveyors in noncadastral disciplines and voluntary registration of multidisciplinary competency certification for all registered surveyors. The Government would not be directly involved in the assessment of competency: rather, an accredited professional organisation would assess professional competency.

Tasmania has advised that legislation will be introduced during the 2002 Spring session of Parliament to implement deregulation of the surveying profession to a greater extent than envisaged by the review.

The Northern Territory

The Northern Territory completed a review of the *Licensed Surveyors Act* in October 1999. The review concluded that potentially anticompetitive provisions could be justified under the CPA. The Government endorsed the review outcomes in February 2000.

Although the review report has not been publicly released, the Northern Territory provided public benefit arguments in its 2002 annual report to support the retained competition restrictions, particularly in relation to entry standards. The Government considers that the entry standards for licensed surveyors in the Northern Territory are consistent with national entry standards, and serve to reduce the extent of information asymmetry in the provision of professional surveying services. The Government deems it unlikely that confidence in the integrity of the Territory's cadastre could be maintained if entry standards for licensed surveyors were lowered.

The Northern Territory has completed its review and reform activity in this area and provided a public benefit case to support retained restrictions. It therefore has met its CPA clause 5 obligations.

Table 13.4 lists the progress of each jurisdiction's review and reform of legislation regulating surveying.

Valuers

Valuers assess the value of properties, especially in property transactions where a purchase is being made with a loan from a financial institution. Five jurisdictions license land valuers: New South Wales, Queensland, Western Australia, South Australia and Tasmania. Occupational licensing for valuers includes entry requirements, registration requirements, the reservation of title, reserved areas of practice, disciplinary processes and business conduct regulations. Queensland also has restrictions on advertising (which must not be false or misleading, directly or indirectly injure the professional reputation of another valuer, or damage the profession).

All governments have recognised the questions that arise where professions and occupations are licensed in some but not all jurisdictions, along with the implications for mutual recognition. Governments established a working party — the Vocational Education, Employment and Training Committee Working Party on Mutual Recognition — in the early 1990s to determine whether occupations that were registered in some but not all jurisdictions should be deregistered or fully registered in all jurisdictions.

This working party examined valuers' legislation. It noted that consumer protection is the objective of the legislation, but that the majority of valuers' clients are banks, legal practitioners, finance companies and other financial intermediaries (who seek a valuation as part of the loan assessment process). These consumers employ their own staff for valuations or have a panel of valuers

on whom to call. In addition, members of the public who use valuation services tend to carry out these transactions through other professionals, institutions or the courts, who are well-informed consumers. The public interest evidence supporting the registration of valuers did not persuade the working party, which recommended abolishing registration (VEETAC 1993). At the time, valuers were registered in all jurisdictions except the ACT and the Northern Territory.

Review and reform activity

Since the working party review, Victoria has repealed its legislation for registering valuers and therefore has no review obligations under the NCP. New South Wales, Queensland and South Australia have completed reviews and completed or announced reform for legislation regulating land valuers. Other jurisdictions have completed legislation reviews.

New South Wales

New South Wales completed a review of the *Valuers Registration Act 1975* in 2000. The review recommended a negative licensing scheme to replace the current system. The proposed scheme involves core legislation that provides for qualification and practice requirements and disciplinary action, similar to the regulatory approach introduced in South Australia in 1994 under the *Land Valuers Act 1994*. The Director-General would have power to take disciplinary action (including prohibiting conducting land valuation). The criterion of 'good character' would be replaced with the requirement of not having been convicted of an offence involving dishonesty and not having been prohibited from acting as a land valuer in any Australian jurisdiction. Continuing professional development and professional indemnity insurance would not be a compulsory condition to carry on business as a valuer.

In April 2000, the Government accepted the review's recommendations, in principle, and approved the preparation of an exposure Bill for public consultation during 2000-01. Additional information has subsequently been prepared on the public benefits and costs of alternative regulatory options. A final reform proposal is expected to be submitted soon for Government endorsement. Amending legislation will be introduced into Parliament during 2002. The Council will complete a final assessment in 2003.

Queensland

Queensland completed a review of the *Valuers Registration Act 1992* in October 1999. The review found that deregulation in the medium to long term is likely to deliver a net public benefit, but that in the short term there is a risk to infrequent users of valuers. The review recommended retaining registration (with a further review in three years) and removing other geographic and price control restrictions (Queensland Government 2001). The Government endorsed the review recommendations in February 2000 and introduced amending

legislation to Parliament in March 2001. The amendments include a re-composition of the board, a reduction in practical experience requirements from five to three years, and a new requirement for continuing professional development for registration renewal.

The Council will look for Queensland to undertake a further review of its registration requirement in 2002, in line with the review recommendation. The Council will complete a final assessment in 2003.

Western Australia

The Department of Consumer and Employment Protection reviewed the *Land Valuers Licensing Act 1978* in 1999. It recommended that land valuers no longer be required to be registered and that the Land Valuers Licensing Board be abolished. The review was not finalised at the time, pending the outcomes of the Gunning Committee of Inquiry into the operations of the boards and committees in the Fair Trading portfolio and the Temby Royal Commission into the finance broking industry.

The Gunning Committee of Inquiry was commissioned in April 2000 and published its final report on 1 September 2000. The Temby Royal Commission into the Finance Broking Industry was commissioned on 11 June 2001 to investigate whether there have been unlawful or improper activities or practices relating to the finance broking industry since 1 January 1994. It considered the conduct of finance brokers, borrowers and those who provide services to them and to lenders, including (but not limited to) advisers, accountants, auditors, bankers, lawyers and valuers. The Royal Commission's final report (published on 21 December 2001) found that:

> *Valuers perform a necessary social role. They must be, and are, trained. It would be a bad thing if anybody, irrespective of skill or character, could adopt the title and carry out the functions of a land valuer. It follows that land valuers should be licensed, as happens presently under the Land Valuers Licensing Act 1978. That Act should be retained, along with the Land Valuers Licensing Board.* (Department of Treasury and Finance 2002)

The Government has endorsed the findings of the Royal Commission, which constitutes a public interest argument to support the licensing of land valuers. The NCP review is being updated to reflect this endorsement. Western Australia expects the updated review to be finalised June 2002. The Council accepts that additional time for Western Australia to complete NCP review and reform activity is warranted, given the Gunning Commission of Inquiry and the Temby Royal Commission, and acknowledges that the Royal Commission provides a public interest case to support continuation of licensing. The Council will make a final assessment in June 2003.

South Australia

South Australia's *Land Valuers Act 1994* involves negative licensing and disciplinary provisions aimed at ensuring consumer protection. These arrangements work by excluding valuers deemed to have acted illegally or improperly. South Australia's review of the Act found the regulation of land valuers in this way to be justified, with consumers placed at risk of significant financial loss if valuers are incompetent, negligent or dishonest. The review panel concluded, however, that the required postgraduate qualifications are too onerous and that the Government should re-examine the current requirements and broaden the number and type of acceptable qualifications (Office of Consumer and Business Affairs 1999b). The Government has endorsed the review recommendations and is awaiting approval of a national training package, which it has undertaken to implement. The Council will make a final assessment in 2003.

Tasmania

Tasmania completed a review of the *Land Valuation Act 1971* and the *Valuers Registration Act 1974* in July 1998. The Government accepted the recommendations of the review, and Parliament passed the *Valuation of Land Act 2001* and the *Land Valuers Act 2001* which implement the review recommendations in 2001. Tasmania assessed the Acts under its legislation gatekeeper requirements. The Acts were due to be proclaimed before mid-2002 (after the regulations were finalised), but only the former Act was in operation at 30 June 2002.

Tasmania has significantly progressed its review and reform activity in this area The Council will make a final assessment in 2003.

Table 13.5 lists the progress of each jurisdiction's review and reform of legislation regulating land valuation.

Building and related trades

Service providers of building and related trades include builders, plumbers, electricians and tradespeople such as painters. Occupational licensing in the building trades can involve entry standards, registration requirements, the reservation of title, reserved areas of practice and disciplinary processes.

All jurisdictions legislate to ensure those who undertake electrical, plumbing, draining and gasfitting work have a minimum level of training and experience to undertake that work. All jurisdictions also license or register builders (or building practitioners). Some jurisdictions provide specific licences for other trades too. Table 13.6 summarises the progress of each jurisdiction's review and reform of legislation regulating building and related trades.

Electrical workers

All governments require electrical workers to be licensed. All governments also distinguish between the types of electrical work and levels of competency. Generally, governments aim to maintain a degree of commonality in basic requirements and qualifications to improve mobility across jurisdiction boundaries. Differences across States and Territories include licence renewal periods, the length of additional experience required for contractors, and the definition of electrical work (CIE 2000c).

The regulation of electrical workers (such as electricians) is aimed at protecting public safety. It is designed to address information asymmetry (where consumers tend to lack the information to be able to assess independently whether a tradesperson has the skills to perform the task safely) and negative externalities (where the electrical work may cause harm to third parties).

Review and reform activity

In the 2001 NCP assessment, the Council assessed Victoria as having met its CPA legislation review obligations in relation to the *Electricity Safety (Installation) Regulations 1999*. Other governments' progress with completing review and reform activity is discussed below.

New South Wales

The *Home Building Act 1989* regulates the entry of tradespeople into the residential building sector and stipulates the activities for which a licence must be obtained including electrical workers and plumbers. In September 1996, the Government released a Green Paper outlining options for licensing of the building industry. A working group chaired by the Department of Fair Trading was set up to review and consult relevant industry and community stakeholders. The review reported in March 1998 and recommended reforms to remove unnecessary components of the licensing system, subject to an assessment of the expected impact on the home warranty insurance scheme.

This report considered that much of the need for licensing would be eliminated given the impact of the home warranty insurance scheme. During consultation, however, approved insurers advised that some licensing requirements are needed to underpin the insurance system.

In response to the report, in November 2000 the Government announced a comprehensive package of reforms for the home building industry covering licensing, home warranty insurance, dispute resolution and building contracts. An issues paper and draft exposure Bill were released in February 2001 for public comment by the end of March 2001. The draft Bill proposes retaining the builders licensing system because the home warranty insurance scheme is not yet able to keep out unscrupulous builders. The draft Bill proposes to tighten existing licensing arrangements and speed up the disciplinary process.

New South Wales enacted the *Home Building Legislation Amendment Act 2001* was enacted in July 2001, proclaiming various elements on 10 August 2001, 30 November 2001 and 1 January 2002. The remaining parts of the Act are expected to be introduced progressively during 2002. As a result of uncertainties in the insurance market affecting the home warranty scheme, New South Wales anticipates that further changes to the Home Building Act and the Home Building Regulation. These changes will establish new arrangements in relation to the insurance requirements of the Act. The Council assess New South Wales as having met its CPA obligations for the 2002 assessment and it will make a final assessment in 2003.

Queensland

Queensland has reviewed the *Electricity Act 1994* in the context of preparing new electrical safety legislation. The Act establishes the framework for the occupational regulation of the electrical trades and includes provisions for licensing, registration, disciplinary processes and business conduct. The review assessed provisions relating to occupational regulation and technical standards. Independent consultants under the supervision of an interdepartmental committee prepared a public benefit test report. The Cabinet endorsed the report's recommendations and an implementation strategy in February 2002. The Council will make a final assessment in 2003

Western Australia

Western Australia's *Electricity Act 1945* and Electricity (Licensing) Regulations 1991 establish the framework for the occupational regulation of electricians. They provide for licensing and the reservation of practice, and establish entry requirements and disciplinary procedures. A review of the legislation is under way.

Western Australia has not completed review and reform in this area, but appears to be progressing consistent with completing its NCP activity by June 2003. The Council will make a final assessment of Western Australia's compliance with its CPA clause 5 obligations in 2003.

South Australia

The *Plumbers, Gas Fitters and Electricians Act 1995* establishes entry requirements for tradespeople and contractors and provides for registration (for tradespeople), licensing (for contractors) and reservation of practice. The review of the Act is nearing completion.

South Australia has not completed review and reform in this area, but appears to be progressing consistent with completing its NCP activity by June 2003. The Council will make a final assessment of South Australia's compliance with its CPA clause 5 obligations in 2003.

Tasmania

Tasmania's *Electrical Industry Safety and Administration Act 1997* imposes a number of competition restrictions, including:

- requiring electricians to be licensed/registered;
- requiring persons wishing to practise as electricians, electrical technicians or contractors meet certain prerequisites aimed at ensuring the person has suitable qualifications and experience;
- ensuring certain services are provided only by licensed/registered electricians;
- establishing a disciplinary process aimed at ensuring electricians who do not provide services of satisfactory quality are prevented from practising; and
- imposing business conduct obligations such as mandatory insurance against liability for injury or property damage.

Tasmania's annual NCP report for 2001 stated that the Government did not intend to review the Act. Tasmania advised the Council that the Tasmanian licensing regime for electrical technicians and electrical contractors is essentially the same as that of other States and Territories and that NCP reviews and other assessments in these jurisdictions have found this regulatory regime to be in the public benefit.

The Council accepts that the Tasmanian restrictions are similar to those in other jurisdictions and that NCP reviews in those other jurisdictions establish public benefit justifications that are likely to apply to the Tasmanian regime. While it is preferable that governments undertake their own reviews to ensure appropriate consideration of localised factors and that legislation is up to date, the Council acknowledges that the NCP provides scope for governments to develop regulatory arrangements on the basis of relevant experience in other jurisdictions. Such an approach, presuming it originate from objective analysis, will at least enhance the prospects for national consistency in jurisdictions' regulation. The Council assesses Tasmania as having met its CPA clause 5 obligations in this area.

The ACT

The ACT conducted a joint review of the occupational regulation aspects of the *Building Act 1972*, the *Electricity Act 1971* (electricians licensing) and the *Plumbers, Drainers and Gasfitters Board Act 1982*. The review, undertaken by the Allen Consulting Group, involved public consultation following the release of a directions paper. It concluded that the information asymmetries and negative externalities that would otherwise result broadly justify the Government's role in ensuring that tradespeople have the appropriate skills to undertake building and construction. The review recommended: replacing legislation with a single new Act for licensing builders, electricians, plumbers, drainers and gasfitters;

replacing existing boards with a single registrar (supported by separate advisory panels); making various changes to remove duplication and streamline licensing arrangements; and changing the disciplinary system. The review also recommended against requiring the holder of an electrician's or electrical worker's licence to undertake ongoing professional development and hold insurance. It proposed, however, transferring the requirement to hold housing indemnity insurance in a new Act under the oversight of the Department of Justice and Community Safety (Allen Consulting Group 2000c).

The ACT Government accepted the majority of the 22 recommendations and drafted legislation, but the 2001 ACT elections meant that the introduction of legislation was postponed until 2002. The only recommendation that the Government did not accept was a provision for a peer group to overturn the registrar's decisions on strictly technical matters. The Government's model involves a panel of people with qualifications at the same level or above who provide technical advice to the registrar before the registrar makes a decision. Further, decisions are appealable through the Administrative Appeals Tribunal (ACT Government 2001).

The ACT is progressing review and reform activity in this area. The Council will make a final assessment in 2003

The Northern Territory

The Northern Territory Government commissioned the Centre for International Economics to review the *Electrical Workers and Contractors Act* in 2000. Public consultation during the review, which was completed in October 2000, involved a publicly released issues paper, consultation with stakeholders and requests for submissions. The review recommendations included:

- maintaining licensing, but affording comparable status to other means of signalling competence;
- removing additional experience requirements for contractors. If they are to be retained, then the Electrical Workers and Contractors Licensing Board should articulate the objectives of this requirement and demonstrate that experience is the best way of achieving the objective;
- amending the 'fit and proper person' test to signal the criteria against which it is assessed;
- removing licensing requirements exemptions for the Power and Water Authority; and
- conducting a more general review of the Act, looking at incorporating the NCP review recommendations, reducing duplication in assessment and accreditation, changing the composition of the board, updating the language in the Act and reviewing the level of enforcement (CIE 2000c).

The Government approved the review recommendations in November 2000 and indicated that it will make the necessary amendments following a review of the administrative structures supporting the Act. The Northern Territory has significantly progressed review and reform activity in this area. The Council will make a final assessment in 2003.

Plumbers, drainers and gasfitters

Regulation of workers in the plumbing and gasfitting trades is designed to protect public health and safety and the integrity of the water, sewerage and drainage infrastructure. The Labour Ministers' Council agreed in 1994 to reforms to plumbing and gasfitting occupational licensing arrangements (Plumbers and Gas-fitters Registration Review Group 1998). These reforms were consistent with Heads of Government decisions on mutual recognition and partially licensed occupations, and with the public and occupational health and safety rationale for licensing. Ministers agreed that licensing of plumbers and gasfitters should be nationally consistent, based on the core areas of sanitary plumbing, water plumbing, draining (drainage from a building, essentially below-ground drains beyond the building line) and gasfitting. To meet these core areas, Ministers agreed to change licensing, including:

- in New South Wales, to discontinue licensing workers for metal roofing, mechanical services, duct fitting and sprinkler fitting;
- in Victoria, to discontinue licensing workers for metal roofing, mechanical services, duct fitting and sprinkler fitting;
- in Tasmania, to discontinue licensing workers for metal roofing and mechanical services;
- in the ACT, to discontinue licensing workers for sprinkler fitting;
- in South Australia and the Northern Territory, to amend licensing arrangements to allow separate licensing of water plumbers; and
- in Victoria and Tasmania, to change the licensing of mechanical services plumbers to cover unrestricted water plumbing.

Ministers also agreed that all licensing should be based on national core curriculums and any future competency standards, that licensing authorities should discontinue assessment or examination that duplicates training authorities' assessment or examination, that formal demonstration of competence be the only criterion for licensing, and that all reference to time serving (except the completion of training contracts) should be removed from legislation. They also agreed on reforms for levels of licensing and contractor licensing.

Review and reform activity

All governments are reviewing legislation regulating plumbers and gasfitters under the NCP. In the 2001 NCP assessment, the Council found both Victoria and Western Australia to have met CPA clause 5 obligations in this area. Victoria enacted the *Building (Plumbing) Act 1998*, which introduced a new licensing requirement for refrigeration mechanics and for plumbers who perform the same work. The Government set out a public interest justification for regulating refrigeration mechanics and plumbers in this way. Western Australia transferred responsibility for plumber licensing from the Water Corporation to a new Plumbers Licensing Board in 2000 via the *Water Services Coordination Amendment Act 1999* and the Water Services Coordination (Plumbers Licensing) Regulations 2000. Western Australia's review of the Water Services Coordination Amendment Act recommended that the Government retain restrictions to prevent unlicensed persons from performing plumbing work and to maintain the power of the board to set licence conditions (Department of Treasury and Finance 2001).

All other jurisdictions are yet to complete review and reform activity relating to plumbers and gasfitters. This section reviews progress by New South Wales, Queensland, Tasmania, the ACT and the Northern Territory. The previous section on electrical workers notes that South Australia is currently reviewing its Plumbers Gas Fitters and Electricians Act.

Queensland

Independent consultants are reviewing the *Sewerage and Water Supply Act 1949* under the supervision of an interdepartmental committee. The Act establishes the occupational regulation framework for plumbers and drainers in Queensland and provides for licensing, registration, and entry requirements. The review being undertaken in conjunction with review of the Building Act, expected to be completed in 2002. The review is considering a proposal to integrate plumbing approvals and appeal processes in the Integrated Planning Act.

Queensland has not completed review and reform in this area, but appears to be progressing consistent with completing its NCP activity by June 2003. The Council will make a final assessment of Queensland's compliance with its CPA clause 5 obligations in 2003.

Tasmania

Tasmania completed a review of the *Plumbers and Gas-fitters Registration Act 1951* in October 1998. The Act restricts competition by requiring licensing and registration of plumbers and gasfitters and specifying entry requirements, the reservation of practice for activities and disciplinary processes. The review recommendations include reducing areas of reservation of practice; limiting the qualifications and experience required for registration to a demonstration of competence; implementing an appropriately constituted self-certification system;

and amalgamating registration and plumbing inspection systems to reduce overlap and reduce the regulatory burden on plumbers.

The Government has not yet responded to the review recommendations but has advised the Council that it expects to do so in 2002. The Council will make a final assessment in 2003.

The ACT

The ACT conducted a review of the *Plumbers, Drainers and Gasfitters Board Act 1982* in conjunction with a review of the occupational regulation aspects of the Building Act and the Electricity Act. This review and the Government's response are discussed in the previous section on electrical workers.

The ACT legislation reserves certain areas of practice for persons qualified to be plumbers. The ACT also requires persons undertaking work as sprinkler fitters to be licensed, despite agreeing in the mid-1990s to abolish the requirement for licensing. Occupational regulation, of which this is an example, is in the public interest where restrictions are directly linked to reducing identified and important harms. The Council accepts that it is appropriate that some plumbing and gas fitting practices are reserved to suitably qualified persons. The ACT has not yet explained its public interest reasoning supporting these restrictions. The Council is seeking evidence from the ACT on this matter for the 2003 assessment.

The Northern Territory

The Northern Territory Government commissioned the Centre for International Economics to review the *Plumber and Drainers Licensing Act* in 2000. Public consultation during the review, which was completed in September 2000, involved a publicly released issues paper, consultation with stakeholders and requests for submissions. The review recommendations included:

- amending the Act to specifically state its objectives and explicitly recognise the national competencies-based approach to trades qualifications;
- making widely known the board's options in dealing with complaints;
- maintaining the 'fit and proper person' test power of the board, provided appeal mechanisms are clear and accessible;
- reviewing membership of the board to establish whether the continued Power and Water Authority membership is desirable; and
- conducting a more general review of the Act, partly to examine the case for compliance certificates and the case for restricted plumbing licences to meet the needs of other trades (CIE 2000e).

The Northern Territory Government approved the recommendations of the review report (Government of the Northern Territory 2001) but has not yet

implemented the review recommendations. The Council will make a final assessment in June 2003.

Builders or building practitioners

The regulation of builders (or building practitioners), as with other related trades, is designed to protect public safety by overcoming information asymmetries and negative externalities. Builders' mistakes can have significant effects, some as significant as loss of life if, for example, a building collapses (Allen Consulting Group 2000c).

Review and reform activity

Legislation covering builders in New South Wales, the ACT and the Northern Territory has been discussed in earlier sections that deal with building regulations and approvals, and with specific occupations. This section discusses review and reform progress in the remaining jurisdictions.

Victoria

Victoria completed a review of the *Building Act 1993* in 1998. Recommendations included: integrating the Act with the Architects Act; making companies and partnerships subject to registration requirements; retaining the Minister's power to issue compulsory insurance orders; increasing the use of audits of building surveyors to ensure standards are maintained; repealing exemptions to public sector employees, public authorities and the Crown (while retaining exemptions that exempt certain high security Crown buildings from the requirement to lodge permit documents with the relevant council); and basing the building permit levy on a formula that is cost-reflective and includes incentives for cost-effective administration of legislation.

The Government has not yet responded to the review recommendations, partly because the States and Territories working party determining the approach to the regulation of architects following the PC review, did not finalise its position until late in 2001. Victoria advised that it anticipates finalising its response to the review of this Act and the Architects Act by 30 June 2002. The Council will make a final assessment in June 2003.

Queensland

The review of the *Queensland Building Services Authority Act 1991* and the Queensland Building Services Authority Regulation 1992 has commenced. The review process is a targeted public review, which examines similar or identical restrictions across the various States' building industry legislation. The NCP review was publicly advertised and submissions were invited. An independent consultant was engaged for the purpose of conducting the review and to

undertake public consultation. An industry reference group comprising consumer, building industry and insurance industry representatives was established to assist with the consultative process.

The major restrictions contained in the legislation are the licensing of builders and tradespeople, restrictions on entry, the reservation of practice, disciplinary processes, business conduct restrictions and the monopoly provision of home warranty insurance. The consultant's findings were delivered in late December 2001. Following significant changes in the provision of home warranty insurance in other States and the conduct of a national review at the direction of the Ministerial Council on Consumer Affairs, the consultants were requested to update their report in June 2002. The Government will consider the report in the second half of 2002. The Council will make a final assessment in June 2003.

Western Australia

The Cabinet has endorsed the completed reviews of the *Builders Registration Act 1939* and the *Home Building Contracts Act 1991*. The former Act prescribes licensing, registration, entry requirements, the reservation of practice and business licensing for builders. The latter Act contains mandatory insurance provisions for builders. The review of the *Building Legislation Amendment Act 2000* (which amended the above two Acts) has also been completed and endorsed by Cabinet. The majority of the amendment Act was proclaimed on 1 August 2001 with the remainder being proclaimed on 1 November 2001.

The Council assesses Western Australia as having met its CPA obligations in this area.

South Australia

In 2001, South Australia completed a review of the *Building Work Contractors Act 1995*. The Act prescribes licensing, registration, entry requirements, the reservation of practice, disciplinary processes and business conduct restrictions that apply to builders and some tradespeople. The review panel issued a supplementary issues paper in October 2001 for public and industry comment. The Government is considering its response to the review.

South Australia has yet to respond to the review recommendations. The Council will consider South Australia's response to the review in the 2003 NCP assessment.

Tasmania

Tasmania's new *Building Act 2000*, includes provisions that regulate building practitioners (and also includes provisions for building regulations and approval — see discussion in earlier section). The Act establishes a co-regulatory accreditation scheme, whereby building practitioners are assessed by authorised industry or professional organisations against accreditation criteria. The

legislation also requires mandatory insurance and replaces joint and several liability with proportionate liability. The Act has received Royal Assent and is expected to operate from 1 January 2003 following consultation with the building industry on details of the regulatory framework. The Council assesses Tasmania as having met its CPA clause 5 obligations in this area.

Other building trades

Queensland's *Queensland Building Services Authority Act 1991* requires licensing for other building trades, such as pest control, painting, insulating and swimming pool construction. The State's progress in reviewing and reforming this Act is discussed earlier in this chapter.

The review of Western Australia's *Painters Registration Act 1961* found that the current system of mandatory licensing is too restrictive and should be removed (Government of Western Australia 1999). The review recommended that the Government develop a certification scheme to allow consumers to readily identify painters who possess particular skills. It proposed negative licensing to support a certification system, whereby persons who do not adhere to basic standards of commercial conduct are removed from the industry.

Western Australia's review found these changes will reduce business costs but still enable some control of the industry and increased certainty for consumers. The Government endorsed the recommendations of the review. The original legislation review was overtaken by the Gunning Committee of Inquiry, which was commissioned in April 2000 to conduct an inquiry into the operations of the boards and committees in the Fair Trading portfolio. The final report by the Gunning Committee was published on 1 September 2000. A wider review of the industry was undertaken in response to this report and is currently being considered by the Minister.

Western Australia's 2002 annual NCP report advises that, following the NCP review, the Government is now undertaking a general review of the *Painters Registration Act 1961,* which is expected to be completed in mid-2002. The Council will make its final assessment in June 2003.

Table 13.6 lists the progress of each jurisdiction's review and reform of legislation regulating building and related trades.

Table 13.3: Review and reform of legislation regulating architecture

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Architects Act 1921*	Registration, entry requirements, the reservation of title, disciplinary processes, business restrictions	Productivity Commission review was completed in August 2000 and recommended repeal of the Act. Previous State review was commenced but is not completed.	A States and Territories working group was established to develop a national response to the review. The working group recommended amendments to existing legislation to remove elements deemed to be anticompetitive and not in the public interest. All jurisdictions have accepted the approach of the working group.	Council to finalise assessment in 2003.
Victoria	*Architects Act 1991*	Registration, entry requirements, the reservation of title, disciplinary processes, business restrictions (ownership provisions that at least two thirds of company directors must be registered architects)	Review was completed February 1999. It recommended retaining title restriction and registration requirements, and reducing business restrictions (including reducing ownership provisions that at least one director or partner must be a registered architect).	See above.	Council to finalise assessment in 2003.
Queensland	*Architects Act 1985*	Registration, entry requirements reservation of title, disciplinary processes, business restrictions, business licensing	Productivity Commission review was completed in August 2000 and recommended repeal of the Act	See above.	Council to finalise assessment in 2003.

(*continued*)

Table 13.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Architects Act 1921*	Registration, entry requirements, the reservation of title, disciplinary processes, business conduct (including Architects Board approval for advertising), business licensing.	Productivity Commission review was completed in August 2000 and recommended repeal of the Act. State review being completed to address recommendations.	See above.	Council to finalise assessment in 2003.
South Australia	*Architects Act 1939*	Registration, entry requirements, the reservation of title, disciplinary processes, business conduct (including accuracy of advertising, ownership), business licensing, advertising restrictions	Productivity Commission review was completed in August 2000 and recommended repeal of the Act. Previous State review completed.	See above.	Council to finalise assessment in 2003.
Tasmania	*Architects Act 1929*	Registration, entry requirements, the reservation of title, disciplinary processes, business restrictions, business licensing	Productivity Commission review was completed in August 2000 and recommended repeal of the Act.	See above.	Council to finalise assessment in 2003.
ACT	*Architects Act 1959*	Registration, entry requirements, the reservation of title, disciplinary processes	Productivity Commission review was completed in August 2000 and recommended repeal of the Act.	See above	Council to finalise assessment in 2003.
Northern Territory	*Architects Act*	Registration, entry requirements, the reservation of title, disciplinary processes	Productivity Commission review was completed in August 2000 and recommended repeal of the Act. Previously completed NT review has been put on hold.	See above.	Council to finalise assessment in 2003.

Table 13.4: Review and reform of legislation regulating surveying

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Surveyors Act 1929*	Licensing, registration, entry requirements (qualification, exam, two years experience, age at least 21 years, good fame and character), the reservation of title and practice, disciplinary processes, business conduct (regulation of the making of surveys and advertising)	Review was completed in August 2001. The review recommended: clarifying the objects of the Act and retaining the system of registration of surveyors and the Board of Surveyors; substantially retaining current standards and requirements subject to ongoing review; giving consideration to deregulating restrictions on the naming and ownership of surveying firms and on advertising; and possibly changing the Surveyors (Practice*)* Regulation 2001 to make it less prescriptive about the methods of surveying.	The Government has accepted the review's recommendations and approved the preparation of amending legislation.	Council to finalise assessment in 2003.
Victoria	*Surveyors Act 1978*	Licensing, registration, entry requirements (education, experience, integrity criteria), the reservation of title and practice, disciplinary processes, business conduct (ownership restrictions, fees)	Review was completed. Its recommendations included: retaining restrictions on entry; making integrity criteria specific; reducing some commercial restrictions, such as the requirement for surveyors or related professions to form a majority of members/directors of a firm engaging in cadastral survey work; removing the power of the regulatory body to set fees for surveying services; and reducing barriers to the interstate mobility of surveyors.	The Government accepted most of the review recommendations and introduced amending legislation during the autumn 2001 sitting of Parliament. The Government has put in place a transitional surveyors board with a greater proportion of nonsurveyors as members in response to the recommendation. Parliament is yet to pass the legislation.	Council to finalise assessment in 2003.

(*continued*)

Table 13.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Surveyors Act 1977*	Licensing, registration, entry requirements (education, experience, good fame and character), the reservation of title and practice, disciplinary processes, business conduct (including business name approval, fee setting, professional indemnity insurance, ownership restrictions)	Review was completed in November 1997, but report is not yet released (brief summary included in 2001 NCP annual report). Review recommendations include retaining registration; removing business name approval and fee setting by the Surveyors Board of Queensland; and removing the requirement that directors of bodies corporate have qualifications.	The Government endorsed the review recommendations to retain registration for nonexempt surveyors (including mining and engineering surveyors) and remove anticompetitive provisions of business name approval and fee setting by the Surveyors Board of Queensland, and qualifications of directors of bodies corporate. It also endorsed scope to move to a co-regulatory model in the future. The Government plans to introduce legislation into Parliament in 2002 to effect review recommendations.	Council to finalise assessment in 2003.

(*continued*)

Table 13.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Licensed Surveyors Act 1909*	Licensing, entry requirements (competency [education and experience], age, good fame and character, continuing professional development), the reservation of title and practice, disciplinary processes, business conduct (including professional indemnity insurance)	Review, in conjunction with the review of *Strata Titles Act 1985*, was completed in 1998. Its recommendations included re-composing the board; clarifying entry standards; and retaining restrictions on professional indemnity insurance.	The Government endorsed the review recommendations. It is drafting amendments to legislation.	Council to finalise assessment in 2003.
	Strata Titles Act 1985	Only licensed surveyors can 'certify' a strata plan, survey-strata plan or notice of resolution where a strata company is requesting a conversion from a strata scheme to a survey-strata scheme	Review, in conjunction with review of *Licensed Surveyors Act 1909,* was completed in 1998. It concluded that the restrictions are in the public interest and should be retained.	The Government endorsed the review recommendation.	Meets CPA obligations (June 2001).
South Australia	*Survey Act 1992*	Licensing, registration, entry requirements (education, experience, fit and proper), the reservation of title (and derivatives), the reservation of practice, disciplinary processes, business conduct (including ownership restrictions), business licensing	Review was completed in 1999 and report was released in 2002. Review supports the retention of licensing and entry requirements. It also recommended reforms to company and partnership controls.	Report is with the Government for consideration.	Council to finalise assessment in 2003.

(*continued*)

Table 13.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Land Surveyors Act 1909*	Licensing, registration, entry requirements, the reservation of practice, disciplinary processes, business conduct (number of supervised graduates, discretionary power for the surveyors board to publish and enforce a scale of fees, survey practice standards)	Review was completed in July 1999 and the report released in December 2000. Review recommended retaining the following restrictions: registration, annual licensing, disciplinary processes, experience (but replacing two years of supervised training with an appropriate course of postgraduate training) and minimum standards (but less prescriptive and more output focused). Review recommended removing the following restrictions: the number of graduates under supervision and the board's power to set fees.	The Government released a draft response for comment, proposing an alternative, less-restrictive, competency-based co-regulation model. The model would establish a single public register of all surveyors, with mandatory registration of land surveyors, voluntary registration of surveyors in noncadastral disciplines and voluntary registration of multidisciplinary competency certification for all registered surveyors. The Government would not be directly involved in the assessment of competency. Rather, an accredited professional organisation would assess professional competency. Legislation to implement deregulation of the surveying profession, to a greater extent than envisaged by the review, will be introduced in 2002.	Council to finalise assessment in 2003.

(*continued*)

Table 13.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Surveyors Act 1967* *Surveyors Act 2001*	Licensing, entry restrictions (educational prerequisites), the reservation of title and practice, ability of board (made up of mostly surveyors) to make regulations and undertake disciplinary processes	Review report was released in December 1998. Recommendations included: retaining registration; having less rigorous entry standards; and abolishing the board in favour of powers of a chief surveyor.	The Government accepted all recommendations but deferred considering the removal of compulsory postgraduate entry requirements until all jurisdictions have completed their reviews of surveyors legislation. The new Act gives powers to a commissioner for surveys, (not a chief surveyor). A new *Surveyors Act 2001* was passed in February 2001.	Meets CPA obligations (June 2001).
Northern Territory	*Licensed Surveyors Act*	Licensing, registration, entry requirements (education, experience, possibly exams, fit and proper), the reservation of title and practice, disciplinary processes, business conduct (including practice standards), business licensing	Review was completed in October 1999 but the report is not yet released. Review concluded that potentially anticompetitive provisions could be justified under the CPA. A public benefit case to support restrictions is provided in the 2002 NCP report.	The Government endorsed the review outcomes in February 2000.	Meets CPA obligations (June 2002).

Table 13.5: Review and reform of legislation regulating land valuation

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Valuers Registration Act 1975*	For real estate valuers: licensing, registration, entry requirements (education, supervised training, good character), disciplinary processes, the reservation of practice. It also confers functions on the Property Services Council.	Department review was completed in 2000, recommending a 'negative licensing' scheme to replace the current system. The scheme would involve core legislation with entry requirements (qualifications, practice requirements and good character). Continuing professional development and professional indemnity insurance would not be a compulsory condition to carry on business as a valuer.	The Government accepted all review recommendations. Legislation is being prepared to repeal the Act and modify the system for the regulation of valuers.	Council to finalise assessment in 2003.
Queensland	*Valuers Registration Act 1992* and Regulations	Licensing, registration, entry requirements (education, five years practical experience and exam or certificate of competence, good fame and character, fit and proper), the reservation of title and practice, disciplinary processes, business conduct (including advertising)	Department review was completed in October 1999. Review found deregulation in medium to long term is likely to deliver net public benefit, but in short term is a risk to infrequent users of valuers. Review recommended retaining registration (with further review in three years) and removing other geographic and price control restrictions.	Government endorsed review recommendations in February 2000. Amending legislation was introduced to Parliament in March 2001 and will be proclaimed in 2002. Amendments included the re-composition of the board, a reduction in practical experience requirements from five to three years, and a new requirement for continuing professional development for renewal of registration.	Council to finalise assessment in 2003.

(*continued*)

Table 13.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Land Valuers Licensing Act 1978* and Regulations	Licensing, entry requirements (member of Institute of Valuers or education and four years experience, and possibly exams), the reservation of title and practice, business conduct (including board setting maximum fees, code of conduct)	The 1999 review of the Act (by the Department of Consumer and Employment Protection) was not finalised as a result of the Gunning Inquiry and the Temby Royal Commission into the finance broking industry. The Review recommended the discontinuation of licensing and the Land Valuers Licensing Board. The Temby Commission recommended that valuers be licensed. The Government endorsed the findings of the Royal Commission. The NCP review is being updated to reflect this and is expected to be completed by June 2002.		Council to finalise assessment in 2003.
	Valuation of Land Act 1987	Valuer-General powers and activities	Review was completed. It was undertaken by an intra-agency committee. Public consultation involved submissions following release of an information paper. The Review recommended defining the eligibility for the position of Valuer General less narrowly (dropping requirement to be a member of the Australian Property Institute); removing the restriction that any person making valuation for rating and taxing purposes must be licensed under Land Valuers Licensing Act; and encouraging a greater flow of information for the purposes of making valuations.	The Government endorsed the review recommendations. Recommendations are being implemented via the Acts Amendment and Repeal (Competition Policy) Bill 2002	Council to finalise assessment in 2003.

(*continued*)

Table 13.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Land Valuers Act 1994*	Negative licensing, entry requirements (qualifications or membership of various professional associations), the reservation of practice, disciplinary processes	Review was completed. It concluded that the current postgraduate qualification requirements are too onerous and that the Government should broaden the number and type of acceptable qualifications.	The Government has endorsed the review recommendations and is awaiting approval of a national training package which it has undertaken to implement.	Council to finalise assessment in 2003.
Tasmania	*Land Valuation Act 1971*	Gives the Valuer-General a monopoly on the provision of valuation services to local government for the setting of valuations for the purpose of determining local rates.	Major review was completed in conjunction with review of Valuers Registration Act. Review recommended tendering for all statutory mass valuation work and retaining the role of the Valuer-General. The Valuer-General would be responsible for developing and monitoring valuation standards and information requirements, determining the length of the revaluation cycle, administering valuation lists, coordinating the collection of information, and being the avenue of appeal. Review also recommended greater administrative separation of the Valuer-General and Government Valuation Services, and the abolition of the Valuers Registration Board.	*Valuation of Land Act 2001*, implementing reforms, was passed in 2001.	Meets CPA obligations (June 2002).

(*continued*)

Table 13.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
	Valuers Registration Act 1974	Licensing, registration, entry requirements (education and experience or 10 years experience, good fame and character), the reservation of title and practice, disciplinary processes, business conduct (Conduct that may result in deregistration includes professional misconduct, taking excessive amounts of alcohol and drugs, suffering from a mental disorder or committing an offence.)	Major review was completed in conjunction with the review of Land Valuation Act.	*Land Valuers Act 2001*, implementing reforms, was passed in 2001, but is not yet proclaimed.	Council to finalise assessment in 2003.

Table 13.6: Review and reform of legislation regulating building trades

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Common-wealth	*Tradesmen's Rights Regulation Act 1946*	National recognition of metal and electrical trade skills developed informally	Metal and electrical trades	Review was completed. Its recommendations included repealing the Act. It also recommended that the Commonwealth Government vacate the domestic skills recognition field (and that registered training organisations established under the Australian Recognition Framework undertake skill recognition on a free competition basis) and that the implementation arrangements be given detailed consideration.	The Government accepted the review recommendations. Bill to repeal legislation was introduced into Parliament. Government is continuing consultations with industry about the new arrangements for domestic skills recognition and migration skills assessment.	Meets CPA obligations (June 2001).
New South Wales	*Building Services Corporation Act 1989* *Home Building Act 1989*	Licensing, registration, entry requirements (qualifications or pass exams, experience, age, character), the reservation of practice (building work, electrical wiring work, plumbing and drainage work, roof plumbing work, refrigeration work, air-conditioning work), business conduct (including insurance for building work over $5000 from approved private insurer), business licensing	Residential building workers, 'specialist workers' (plumbing, gasfitting, electrical, refrigeration and air-conditioning workers) and suppliers of kit homes	Review was completed in March 1998, recommending reforms to remove unnecessary components of the licensing system, subject to an assessment of the expected impact on the home warranty insurance scheme. Consultations concluded that some licensing requirements were needed to underpin the insurance system. The Government released a White Paper in February 2001 proposing: a tighter licensing system; faster disciplinary process; increased penalties for noncompliance; changes to insurance scheme; an early intervention dispute resolution system; and strategies to raise consumer awareness of available remedies when things go wrong.	The Building Services Corporation Act was renamed the *Home Building Act 1989*, which privatised compulsory insurance and abolished business licensing. The *Home Building Legislation Amendment Act* containing reforms was enacted in July 2001 and is progressively coming into operation.	Meets CPA obligations (June 2002).

(*continued*)

Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Building Act 1993*	Licensing, the reservation of title and practice (plumbing: mechanical services, residential and domestic fire sprinklers, roofing [stormwater], sanitary, water supply, draining, gasfitting), registration requirements, permit requirements, business conduct (insurance)	Engineers, quantity surveyors, building surveyors, building practitioners, plumbers, drainers, gasfitters	Review completed in 1998. Its recommendations included: integrating the Act with the Architects Act; making companies and partnerships subject to registration requirements; retaining the Minister's power to issue compulsory insurance orders; increasing the use of audits of building surveyors to ensure standards are maintained; repealing exemptions to public sector employees, public authorities and the Crown (except those that exempt certain high security Crown buildings from requirement to lodge permit documents with the relevant council); and basing the building permit levy on a formula that is cost-reflective and includes incentives for cost-effective administration of legislation.	Government is considering review report.	Council to finalise assessment in 2003.
	Electricity Safety (Installations) Regulations 1999	Licensing (workers and inspectors), registration (electrical contractors), entry requirements (qualifications, also training course for person responsible for business management and administration), business conduct (insurance), prescribed methods for carrying out installation work, standards for the quality of materials, fittings and apparatus	Electrical trade work	New legislation was assessed under Victoria's legislation gatekeeping arrangements.	Act is designed to address information asymmetries. The Government notes that regulations are justified because unskilled workers or inspectors or the use of inappropriate methods or substandard materials can result in loss of life, injury, industry downtime and property damage.	Meets CPA obligations (June 2001).
	Building (Plumbing) Act 1998	Licensing, registration	Refrigeration mechanics	New legislation was assessed under Victoria's legislation gatekeeping arrangements.	Act removes exemption from licensing for registration applying to refrigeration mechanics.	Meets CPA obligations (June 2001).

(*continued*)

Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Building Control (Plumbers Gasfitters and Drainers) Act 1981*		Plumbers, gasfitters, drainers		Act repealed and replaced by *Building Act 1993*.	Meets CPA obligations (June 2001).
	Electric Light and Power Act 1958		Electrical trade work		Act repealed and replaced by *Electricity Safety Act 1998.*	Meets CPA obligations (June 2001).
Queensland	*Queensland Building Services Authority Act 1991*	Licensing, registration, entry requirements (qualifications and experience, fit and proper, financial requirements), the reservation of practice, disciplinary processes, business conduct (ownership, advertising and sign at building site [whereby workers must state whether licensed, name licensed under and identifying numbers], written contract; compulsory insurance; warranty)	Building work: 90 licence categories in the areas of plumbing, draining, gasfitting, pest control, demolition and residential building and design (such as painting, insulating, swimming pool construction)	The consultants were requested to update their report in June 2002 following significant changes in the provision of home warranty insurance in other States and the conduct of a national review at the direction of the Ministerial Council on Consumer Affairs. The Government will consider the report in the second half of 2002.		Council to finalise assessment in 2003.

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Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Electricity Act 1994* and Electricity Regulation 1994	Licensing, registration, entry requirements (qualifications and experience, also suitable person financial requirements for electrical contractor), disciplinary processes, business conduct (advertising whereby workers must state whether licensed, name licensed under and identifying number; public liability insurance for electrical contractor)	Electrical workers, electrical contractors	A public benefit test report was prepared by independent consultants under the supervision of an interdepartmental committee. The report's recommendations and an implementation strategy were endorsed by Cabinet in February 2002		Council to finalise assessment in 2003.
	Sewerage and Water Supply Act 1949 and Regulations	Licensing, registration, entry requirements (qualifications and prescribed practical experience), the reservation of practice, disciplinary processes, provision for the making of plumbing and drainage standards	Plumbers, drainers	The review is being undertaken by independent consultants under the supervision of an interdepartmental committee. It is being undertaken in conjunction with a review of the Building Act and is expected to be completed in 2002. Review is considering a proposal to integrate plumbing approvals and appeal processes in the Integrated Planning Act.		Council to finalise assessment in 2003.
Western Australia	*Country Towns Sewerage Act 1948* and Bylaws Metropolitan Water Supply, Sewerage and Drainage Bylaws 1981	Licensing, registration, entry requirements (certificate of knowledge and competence, five years experience, fit and proper, age over 21), the reservation of practice (either licensed or under licensed supervision), disciplinary processes, business conduct	Plumbers	Review was completed.	Plumber licensing provisions were transferred to the Water Services Coordination (Plumbers Licensing) Regulations 2000. Transfer also shifted responsibility for plumber licensing from the Water Corporation to a new Plumbers Licensing Board.	Meets CPA obligations (June 2001).

(*continued*)

Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Water Services Coordination Act 1995* and Water Services Coordination (Plumbers Licensing) Regulations 2000	Licensing, registration, entry requirements (competency or six years experience and qualification, fit and proper), the reservation of practice (either licensed or under licensed supervision), disciplinary processes	Plumbers, tradepersons (under general direction of plumber)	Review was completed, recommending retaining restrictions to prevent unlicensed persons from performing plumbing work and maintaining the power of the board to set licence conditions.	The Government endorsed the review recommendation.	Meets CPA obligations (June 2001).
	Painters Registration Act 1961	Licensing and registration (for persons carrying on a painting business in their own right and not as employees and for painting valued greater than $200), entry requirements (degree/apprenticeship/ experience and exams, age, good character), the reservation of title and practice, disciplinary processes, business licensing	Painters	Review was completed in 1998, concluding that the current system of mandatory licensing is too restrictive and should be removed. The review recommended that a certification scheme be developed to allow consumers to readily identify painters who possess particular skills. It also recommended negative licensing to support a certification system, allowing for the removal from the industry of persons who do not adhere to basic standards of commercial conduct. These changes will reduce business costs but still enable some control of the industry and certainty for consumers. A general review of the *Painters Registration Act 1961,* following the NCP review, is being finalised and is expected to be completed in mid-2002.	The Government endorsed the review recommendations.	Council to finalise assessment in 2003.

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Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
	Gas Standards Act 1972 and Gas Standards (Gasfitting and Consumer Gas Installations) Regulations 1999	Licensing, registration, entry requirements (knowledge and skills, fit and proper), the reservation of practice	Gasfitters	Review is under way.		Council to finalise assessment in 2003.
Western Australia (continued)	*Electricity Act 1945* and Electricity (Licensing) Regulations 1991	Licensing, entry requirements (apprenticeship/training and experience/exam, fit and proper), the reservation of practice, disciplinary processes	Electricians	Review is under way.		Council to finalise assessment in 2003.
	Builders Registration Act 1939 and Regulations	Licensing, registration, entry requirements (training and seven years practical experience, age, good character, 'sufficient material and financial resources'), the reservation of practice, business licensing	Builders	Review, in conjunction with a review of the *Home Building Contracts Act 1991,* was completed. Its recommendations included reducing restrictions on owner builders, expanding the scope of conditional licences, and expanding the coverage of the Act to the whole State.	The *Building Legislation Amendment Act 2000* was proclaimed in 2001.	Meets CPA obligations (June 2002).
	Home Building Contracts 1996	Requirement of written contracts, conditions (including mandatory insurance)		Review, in conjunction with a review of the *Builders Registration Act 1939* was completed. Its recommendations included retaining requirements for written contracts and a maximum deposit amount, the 'warranty' period and home indemnity insurance (but with further examination of the differences in requirements in Western Australia and the rest of Australia). It also recommended that insurance authorisation be modified so the Minister (rather than insurers) approves policies.	See above.	Meets CPA obligations (June 2002).

(*continued*)

Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Building Work Contractors Act 1995*	Licensing (building work contractors), registration (building work supervisors), entry requirements (for contractors: qualifications, experience, sufficient business knowledge and experience and financial resources, fit and proper, not bankrupt within last ten years; for supervisor: qualifications and experience), the reservation of practice, disciplinary processes, business conduct (written contracts, product or service standards, statutory warranty)	Builders, building industry tradespeople	Review was completed in 2002. The Government is considering its response.		Council to finalise assessment in 2003.
	Plumbers, Gas Fitters and Electricians Act 1995	Licensing (contractors), registration (workers), entry requirements (for contractor: qualifications, experience, no undischarged bankruptcy, fit and proper, sufficient business knowledge and experience and financial resources; for worker: qualifications and experience), the reservation of practice (for plumbing: water, sanitary or draining work or the installing or testing of backflow prevention devices), disciplinary processes	Plumbers, gasfitters, electricians	Review is nearing completion.		Council to finalise assessment in 2003.

(*continued*)

Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Electricity Industry Safety and Administration Act 1997*	Licensing, registration, entry requirements, reservation of practice, disciplinary processes, business conduct (electrical contractor to have insurance)	Electrical contractors and technicians	No review was undertaken. The Government assessed the restrictive provisions of this Act as essentially the same as those of other jurisdictions in which NCP reviews and other assessments have established the public benefit of the restrictions		Meets CPA obligations (June 2001).
	Plumbers and Gas-fitters Registration Act 1951	Licensing, registration, entry requirements (qualification or experience, apprenticeship and exam), the reservation of practice (sanitary, mechanical services, water and backflow prevention plumbing, draining and roof plumbing, any other plumbing work, gasfitting), disciplinary processes	Plumbers, gasfitters	Review was completed. Its recommendations included: reducing areas of reservation of practice; limiting qualifications and experience required for registration to demonstrate competence; implementing an appropriately constituted self-certification system; and amalgamating registration and plumbing inspection systems to reduce overlap and the regulatory burden on plumbers.	The Government is considering the review recommendations.	Council to finalise assessment in 2003.
	Building Act 2000	Mandatory accreditation, entry requirements (including continuing professional development), the reservation of practice, disciplinary processes, business conduct (insurance)	Building practitioners for building and plumbing work over $5000	New legislation. The regulatory impact statement on the Building Bill 1999 was released in August 1999. The Act provides a framework for regulation of the building industry and details of the framework are being developed in consultation with the building industry.	The Act received Royal Assent in December 2000, and is expected to commence from 1 January 2003, following the completion of industry consultation.	Meets CPA obligations (June 2002).

(*continued*)

Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Building Act 1972*	Licensing, registration, entry requirements (training, course work, practical experience or qualifications and supervised building work, business capacity), the reservation of practice, disciplinary processes, business conduct (insurance)	Building practitioners	Targeted public review, in conjunction with review of the *Electricity Act 1971* (electricians licensing) and the *Plumbers, Drainers and Gasfitters Board Act 1982* was completed in August 2000. It recommended replacing legislation by a single new Act for licensing builders, electricians, plumbers, drainers and gasfitters; abolishing existing boards and replacing them with a single registrar supported by separate advisory panels; making changes to remove duplication and streamline the licensing arrangements; and changing the disciplinary system.	The Government announced its response to the review, agreeing with most recommendations. It does not agree with the recommendation for a peer group to have the power to overturn registrar's decisions on strictly technical matters. Legislation drafted in 2001 but introduction into Parliament postponed until 2002.	Council to finalise assessment in 2003.
	Electricity Act 1971 (electricians licensing) *Electricity Safety Act 1971*	Licensing, registration, entry requirements (skills, qualifications, experience, business capacity), the reservation of practice (installing, altering or repairing an electrical installation, other than an electrical installation that operates at extra low voltage), disciplinary processes, business conduct (insurance)	Electricians, electrical workers	See discussion of Building Act.	See discussion of Building Act.	Council to finalise assessment in 2003.

(*continued*)

Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
ACT (continued)	*Plumbers, Drainers and Gasfitters Board Act 1982*	Licensing, registration, entry requirements (skills, experience, qualifications, age 18 years or over, fit and proper), the reservation of practice (installing/ fitting a fire-fighting sprinkler, sanitary plumbing, water supply plumbing, laying or repairing drains, installing/repairing/ inspecting/testing consumer natural gas piping and gas appliances), disciplinary processes	Plumbers, drainers, gasfitters	See discussion of Building Act.	See discussion of Building Act.	Council to finalise assessment in 2003.
Northern Territory	*Building Act*	Licensing and provision for establishment of building technical standards, registration of building practitioners and certifiers, regulation of building matters (including the registration of building products), the granting of permits, the establishment of appeals processes	Building practitioners	A review was undertaken in 1999, with the results to be incorporated into a general review of the Act, which is under way.		Council to finalise assessment in 2003.

(*continued*)

Table 13.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory (continued)	*Electrical Workers and Contractors Act*	Licensing, registration, entry requirements (qualifications, experience, fit and proper), the reservation of practice (electrical work unless extra low voltage)	Electrical workers	Review by Centre for International Economics was completed in October 2000. Consultation involved public release of issues paper, consultation with stakeholders and submissions. Recommendations included that licensing should be maintained, but also that other means of signalling competence should be afforded comparable status, the board should consider removing additional experience requirements for contractors, the fit and proper person test should be amended to signal the criteria against which it is assessed, and exemptions to licensing requirements for the Power and Water Authority should be removed. The review recommended a more general review of the Act.	The Government approved the review recommendations in November 2000. The necessary amendments are to be made following a review of the administrative structures supporting the Act.	Council to finalise assessment in 2003.
	Plumbers and Drainers Licensing Act	Licensing, registration, entry requirements (qualifications or experience, fitness of character), the reservation of practice (for plumbing: installing, altering, removing or repairing fixtures, fittings and pipes designed to receive and carry sewage or water, and the ventilation of those fixtures, fittings and pipes), business conduct (supervision)	Plumbers, drainers	Review by Centre for International Economics was completed in September 2000, recommending that: the Act should give explicit recognition of national competencies-based approach; the board's options in dealing with complaints should be made widely known; 'fit and proper person' test should be maintained so long as appeal mechanisms are clear and accessible; and membership of the board should be reviewed to establish whether the continued Power and Water Authority membership is desirable. Review also recommended a more general review of the Act, to examine the case for compliance certificates and the case for restricted plumbing licences to meet the needs of other trades.	The Government approved the review recommendations.	Council to finalise assessment in 2003.

14 Communications

The Australian communications sector is undergoing rapid change, driven mainly by the fast pace of technological development and innovation. It is important to Australia's overall competitiveness that the sector adapts to the pressures for change. Government policies and regulations have the potential to significantly affect the pace of adaptation to the new technologies and market possibilities.

The Commonwealth Government has significant legislative responsibilities for communications. Legislation being reviewed under the National Competition Policy (NCP) includes:

- the *Broadcasting Services Act 1992*;
- the *Radiocommunications Act 1992*; and
- the *Australian Postal Corporation Act 1989*.

The Commonwealth-owned Australia Post and the part-owned Telstra are significant operators in communications markets, and the Commonwealth has been considering a range of regulatory issues relating to these enterprises. The Commonwealth is considering, for example, whether Telstra's internal accounting arrangements are conducive to competition in telecommunications. The Minister for Communications, Information Technology and the Arts announced in April 2002 that there will be an accounting separation of the wholesale and retail arms of Telstra. The details of this separation have not yet been announced (Alston 2002).

The Commonwealth Government has commissioned several inquiries in recent years that considered the impact of legislative and regulatory restrictions on competition in the communications sector. In March 1999, the Treasurer commissioned the Productivity Commission to advise on how to 'improve competition, efficiency and the interests of consumers in broadcasting services' (PC 2000a, p. IV). The Productivity Commission presented its broadcasting inquiry report to the Government in March 2000. The Government publicly released the report in April 2000, but has not announced its response.

In June 2000, the Treasurer requested the Productivity Commission to prepare an inquiry report into telecommunications competition regulation, with particular reference to parts XIB and XIC of the *Trade Practices Act 1974* and certain provisions of the *Telecommunications Act 1997*. The Productivity Commission was requested to assess whether these provisions in the two Acts prevent integrated telecommunications companies (such as Telstra) using their market strength to reduce competition, or whether alternative arrangements are necessary.

In January 2001, the Assistant Treasurer requested that the Productivity Commission, in undertaking the review, 'specifically consider the implications of current pay television programming arrangements for the development of telecommunications competition in regional Australia, and consider whether additional regulatory measures are needed to facilitate access to pay television programming' (PC 2001b, p. V). The Productivity Commission provided its inquiry report to the Government in September 2001. The Government released the report on 21 December 2001 and the Minister for Communications, Information Technology and the Arts announced the Commonwealth's initial response to this review on 24 April 2002.

In July 2001, the Assistant Treasurer referred legislation on radiocommunications to the Productivity Commission for inquiry and report by July 2002. The Productivity Commission was requested to focus on those parts of the legislation that restrict competition or that impose costs/confer benefits on business. The Productivity Commission is to report on appropriate arrangements for spectrum management.

On 19 December 2001, the Minister for Communications, Information Technology and the Arts released an issues paper and called for submissions to a Government review on datacasting services, as specified in schedule 6 of the Broadcasting Services Act. The Minister's media release (Alston 2001) stated that the purpose of the review 'is to ensure that the legislative framework for datacasting services provides the maximum scope for development of new and innovative digital services while maintaining the moratorium on new commercial television licences' (until the end of 2006). The inquiry report was under way at the time of the NCP assessment and is expected to be finished during 2002. It must be tabled in Parliament within 15 sitting days of its provision to the Government.

Legislation restricting competition

Broadcasting Services Act 1992

The Commonwealth Government is responsible for the regulation of broadcasting in Australia. The Broadcasting Services Act, which is the regulatory legislation, specifically mentions radio and television services in defining its objectives (s. 3a). Technological change, however, is likely to expand greatly the range of broadcasting services being regulated.

The *Television Broadcasting Services (Digital Conversion) Act 1998* added major new provisions to the Broadcasting Services Act. These provisions set the framework for the conversion of television services from analogue to digital format, and for the regulation of these services and other potential services provided via the digital spectrum.

The Council noted in the 1999 NCP assessment that legislative prohibitions on new commercial broadcasters and the use of digital channels worked against the objective of maximising viewer choice and product diversity. At the same time, the prohibitions were not obviously required to ensure the timely adoption of digital television, maximise the use of existing infrastructure or minimise disruption to consumers.

Productivity Commission and departmental inquiries

The Productivity Commission reviewed the Broadcasting Services Act and the Government released its final inquiry report in April 2000 (PC 2000a).

The Productivity Commission inquiry raised significant questions about the legislation and made extensive recommendations for change. The inquiry report argues that:

> *Broadcasting policy has been, and continues to be, characterised by highly prescriptive regulation. Such an approach was taken to the introduction of subscription television. More recent legislation on the introduction of digital television mandates specific television formats and services.*
>
> *This approach reflects a history of political, technical, industrial, economic and social consequences. This legacy of* quid pro quos *has created a policy framework which is inward-looking, anticompetitive and restrictive ...*
>
> *Technological change has ramifications for many areas of media regulation — access to spectrum, the definition of digital television services, ownership and control, and content regulation. With the increasing pace of technological change in media and communications, the means for achieving the community's policy objectives must also change.* (PC 2000a, pp. 5–6)

The report highlights the important barriers to entry that are established in the Broadcasting Services Act: the ban on new commercial television broadcasting licences until 31 December 2006, and the limitations on the release of broadcasting spectrum (PC 2000a, p. 314).

Further, the Productivity Commission expressed its concerns that the Government's digital conversion policy will not enable consumers to take full advantage of this technology, which has the potential to facilitate greatly increased choice and quality for television viewers. The policy provided each free-to-air television station with an extra channel (without charge), to convert from analogue to digital transmission, and protected the channels from additional competition until the end of 2006. 'Datacasting' was created, involving further regulations; sport cannot be datacast, for example, even though this would be a low cost method of transmission. Restrictions also relate to genres of programs, duration and timing of material, and mode of

presentation. Subject to a review by 1 January 2005, multichannelling by free-to-air stations is prohibited, reflecting concerns about protecting subscription television broadcasters. The Government made a full digital channel available to free-to-air stations, leaving little spectrum available to potential new broadcasters wishing to offer a digital product (PC 2000a, pp 9-15 and 256).

Reflecting these restrictions, few Australians have taken up digital television. The Productivity Commission expressed its concern that the digital conversion plan could fail unless substantially changed. It commented that:

> *Regulatory restrictions on datacasting, multichannelling, and interactive services will be costly to Australian consumers and businesses alike. They will delay consumer adoption of digital technology and deprive business of opportunities to develop new products and services for the world as well as Australian markets. They could have a particularly severe effect on regional consumers who have limited access to other broadband digital platforms.* (PC 2000a, p. 15)

The Productivity Commission recommended that:

> *Broadcasting policy must be reformed quickly to deal with the new competitive dynamics.*
>
> *As an initial step, fundamental reform is needed to make better use of the broadcasting spectrum ('the airwaves'). The spectrum should be priced and allocated as a scarce resource ... Access to spectrum should be separated from broadcasting licences. Broadcasters should be able to provide their services using whichever platform (over the air, cable or satellite) is most efficient ... Pricing spectrum would encourage broadcasters to use it more efficiently. Broadcasting licence fees should be replaced by spectrum access fees ...*
>
> *Anticompetitive legislation should be removed, including restrictions on the entry of new television stations, foreign investment, pay television advertising and sports broadcasting, and Australian quotas for advertisements.* (PC 2000a, pp. 2–3)

Among the most important concerns identified by the inquiry is that scarce spectrum should be allocated to its most highly valued uses. Existing arrangements that do not require incumbent television networks to bid for spectrum cannot guarantee this outcome. Similarly, mandating the 'simulcasting' of high definition television may not be consistent with consumer preferences.

The Productivity Commission inquiry report recommended that datacasting services be defined as digital broadcasting services to facilitate consumers' adoption of digital television. It also recommended that multichannelling and the provision of interactive services by commercial and national broadcasters be permitted.

The Commonwealth is yet to respond fully to the Productivity Commission inquiry into broadcasting, so has not addressed its NCP obligations in this area. The Government has begun the process of responding to aspects of the report — the Minister for Communications, Information Technology and the Arts announced on 5 August 2002 a review of the roles of the Australian Broadcasting Authority and the Australian Communications Authority. This review will focus on, but not be limited to, arrangements for the management of broadcasting and telecommunications spectrum.

The datacasting inquiry, announced by the Commonwealth in December 2001, is being conducted by the Department of Communications, Information Technology and the Arts. The department released an issues paper when the inquiry was announced. In discussing possible options for change, the issues paper suggested some liberalisation of the genre rules, case-by-case decisions by the Australian Broadcasting Authority on whether a datacast would fall within the definition of a commercial television broadcast, allowing datacasters to offer interactive services only, and allowing datacasters to offer narrowcasting services (services to specific groups). The issues paper suggests that the inquiry has quite a narrow focus and thus may not make recommendations that would have a potentially significant impact on competition. The department is expected to finalise the datacasting report in 2002, and the Government is required to release it within 15 sitting days of receiving it.

Radiocommunications Act 1992

The Radiocommunications Act is the key legislation governing the use of the radiofrequency spectrum. Its primary objective is to maximise the public benefit from using the spectrum by ensuring its efficient and equitable allocation. Other objectives include making adequate provision for using the spectrum for public and community services and encouraging the use of efficient technologies to provide a wide range of services.

The Act implements these objectives by providing for:

- the preparation of spectrum plans by the Australian Communications Authority, setting out which parts of the spectrum are to be available for which purposes;

- the issue and trade of spectrum licences (authorising the use of transmitters/receivers on a given part of the spectrum) and their resumption by the Australian Communications Authority;

- the issue of apparatus licences to operate transmitters and/or receivers on parts of the spectrum not allocated for the issue of spectrum licences;

- the issue of class licences for specific purposes; and

- the reallocation of parts of the spectrum.

Productivity Commission inquiry

The Commonwealth commenced a review of the Radiocommunications Act in 1997, but did not examine the NCP aspects of the legislation. Subsequently, the Productivity Commission commenced a review of the Act in July 2001, receiving terms of reference (from the Assistant Treasurer) that focused on those parts of the legislation that restrict competition, or that impose costs/confer benefits on business. The terms of reference required the Productivity Commission to report on appropriate arrangements for spectrum management, accounting for the Competition Principles Agreement (CPA) principle that legislation that restricts competition should be retained only if the benefits to the community as a whole outweigh the costs, and if the objectives of the legislation can be achieved only by restricting competition.

In its draft inquiry report released in February 2002, the Productivity Commission commented that:

> *Radiofrequency spectrum is a vital input to modern communications. The potential for interference creates a role for government in managing spectrum – but regulation risks stifling innovation and impairing the efficient allocation of resources. Market-based solutions based on property rights offer potential for better outcomes.* (PC 2002b, p. XXXII)

The draft report makes several recommendations, including that:

- spectrum licensing is working quite well, but could be improved by better conversion mechanisms, the sale of encumbered spectrum as a going concern, and licensing of 'fallow spectrum';
- 'public interest' tests for renewing licences should not apply to new licences;
- spectrum licences should be re-assigned using market based mechanisms three years before expiry; and
- all spectrum should be subject to the same rules. (PC 2002b, p. XXXII)

The Productivity Commission signed the final report on 1 July 2002 and forwarded it to the Government, which is required to release it publicly (by tabling it in Parliament) within 25 parliamentary sitting days of its receipt.

Australian Postal Corporation Act 1989

Despite the rapid pace of technological change and the concomitant growth of alternative means of communication, postal services remain important to the communications needs of Australians. Australia Post remains a dominant player in the postal services and parcel delivery market, with a legislated monopoly in the provision of certain services.

The Australian Postal Corporation Act establishes Australia Post as a legislated corporation. It guarantees an Australia-wide postal service, known as the universal service. It also requires Australia Post to provide this universal service at a uniform price, whether a letter is sent from interstate or around the corner in a capital city. This is the so-called universal service obligation.

To ensure Australia Post can fulfil the universal service, the Act gives Australia Post an exclusive right to provide some postal services (reserved services). Without the risk of losing market share from competitors, therefore, Australia Post can use the protected profitable services to subsidise the services that the Commonwealth requires it to provide. Such reserved services and cross-subsidies are possible areas of reform to increase competition.

The postal services sector is considerably broader than Australia Post. A range of other operators offer services such as express delivery, parcel services and unaddressed mail delivery. Any competition reforms to the Australian Postal Corporation Act would be likely to result in additional players (and benefits for consumers) in deregulated areas of the market, because existing and potential players would wish to increase their role in this industry.

The Act restricts competition by reserving certain postal services to Australia Post. With a few exceptions, only Australia Post can carry a letter for less than $1.80 if it weighs less than 250 grams. In addition, only Australia Post can deliver international mail in Australia.

Regulating in the public interest

Providing a universal postal service at a reasonable cost is the main objective of the Government's legislation. Further, postal services fulfil an important and growing role in business, where innovation and flexibility may be more important than for households. Nevertheless, any reforms that lower the cost of postal services for households as well as for businesses would enhance consumer welfare and the general efficiency of the economy.

The Commonwealth is likely to require any reforms to be made in the context of maintaining the universal service obligation. That service clearly has a community service obligation feature because the real cost of delivering letters to most regional parts of Australia would be greater than the uniform price. It would be preferable for any such community service obligations to be clearly defined in legislation, and transparently funded and reported. There is some uncertainty about some of the community service obligations that Australia Post delivers, including uncertainty about whether the services are required, and about the extent and source of their funding. Reforms should allow Australia Post to meet defined social contributions and, at the same time, benefit consumers of postal services by encouraging growth in competing firms.

National Competition Council review

On 19 May 1997, the Commonwealth requested that the National Competition Council review the Australian Postal Corporation Act and report on the legislation's restrictions on competition. The terms of reference for the review required the Council to consider the Government's commitments to maintain Australia Post in full public ownership and to provide a standard letter service to all Australians at a uniform price.

The Council recommended a package of reforms, including:

- that Australia Post retain the obligation to provide an Australia-wide letter service, with the unprofitable parts of this obligation treated as a community service obligation funded directly from the Budget;
- that household letter services remain reserved for Australia Post, with a mandated uniform rate of postage;
- that business letter services be opened to competition, with Australia Post free to discount against a maximum charge set at the same level as the uniform rate for household letters; and
- that all international mail services be opened to competition.

These recommendations were aimed at:

- maintaining and, where appropriate, enhancing the social obligation of Australia Post to provide a mail service that is reasonably accessible to all Australians;
- maximising the contribution of Australia Post to the Australian community; and
- facilitating the emergence and growth of competing firms in the postal services industry in the interests of the Australian community.

Reform activity

The Commonwealth Government announced its response in July 1998. The key changes included:

- reducing the protection afforded to Australia Post's monopoly from 250 grams and four times the standard letter rate to 50 grams and one times the standard letter rate;
- removing incoming international mail from the monopoly;
- establishing a regime to provide third party access to Australia Post's network services; and

- converting Australia Post from a statutory corporation to a corporations law company.

The Commonwealth also announced that Australia Post would continue to fund its community service obligations from cross-subsidies and that the uniform rate would remain at 45 cents until at least 2003. While the Commonwealth's proposals differed from those recommended by the Council, both approaches were aimed at increasing competition in the provision of mail services while maintaining Australia Post's universal service obligation and the uniform letter rate.

When the Commonwealth announced its reform proposals for Australia Post, it intended to introduce them into Parliament by the end of 1998, with the reforms to be implemented from 1 July 2000. It did not introduce the amending Bill into the Parliament, however, until the autumn session in 2000. The Senate Environment, Communications, Information Technology and the Arts Legislation Committee examined the Bill, reporting on 5 June 2000.

The Government withdrew the Bill on 29 March 2001. As a result, the Government no longer has a response to the NCP review of the restrictions on postal services. Given that the NCP review found Australia Post could fulfil its social obligations with a less restrictive regime, compliance with CPA clause 5 requires the Government to provide a reform package that removes unjustified restrictions on the provision of postal services.

Competitive neutrality matters

Competitive neutrality measures, which all governments have adopted, seek to ensure significant government-owned businesses do not have an advantage over their private competitors simply as a result of their public ownership. Competitive neutrality ensures significant government businesses face the same taxes, incentives and regulations as those facing private competitors and that prices for their goods and services reflect the full cost of supply. Private companies that believe government-owned competitors are not applying appropriate competitive neutrality principles can raise a complaint with the competitive neutrality complaints body in their jurisdiction.

On 18 February 2000, the Conference of Asia Pacific Express Carriers lodged a competitive neutrality complaint against Australia Post with the Commonwealth Competitive Neutrality Complaints Office (CCNCO). It claimed that Australia Post enjoys an advantage in competing for business because it receives preferential treatment from Customs with respect to screening charges. In particular, it argued that Australia Post is advantaged by:

- higher thresholds for incoming and outgoing postal items before formal Customs screening requirements take effect; and

- exemption for postal items from recently introduced reporting and cost recovery charges for high volume, low value consignments.

The CCNCO (2000) investigated the complaint and recommended that:

- the value thresholds for formal Customs screening of incoming and outgoing mail be aligned for postal and nonpostal articles;
- the Government consider the feasibility of imposing cost recovery charges for informal Customs screening of incoming postal items; and
- the Government address concerns about charges for nonpostal items in high-volume, low-value consignments be addressed as part of the broader issue of whether Australia Post should pay cost recovery charges for informal screening of incoming postal consignments.

The Council's 1998 report on Australia Post raised the issue of differential Customs treatment. The Council recommended that the *Customs Act 1901* be amended so all postal operators are subject to a threshold of the same value. The Government introduced the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*, which provides a modern legal framework for Customs' management of import and export cargo. The Government proposes to harmonise the value thresholds for both incoming and postal items on 1 July 2002 and for incoming postal items in March 2004.

The Minister for Customs has agreed in principle to the CCNCO's second and third recommendations. The imposition of cost recovery charges on Australia Post would require legislative change to the *Customs Act 1901* and the *Import Processing Charges Act 1997*. The Australian Customs Office is consulting with the Department of Communications, Information Technology and the Arts on this matter.

NCP obligations relating to Telstra

Telstra supplied Australia's telecommunications services as a public monopoly until 1991, when the Commonwealth Government introduced changes that ended Telstra's monopoly provision of telecommunications carriage services.[1] The Government accorded Optus a second fixed network carrier's licence, and Optus and Vodafone were given carrier licences to compete with Telstra in seeking mobile phone business.

The Telecommunications Act resulted in the introduction of full competition in carriage services, and the number of suppliers of telecommunications has

[1] Carriage service operators rent space on the networks and supply services to the public via these networks.

since burgeoned (with more than 60 licensed carriers at the end of 2000). Telstra is the still dominant player in the Australian telecommunications industry, however, a result of its huge and pervasive network of communications lines throughout Australia that has been established over many years, and its associated 'incumbency' in the eyes of many customers. The Australian Competition and Consumer Commission's (ACCC's) submission to the Productivity Commission's inquiry into telecommunications competition regulation commented on the characteristics of the Australian market and Telstra, noting:

> *... the overwhelming dominance in the national market, and almost every segment of that market, of a single, vertically integrated incumbent. This dominance creates the potential and the fact of extensive market power in the most basic carriage services as well as a range of enhanced services. Telstra's ubiquitous network and integrated nature ensure that even when other firms operate with it in the delivery of retail services, they rely on interconnection to its network in almost every circumstance. These circumstances are not matched to anywhere near the same extent in any other network industry.* (ACCC 2000, p. 6)

In its final inquiry report, which was released by the Treasurer on 21 December 2001, the Productivity Commission commented that:

> *As the original incumbent, Telstra is still very much the largest operator in the industry, accounting for around two-thirds of telecommunications services revenue ...*
>
> *Effective competition is less well developed in:*
>
> - *Local access services — Telstra's ubiquitous copper local loop is still overwhelmingly the dominant customer access network in Australia ... At June 2001, Telstra accounted for around 95 per cent of local access services*
>
> - *Local telephony services — Telstra accounts for around 81 per cent of retail telephony revenue and 83 per cent of retail local services ... Sustainable service-based competition in local telephony is dependent on Telstra's local call wholesale service provided to competitors, as well as its access price for the unconditioned local loop service ...*
>
> *Overall, while the existing state of competition is much greater than some years ago, this partly reflects the impact of the competition regulations that are in place. In the absence of any regulatory oversight, it is likely that competition would be weakened significantly* ... (PC 2001b, pp. 83 and 99).

The Productivity Commission report argued that regulation in the telecommunications industry is required because carriers need access to Telstra's local loop to offer call origination and termination services to their

customers, with the local network tending to be a natural monopoly as a result of the magnitude of construction costs. As well, Telstra's prior status as the monopoly provider means that it dominates the access network and subscriber numbers. The Productivity Commission recommended that the ACCC continue to oversee telecommunications competition and that access arrangements apply only to core telecommunications services (PC 2001b, 'Overview').

CPA clause 4 obligations relating to Telstra

Legislation in 1997 and 1999 provided for the part privatisation of Telstra, and the company is now 49.9 per cent privately owned. The part privatisation raised a commitment under clause 4 of the CPA for the Commonwealth to review, *inter alia*, 'the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly'.

In the 1997 NCP assessment, the Council noted that the Commonwealth believed related reviews before the part privatisation satisfied its clause 4 obligations. The Commonwealth indicated that it preferred to prohibit anticompetitive conduct and to facilitate third party access to services via the use of telecommunications-specific parts of the TPA (parts XIB and XIC respectively) rather than to pursue the structural separation of Telstra's fixed local network.

The Council also noted that further changes to the regulatory regime governing Telstra had been proposed in the Telstra (Transition to Full Private Ownership) Bill 1998. Moreover, the ACCC had established a telecommunications working group with industry representatives to review Telstra's accounting and cost allocation arrangements, to help develop an accounting separation model for Telstra. The Telstra (Transition to Full Private Ownership) Bill has not proceeded, so its further limitations on anticompetitive behaviour by Telstra — limitations that the Council had indicated would considerably address the Commonwealth's responsibilities under CPA clause 4 — have not come into effect. The ACCC, however, released draft record-keeping rules in June 2000, with final record-keeping rules coming into effect in May 2001.

In 1999, the Council commissioned work by the economic consultants, Tasman Asia Pacific, which was published in the 1999 NCP assessment. Tasman found that record-keeping rules would allow the ACCC to assess anticompetitive behaviour by carriers and carriage service operators, and would comprise a necessary first step to establishing a broader ring-fencing framework. Tasman concluded, however, that a ring-fencing regime would not remove the sources of Telstra's market power and therefore the incentive for it to engage in anticompetitive behaviour. Tasman argued that the advantages of structural separation of the natural monopoly elements from the competitive elements of the telecommunications system would exceed the costs.

The Productivity Commission reviewed telecommunications-specific parts of the TPA (parts XIB and XIC), on which the Commonwealth has largely relied to constrain Telstra's conduct in relation to market competitors (PC 2001b). As noted above, the Productivity Commission's final report argued that regulation is required in response to Telstra's dominance of the local loop, the natural barrier to entry of network construction costs, and Telstra's historical relationship with most Australian phone users. The Productivity Commission recommended:

- legislating the criteria for regulatory pricing decisions;
- allowing a group of access seekers to resolve their access price arrangements with an access provider simultaneously; and
- preventing access price structures from allowing a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations.

The Productivity Commission also recommended that the ACCC be required to report publicly every year on the state of competition in the pay television and related telecommunications markets, and to investigate and report on instances where networks (proposed and new) have difficulty accessing content and pay television services. The Productivity Commission also found that problems in other sectors can have adverse effects on telecommunications (for example, pole access pricing by power utilities). It argued that access arrangements across industries should be consistent.

Analysis of CPA clause 4 compliance

The Productivity Commission's final report finding on the link between Telstra's ability to maintain market power and its ownership of the fixed network emphasises the importance to telecommunications of appropriately addressing the structure of Telstra. The terms of reference for the inquiry required the Productivity Commission to report on the community and economic benefits and costs flowing from parts XIB and XIC of the Trade Practices Act and certain provisions of the Telecommunications Act. The Productivity Commission also was required to report on whether these legislative provisions:

> *… are sufficient to prevent integrated firms taking advantage of their market power with the purpose or effect of substantially lessening competition in a telecommunications market, or whether alternative arrangements are required or appropriate.* (PC 2001b, p. V)

While this term of reference appears broadly consistent with the underlying requirements of CPA clause 4, term of reference 5(c) specifically prevented the Productivity Commission from considering the structural separation of Telstra. This limitation on the scope of the inquiry prevented the Productivity Commission from considering the option in CPA clause 4(3)(b) of facilitating

competition in telecommunications by separating the natural monopoly and competitive elements of Telstra's business.

The Council acknowledges that the part privatisation means that shareholders have invested in Telstra on the basis of its ownership of the integrated local network. Achieving a competitive telecommunications industry capable of delivering substantial benefits to consumers suggests, however, that the Government should further consider the structure of Telstra, including the option of structural separation of the fixed network.

On 24 April 2002, the Minister for Communications, Information Technology and the Arts announced the Commonwealth's initial response to the Productivity Commission's report on telecommunications competition regulation. He stated that the Commonwealth will:

- retain the telecommunications-specific regulatory regime;

- require that the ACCC publish benchmark terms and conditions (including prices) of access to core telecommunications services;

- remove the rights of 'merits review' in relation to access arbitrations. This means that Telstra will no longer be able to appeal to the Australian Competition Tribunal on the ACCC's access arbitration decisions. This measure, which is contrary to the Productivity Commission's recommendation, is a response to the view of some communications commentators that the appeal process has enabled the dominant player in the industry to slow the entry of other companies to the industry. The Commonwealth notes that companies seeking access to Telstra's infrastructure have experienced difficulty raising or committing capital because of the possibility of not gaining access and long delays in resolving access disputes; and

- implement accounting separation of Telstra's wholesale and retail operations to encourage a 'more transparent regulatory market'. The Government will decide the precise nature and extent of this accounting separation after discussions among the Government and Telstra and the wider industry. (Alston 2002)

The Commonwealth is faced with a range of complex issues. It is apparent that changes are occurring in important regulatory and possibly structural aspects of the telecommunications industry. The Council will monitor these changes in terms of adherence to the NCP.

Table 14.1: Review and reform of legislation regulating communications

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Broadcasting Services Act 1992* (including *Television Broadcasting Services [Digital Conversion] Act 1998*) *Broadcasting Services (Transitional Provisions and Consequential Amendment) Act 1992* *Radio Licence Fees Act 1964* *Television Licence Fee Act 1964*	Licensing, entry, ownership, conduct	Review by Productivity Commission was completed in March 2000 and released in April 2000. Public consultation involved public release of an issues paper, a draft report, consultation, public hearings and receipt of submissions. Review raised significant questions and made extensive recommendations for reform, including: • that licences granting access to spectrum should be separated from content related licences that grant permission to broadcast; • that spectrum for new broadcasters should be sold competitively; • that licence fees for existing commercial radio and television broadcasters should be converted to fees that reflect the opportunity cost of the spectrum; and • that multichannelling and the provision of interactive services by commercial and national broadcasters be permitted.	The Government announced a review of the roles of the Australian Communications Authority and Australian Broadcasting Authority on 5 August 2002 (with a focus on arrangements for the management of broadcasting and telecommunications spectrum).	Council to finalise assessment in 2003.

(*continued*)

Table 14.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	Telecommunications competition regulation (parts XIB and XIC of the *Trade Practices Act 1974)*		Review by the Productivity Commission was released by the Government in December 2001, arguing that telecommunications regulation is necessary because carriers need access to Telstra's ubiquitous 'local loop' and its historical dominance of the customer base. Review also argued for an access regime.	On 24 April 2002, the Minister for Communications, Information Technology and the Arts announced the Government's initial response to the report, including: • retaining the telecommunications-specific regulatory regime; • requiring the ACCC to publish benchmark terms and conditions, as well as prices, of access to core telecommunications services; • removing 'merits review' rights so Telstra cannot appeal to the Australian Competition Tribunal on the ACCC's access arbitrations; and • implementing accounting separation of Telstra's wholesale and retail operations.	Council to finalise assessment in 2003.

(*continued*)

Table 14.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Radiocommunications Act 1992* and related Acts	Licensing, spectrum allocation	A review commenced in 1997 but NCP aspects of the review were not completed. The Productivity Commission commenced a review of the Act and related Acts in July 2001. The review was completed on 1 July 2002 (to be released by the Government within 25 sitting days of its receipt).	The Government has not yet released the Productivity Commission's report.	Council to finalise assessment in 2003.
Commonwealth	*Australian Postal Corporation Act 1989*	Legislated monopoly for Australia Post for activities including letter delivery and inward international mail	Review was completed in 1998, recommending reserving only household mail to Australia Post.	Amendment Bill (reducing Australia Post monopoly protection from four times the standard letter rate to one times the standard letter rate, and the weight restriction from 250 grams to 50 grams; removing incoming international mail from the monopoly and establishing an access regime) was withdrawn. The Government has made no further response to the review.	Council to finalise assessment in 2003.

15 National legislation review and reform matters

This chapter discusses legislation review and reform matters that are being conducted on an interjurisdictional basis or are issues for which all governments have collective responsibility to achieve compliance with National Competition Policy (NCP) obligations. The NCP program involves 12 national reviews of which nine have been completed; implementation of the reform recommended by the reviews, however, is incomplete in most cases. In addition to participating in national reviews of legislation, governments have a responsibility arising from the Agreement to implement the National Competition Policy and Related Reforms to ensure the decisions of Ministerial councils and other bodies that set national standards (including voluntary codes or instruments with which compliance is widely expected to require compliance) reflect good regulatory practice.

National reviews

The Competition Principles Agreement (CPA) provides, where a review raises issues with a national dimension or effect on competition (or both), that the government responsible for the review will consider whether the review should be undertaken on a national (interjurisdictional) basis. Where a government considers a national approach to be appropriate, it must consult other interested governments before determining the terms of reference and the appropriate body to conduct the review.

Nine national reviews have been completed under the NCP program, with a further three in progress. In most cases, however, governments are still to complete the implementation of reforms recommended by the national reviews. Table 15.1 summarises the current status of national review and reform activity.

Delays in completing national review and reform activity often arise as a result of protracted interjurisdictional consultation. An added dimension is that sometimes review and reform activity by each State and Territory must await the conclusion of the national process, which can mean significant delay in reforming relevant State and Territory legislation.

The National Competition Council acknowledges the importance of thoroughly investigating relevant issues and adequately consulting affected governments. It also accepts that there has been useful progress in reviewing several significant regulation issues and that the national focus has improved

the consistency of regulation among jurisdictions. The Council would be concerned, however, if the current processes are not concluded within a reasonable period to enable reform of State and Territory legislation to proceed. It considers that all governments have a collective responsibility to ensure the completion of national reviews and resulting policy recommendations.

Assessment

Most of the national reviews that are listed in Table 15.1 are now finalised. In some cases, however, Ministerial councils or jurisdictions have requested further reports by working parties on the implications of the review recommendations and thus had not decided their reform strategy by 30 June 2002, the target date set by CoAG for completing the legislative review and reform program. In other cases, such as the reviews of radiation protection, architects and petroleum (submerged lands) legislation, the jurisdictions have agreed on an implementation strategy but have not completed their implementation of legislative changes arising from the reviews.

Where reviews have been completed and Ministerial councils and governments have agreed and committed to firm implementation strategies, the Council considers that NCP requirements have been fulfilled. The Council's approach reflects CoAG's agreement in November 2000 that satisfactory implementation of reforms may include having in place firm transitional arrangements that extend beyond CoAG's deadline for regulatory review and reform. The Council considers, for example, the radiation protection strategy to be a firm transitional arrangement and therefore compliant with CPA clause 5 obligations, even though it will not be fully implemented until 2004. The Council will monitor adherence to the implementation timetable in these cases.

Where national reviews have not been completed, or the reform strategy has not been decided, governments are yet to comply with CPA clause 5 obligations. The Council will finalise its assessment in 2003.

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Table 15.1: Current status of national reviews

Review	*Details of review*	*Current status of review*
Agricultural and Veterinary Chemicals Act 1994 and related Acts	This review covers legislation that created the National Registration Scheme for Agricultural and Veterinary Chemicals and legislation controlling the use of agricultural and veterinary chemicals in Victoria, Queensland, Western Australia and Tasmania. Separate to that review, the jurisdictions of New South Wales, South Australia and the Northern Territory conducted reviews of their own control-of-use legislation to be aggregated with the NCP review. The Victorian Minister for Agriculture and Resources commissioned the review on behalf of Commonwealth, State and Territory Ministers for agriculture/primary industries following a decision by the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ). The consultant's final report was presented on 13 January 1999. The steering committee accepted that the report fulfilled the terms of reference. On 3 March 1999, the Standing Committee on Agricultural Resource Management (SCARM) publicly released the report and established a jurisdictional Signatories (to the National Registration Scheme for Agricultural and Veterinary Chemicals) Working Group to prepare an intergovernmental response to the report's recommendations. SCARM/ARMCANZ endorsed the intergovernmental response to the review in 2000. The Council of Australian Governments (CoAG) Committee on Regulatory Reform (CRR) cleared the response. This response accepted some of the recommendations and established working groups to consider the other issues.	Reports of these other working groups are expected to be finalised in 2002 and then will proceed to the Primary Industries Standing Committee/Primary Industries Ministerial Council. State and Territory reform will follow the Primary Industries Ministerial Council's consideration and endorsement of a new national framework. Chapter 4 discusses this review.

(*continued*)

Table 15.1 continued

Review	*Details of review*	*Current status of review*
Mutual Recognition Agreement and the *Mutual Recognition (Commonwealth) Act 1992*	Review was conducted in 1997-1998 by a working group of the CoAG Committee on Regulatory Reform, comprising representatives from the Commonwealth, New South Wales, Queensland (chair) and Western Australia. The review report noted that the scheme is generally working well. It made 30 recommendations addressing the operation of the Act and recommended that jurisdictions endorse the continued operation of the Act.	The review found that the scheme is generally working well to minimise the impediments to freedom of trade in goods and services and to establish a national market in goods and services in Australia. The review data indicated that the Mutual Recognition Agreement has increased competition and consumer choice, and reduced business costs. In relation to the NCP review, the review recommended retaining all existing (potentially anti-competitive) exceptions to the Mutual Recognition Agreement. Jurisdictions generally support the review's recommendations. Queensland had concerns about recommendations 17 (pornographic material), 23 (manner of sale of goods) and 27 (packaging and labelling requirements relating to transport, storage and handling). Victoria expressed concerns about recommendation 24 (packaging and labelling for drugs and poisons). The upcoming 2003 review of the Mutual Recognition Agreement will take up recommendations of the review and the concerns expressed by Queensland and Victoria.
Petroleum (Submerged Lands) Acts	The Act regulates exploration for and development of undersea petroleum resources. This legislation forms part of a national scheme. In April 2000, an independent consultant was commissioned to review the scheme. In response to its report, the Review Committee reported that the legislation is essentially pro-competitive and, to the extent that there are restrictions on competition (for example, in relation to safety, the environment, and resource management) these are appropriate given the net benefits to the community. The ANZMEC Ministerial Council endorsed the report on 25 August 2000. The final report was made public on 27 March 2001, following consideration by the CoAG Committee on Regulation Reform.	Two specific legislative amendments flow from the review. One will address potential compliance costs associated with retention leases and the other will expedite the rate at which exploration acreage can be made available. These amendments were incorporated in the Commonwealth's Petroleum (Submerged Lands) Legislation Amendment Bill 2002, which was introduced into Parliament on 15 May 2002, and is being considered. This Bill also proposes a rewrite of the *Petroleum (Submerged Lands) Act 1967*. Amendment and rewrites of the counterpart State and Northern Territory legislation will follow. Chapter 3 discusses this review.

(*continued*)

Table 15.1 continued

Review	*Details of review*	*Current status of review*
Drugs, poisons and controlled substances legislation	The State, Territory and Commonwealth governments commissioned a review to examine legislation and regulation that imposes controls over access to, and supply of drugs, poisons and controlled substances. The review's report has been finalised and presented to the Australian Health Ministers Conference which is required by the review's terms of reference to forward the report to CoAG with their comments. The final report was publicly released in January 2001.	The Health Ministers referred the review report to the Australian Health Ministers' Advisory Council (AHMAC), which established a working party to develop a draft response to the review recommendations for CoAG consideration. The working party has prepared a draft response, which has been endorsed by AHMAC and is now being considered by the Primary Industries Ministerial Council. Once any issues raised by the Primary Industries Ministers have been resolved, the draft response will be forwarded to CoAG. Following this process, individual governments will need to respond to the report and, where appropriate, initiate legislative change. Chapter 6 discusses this review.
Food Acts	The legislation for review comprises the Food Acts in each State and Territory and New Zealand. The objectives of the Food Acts are to ensure compliance and enforce food standards in each jurisdiction. The review was established in 1996 at the request of the Australia New Zealand Food Standards Council. The Australia New Zealand Food Authority coordinated the review, on behalf of the other jurisdictions and included representatives of the jurisdictions on the review panel. The authority released the review report in May 1999 and recommended removing some restrictive provisions of the Food Acts (for example opening up food inspections to third party auditors). The review concluded that governments should retain exclusive powers, in recognition of the appropriateness of government's enforcement role.	On 3 November 2000, CoAG agreed to the food regulatory reform package, of which the model food Act is a part. In addition, CoAG signed off on an Intergovernmental Agreement on Food Regulation agreeing to implement the new food regulation system. All jurisdictions agreed to use their best endeavours to introduce legislation based on the model food Act into their respective Parliaments by November 2001. Victoria, Queensland, South Australia, Tasmania and the ACT modified their food legislation in 2001, while New South Wales and the Northern Territory intend to introduce the legislation in 2002. Western Australia has not reported its timetable for introducing the model food Bill. Chapter 4 discusses this review.

(*continued*)

Table 15.1 continued

Review	*Details of review*	*Current status of review*
Pharmacy Regulation	The National Review of Pharmacy Regulation (Wilkinson Review) was completed in February 2000. The review recommended retaining registration, the protection of title, practice restrictions and disciplinary systems (although with minor changes to the registration systems recommended for individual jurisdictions). Further, the review recommended maintaining existing ownership restrictions and removing business licensing restrictions.	CoAG referred the Wilkinson Review to a senior officials' working party, which has reported back to CoAG. Approval to release the report was given by CoAG out-of-session. Chapter 6 discusses this review.
Review of legislation regulating the architectural profession	In November 1999, the Productivity Commission commenced a nine-month review of the legislation regulating the architectural profession. This inquiry served as a national review of participating States and Territories' legislation. On 4 August 2000, the Productivity Commission completed the review and released the final report on 16 November 2000. The recommended (and preferred) approach was that State and Territory architects Acts (under review) should be repealed after an appropriate (two-year) notification period to allow the profession to develop a national, nonstatutory certification and course accreditation system which meets requirements of Australian and overseas clients.	A national working group comprising representatives of all States and Territories was convened to recommend a consolidated response to the Productivity Commission's findings. The working group supported the Productivity Commission's broad objectives and, guided by these broad objects, rejected the recommended preferred approach as not being in the public interest. It recommended, instead, adopting the alternative approach of adjusting existing legislation to remove elements deemed to be anticompetitive and not in the public interest. Each government has committed to the reform agenda developed by the working party. Chapter 13 discusses this review.

(continued)

Table 15.1 continued

Review	*Details of review*	*Current status of review*
Review of radiation protection legislation	In December 1998, CoAG agreed to the conduct of a single joint national NCP review of radiation protection legislation. The Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) would coordinate the review. One of ARPANSA's aims is to promote national uniformity in radiation protection and nuclear safety policy and practices. To this end it formed the National Uniformity Implementation Panel (Radiation Control) in August 1998 as a working group of its Radiation Health Committee. It comprises officers from the Commonwealth, States and Territories' radiation protection agencies. The NUIP (RC) is also the Steering Committee for this NCP review. A draft Issues Paper was released for public comment on 16 October 2000. Following submissions, a draft final report was released for public comment in March 2001. A series of consultation meetings were held, before drafting the final report, which was approved by the Steering Committee and produced on 8 May 2001.	In August 2001 ARPANSA sought and received jurisdictions' responses to the recommendations in the final report. and presented them to AHMAC. The final list of recommendations was approved by AHMAC on 30 May 2002. Generally, the review found the current legislative framework for radiation protection to be appropriate. The retention of a generally prescriptive regulatory approach was found to be necessary to protect public health and safety and the environment from the harmful effects of radiation. Most of the existing restrictions were found to be of net public benefit. The only restriction that was recommended for removal was that relating to advertising and promotional activities (this applies only to Western Australia). Recommendations were made for further action to improve the efficiency of the legislation. AHMAC approved an implementation plan for the recommendations, which contains 12 projects for implementation by various jurisdictions. Completion dates vary, but in any case do not extend beyond 30 June 2004.

(continued)

Table 15.1 continued

Review	*Details of review*	*Current status of review*
Review of trustee corporations legislation	The Standing Committee of Attorneys General (SCAG) is conducting a NCP review of the regulation of trustee companies with a view to replacing the current State-by-State regulation with a national scheme of complementary laws. SCAG released a consultation paper a draft uniform Bill in May 2001. The consultation paper discusses the key features of the trustee corporations industry, undertakes a competition analysis of the provisions and proposes alternative options for the future regulation. The draft Bill seeks to provide for regulation of the trustee corporations industry that is commensurate with the nature of the industry and the risks posed to consumers by defaults of trustee corporations.	Governments have not completed their consideration of the issues raised in the consultation paper and the draft Bill.
Review of travel agents legislation	The Ministerial Council on Consumer Affairs has commissioned a national review (coordinated by Western Australia), which is under way. As part of the national review, the Ministerial Council released a review report by the Centre for International Economics for public comment in August 2000. The report recommended removing entry qualifications for travel agents. The report also recommended maintaining compulsory insurance, but dropping the requirement for agents to hold membership of the Travel Compensation Fund (the compulsory insurance scheme). It considered instead that a competitive insurance system, whereby private insurers compete with the Travel Compensation Fund, would be a better approach.	The Western Australian Department of Consumer and Employment Protection is coordinating the preparation of the response to the national review. The department has prepared a draft response, expected for final endorsement by the Ministerial Council on Consumer Affairs by September 2002. Chapter 8 discusses this review.

(*continued*)

Table 15.1 continued

Review	*Details of review*	*Current status of review*
Consumer credit legislation	In 1993 State and Territory governments entered into the Australian Uniform Credit Laws Agreement, which provides for the adoption of a national Consumer Credit Code. The code, which came into effect in November 1996, replaced various State and Territory statutes governing credit, money lending and aspects of hire purchase. The code is enacted by template legislation, with Queensland being the lead legislator. All jurisdictions except Western Australia and Tasmania have enacted legislation applying the Consumer Credit Code as in force in Queensland. Western Australia has enacted alternative consistent legislation, which will require amendment by the Western Australian Parliament to remain consistent when the code is amended. Tasmania has enacted a modified template system. State and Territory governments are jointly undertaking an NCP review of the Consumer Credit Code legislation. In addition to this review, several jurisdictions have identified other consumer credit-related legislation for review, possible review or amendment A national review of the Consumer Credit Code commenced in late 1999, with Queensland as the lead agency, based on a review process approved by the CoAG Committee on Regulatory Reform.	A draft report of the national NCP review of the Consumer Credit Code was released for public consultation in December 2001. It recommends maintaining the current provisions of the code, reviewing its definitions to bring sale of land, conditional sale agreements, tiny term contracts and solicitor lending within the scope of the code, and enhancing the code's disclosure requirements. The Ministerial Council on Consumer Affairs considered the final report on 2 August 2002. Chapter 11 discusses this review.

(*continued*)

Table 15.1 continued

Review	*Details of review*	*Current status of review*
Trade measurement legislation	Each State and Territory has legislation that regulates weighing and measuring instruments used in trade and controls for pre-packaged goods. Regulated instruments include shop scales, public weighbridges and petrol pumps. Governments (except Western Australia) formally agreed to a nationally uniform legislative scheme for trade measurement in 1990 to facilitate interstate trade and reduce compliance costs. Participating jurisdictions have since progressively enacted the uniform legislation. The legislation places the onus on owners to ensure instruments are of an approved type and maintained in an accurate condition. Governments identified that the national scheme involves legislation that may have an impact on competition. As a result, a national NCP review of the scheme for uniform trade measurement legislation is being undertaken. Some jurisdictions have indicated that they will review the Acts administering the national scheme, in addition to those applying it.	A scoping paper for the national review concluded that restrictions on the method of sale appear to have little adverse effect on competition and provide benefits for consumers. The one exception concerns about restrictions on the sale of nonprepacked meat. A draft report on such meat was circulated to jurisdictions during February 2002 and the review's working group is now finalising the report. The Standing Committee of Officials on Consumer Affairs will consider the report before it is passed to the Ministerial Council on Consumer Affairs. Chapter 11 discusses this review.

National standard setting obligations

The Agreement to Implement the National Competition Policy and Related Reforms (the Implementation Agreement) obliges governments to ensure that Ministerial councils and intergovernmental standard-setting bodies set national regulatory standards in accord with principles and guidelines endorsed by the Council of Australian Governments (CoAG) and with advice from the independent Commonwealth Office of Regulation Review (ORR) on compliance with these principles and guidelines. The national standard-setting obligation is a collective responsibility of all governments.

The CoAG principles and guidelines aim to promote good regulatory practice in decisions by Ministerial councils and standard-setting bodies. The national standard-setting obligations seek to ensure that standards are the minimum necessary, such that they avoid imposing excessive or unnecessary requirements on businesses while accounting for governments' economic, environmental, health and safety concerns. CoAG aims for standards to be subject to a nationally consistent process that assesses their effectiveness in meeting these objectives. Accordingly, CoAG's principles and guidelines:

- set out consistent processes for Ministerial councils and intergovernmental standard-setting bodies to determine whether associated laws and regulations are appropriate; and

- describe, where regulation is shown to be warranted, the features of good regulation and recommend principles for standard setting and regulatory action.

CoAG's focus on ensuring effective national standard setting via the 1995 NCP program arose from concerns expressed by major business associations that Australia's regulatory system could undermine the economy's capacity to compete internationally and to attract investment. At the time, these associations considered Australia's regulatory system to be unnecessarily complex: the system was seen to generate delays, inconsistencies and additional costs for business investment, and inhibit risk taking. The Mutual Recognition Agreement, by highlighting discrepancies in standards among jurisdictions, was an impetus for the development of national standards during this period. Under the agreement, Ministerial councils can be called on to create a standard for any product or to develop nationally uniform criteria for the registration of any occupation.

Principal or delegated legislation, administrative direction or other measures can give effect to the regulatory agreements or decisions of Ministerial councils and national standard-setting bodies. The ORR, governments and standard-setting bodies usually agree on which types of agreement and decision are covered by CoAG's guidelines.

Around 40 Ministerial councils and a small number of standard-setting bodies make national decisions that have a regulatory impact (PC 2001a, p. 13). Bodies that develop voluntary codes and other advisory instruments need to take account of the principles and guidelines where their promotion and dissemination of the code or instrument could be widely interpreted as requiring compliance (CoAG 1997).

Where a Ministerial council or intergovernmental standard-setting body proposes to agree to a regulatory action or adopt a standard, it must first certify that a Regulatory Impact Statement (RIS) has been completed and that the analysis in the RIS justifies adoption of the regulatory measure. The RIS must:

- demonstrate the need for the regulation;
- detail the objectives of the measures proposed;
- outline the alternative approaches considered, including nonregulatory options, and explain why they were not adopted;
- document which groups benefit from regulation and which groups pay the direct and indirect costs of implementation;
- demonstrate that the benefits of regulation outweigh the costs (including the administrative costs);
- demonstrate that the regulation is consistent with relevant international standards (or justify any inconsistencies); and
- set a date for review or sunsetting of regulatory instruments (CoAG 1997).

The CoAG principles and guidelines state that the RIS process must be open and public, with advertisements placed in all jurisdictions to notify of the intention to adopt regulatory measures, advise that the RIS is available on request, and invite submissions. The RIS must list the persons who made submissions or were consulted, and contain a summary of their views. The Ministerial council or standard-setting body is required to consider views expressed during the consultation process.

The Commonwealth Office of Regulation Review

Under the CoAG guidelines, the ORR has a significant role in the RIS process. It advises Ministerial councils and standard-setting bodies on whether a draft RIS is consistent with CoAG's principles and guidelines. The relevant Ministerial councils or standard-setting body must notify the ORR that a RIS is to be drafted on a relevant topic. The ORR assesses each RIS at two stages: first, before the RIS is distributed for consultation with parties affected by the proposed regulation and, second just before the relevant body

makes a decision. The ORR assesses the RIS within two weeks and advises the Ministerial council or standard-setting body of its assessment. While not obliged to adopt the advice of the ORR, Ministerial councils and standard-setting bodies should respond to any significant matters that have not been addressed as recommended by the ORR.

The ORR assesses in particular:

- whether the RIS guidelines have been followed;
- whether the type and level of analysis are adequate and commensurate with the potential economic and social impacts of the proposal; and
- whether the RIS has adequately considered alternatives to regulation.

Bodies that set national standards that require a complying RIS are:

- Ministerial councils (for example, the Australian Transport Council, the National Environment Protection Council and the Australia New Zealand Food Standards Council); and
- national entities (for example, the National Occupational Health and Safety Commission, the Australian Building Codes Board and the Australian Radiation Protection and Nuclear Safety Agency).

The ORR advises the relevant Ministerial council or standard-setting body of the assessed degree of compliance with the RIS requirements. It also reports to Heads of Government, through the CoAG Committee on Regulatory Reform, on significant decisions of Ministerial councils and standard-setting bodies that it considers are inconsistent with the CoAG guidelines. In addition, it reports to the CoAG Committee on Regulatory Reform annually on overall compliance with the guidelines.

The ORR annually advises the National Competition Council on governments' compliance with the national standard-setting obligations. This advice identifies the instances of regulation introduction that should have been subject to the CoAG guidelines and cases where the requirements have not been met. The ORR's report to the Council also covers broad planning and strategy decisions that have regulatory implications, along with best practice measures such as 'model' legislation that Ministerial Councils and standard-setting bodies sometimes agree on to influence the conduct of regulated entities. The ORR's reports to the Council do not comment on administrative decisions where the regulatory framework is already established. Further, the ORR does not comment on decisions that have an insignificant impact and thus would hardly benefit from undergoing a RIS process.

The ORR's advice forms the basis of the Council's consideration of governments' compliance with the national standard-setting obligation in the Implementation Agreement. For the 2002 NCP assessment, the Council sought ORR advice on governments' compliance over the period 1 April 2001 to 31 March 2002. This allowed the ORR time to consult with Ministerial

councils and standard-setting bodies on its draft findings before finalising the compliance report for the Council to consider in the 2002 NCP assessment.

Governments' compliance

The broad NCP obligation on governments is to demonstrate that bodies setting national standards have prepared a RIS, consistent with the CoAG principles and guidelines, for a proposed regulatory measure. The specification of the standard-setting obligation in the Implementation Agreement implies that the obligation is a collective responsibility of all governments. All governments usually are involved on Ministerial councils and all need to ensure standards set by national bodies involve an appropriate RIS.

In its 2002 report to the Council, the ORR identified 24 matters subject to the CoAG requirements which reached the decision stage during the 12-month period to 31 March 2002 (Office of Regulation Review, Australia 2002). The ORR considered that the CoAG requirements had been met in all except one of these matters: the prohibition of the sale of Level 2 18+ recordings to minors. (Level 2 18+ is a lyric advisory warning label designed to assist buyers of recordings.) At their 8 March 2002 meeting, Commonwealth, State and Territory censorship Ministers decided to ask the Australian Record Industry Association to amend its industry code of practice for labelling compact discs and tapes that contain explicit lyrics to prohibit the sale of Level 2 18+ recordings to minors. The meeting agenda had not included the proposal. The secretariat for the meetings of the censorship Ministers, the Office of Film and Literature Classification, therefore had not had an opportunity to prepare papers on the proposal. As a result, a RIS had not been prepared.

Table 15.2 lists the 23 cases where the ORR considers that the CoAG guidelines had been appropriately applied and the RIS requirements were satisfactorily met.

Table 15.2: Matters where Regulatory Impact Statement requirements were met, 1 April 2001 to 31 March 2002

Measure	*Body responsible*	*Date of decision*
National Code of Practice for the Defined Interstate Rail Network Volumes 1–3	Australian Transport Council	25 May 2001
National Standard for Commercial Vessels — Part D, Crew Competencies	Australian Transport Council	25 May 2001
Annual adjustment procedure for heavy vehicle charges	Australian Transport Council	25 May 2001
Policy framework for performance-based standards for heavy vehicle regulations	Australian Transport Council	25 May 2001

(*continued*)

Table 15.2 continued

Measure	*Body responsible*	*Date of decision*
Amendment to Building Code of Australia 1996 to increase the number of toilet pans for female patrons of certain theatres/cinemas	Australia Building Codes Board	15 June 2001
In-Service Diesel Vehicle NEPM	National Environment Protection Council	29 June 2001
National Approach to Firewood Collection	Australian and New Zealand Environment and Conservation Council	29 June 2001
Amendment of ADR 80 Emission Controls for Heavy Vehicles	Australian Transport Council	Out-of session decision process completed by 30 June 2001
Minimum energy performance standards for air conditioners	Australia and New Zealand Minerals and Energy Council	Out-of-session decision process completed by mid-July 2001
Minimum energy performance standards for electric motors	Australia and New Zealand Minerals and Energy Council	Out-of-session decision process completed by mid-July 2001
Approval of Joint Australia/New Zealand Standard addressing Brake Systems for Passenger Cars	ATC	6 July 2001
Adoption of provisions relating to bovine spongiform encephalopathy into the Food Standards Code	Australia New Zealand Food Standards Council	20 July 2001
Amendment of the Food Standards Code to permit the production in Australia of formulated caffeinated beverages	Australia New Zealand Food Standards Council	31 July 2001
Temperature compensation of petroleum fuels	Ministerial Council on Consumer Affairs	13 August 2001
Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption	Agriculture and Resource Management Council of Australia and New Zealand	17 August 2001
Permission for the irradiation of herbs, spices, seeds and herbal infusions	Australia New Zealand Food Standards Council	13 September 2001
Phase-out of use of chrysotile asbestos in Australia	National Occupational Health and Safety Commission	21 September 2001
Code of Practice for the Safe Transport of Radioactive Material	Australian Radiation Protection and Nuclear Safety Agency (ARPANSA)	24 September 2001
Requirements to update signage for people with disabilities, including requirements for braille and tactile signs	ABCB	1 October 2001
Automatic annual adjustment of heavy vehicle registration charges	Australian Transport Council	8 January 2002

(*continued*)

Table 15.2 continued

Measure	*Body responsible*	*Date of decision*
Implementation Plan for Overweight Containers Strategy	Austroads	Out-of-session decision process completed by 28 February 2002
Revised Minimum Energy Performance Standards for Refrigerators and Freezers	Minister Council on Energy	Out-of-session decision process completed during March 2002
Minimum Energy Performance Standards for Lighting Ballasts	Ministerial Council on Energy	Out-of-session decision process completed during March 2002

Improved compliance rate

Compliance with the CoAG guidelines has improved since the 2001 NCP assessment. Only one of the 24 regulatory decisions made in the period 1 April 2001 to 31 March 2002 was not compliant with CoAG's requirements. This implies a compliance rate of 96 per cent, in contrast to the compliance rate of 71 per cent for the period of the first report (Office of Regulation Review, Australia 2001).

In its second report to the Council, the ORR reported on an additional aspect of compliance, accounting for the relative significance of each regulatory decision. It considered each regulatory proposal that requires a RIS in terms of the nature and magnitude of the proposal and its impact on affected parties and the community.

The ORR assessed six of the 24 regulatory decisions made in the 1 April 2001 to 31 March 2002 period as more significant than others.

- The Australian Transport Council (1) adopted a policy framework for performance-based standards for heavy vehicle regulations and (2) amended Australian Design Rule 80 in relation to emission controls for heavy vehicles.

- The Ministerial Council on Consumer Affairs decided that governments should change the uniform trade measurement legislation to introduce temperature compensation for petrol and diesel fuel loaded at refineries and terminals across Australia.

- The Australian Radiation Protection and Nuclear Safety Agency adopted an updated Code of Practice for the Safe Transport of Radioactive Material. This code affects the mining, medical and scientific industries.

- The Ministerial Council on Energy adopted revised minimum energy performance standards for refrigerators and freezers, which are expected to reduce significantly the electricity consumption by these appliances.

- The Australia New Zealand Food Standards Council made an emergency decision to adopt provisions relating to bovine spongiform encephalopathy (BSE) into the Food Standards Code.

The ORR considered that the RISs prepared for the first five of the above six significant regulatory measures had an analytical content commensurate with their significance. The change to the Food Standards Code was an emergency regulatory decision in response to the BSE issue. Such decisions are exempt from CoAG's requirement for a RIS to inform the decision, but a RIS must be prepared after the decision. (A RIS is being prepared on the new Food Standards Code provision.) Governments' performance in meeting obligations for the more significant matters improved for the 2002 ORR report compared with the 2001 report, which found that four of the nine matters of greater significance were noncompliant with the RIS requirements.

Matters for which CoAG requirements were not met in the first reporting period

In its report to the Council for the 2001 NCP assessment (covering the period 1 July 2000 to 31 May 2001), the ORR provided information on six matters for which the RIS requirements had not been met. In four of these cases, the report described processes (proposed or under way) that may lead to improvement in outcomes. The Council asked the ORR to follow up on progress in these cases; the intention was to encourage governments to adopt implementation arrangements that would reduce the costs of the noncompliance.

The Australia New Zealand Food Standards Council decided in November 2000 to adopt a new joint Food Standards Code, including a requirement for the labelling of ingredients and nutrition on food products. RISs that had been previously prepared included a cost–benefit analysis that did not demonstrate net benefits from adopting the code. Ministers set up an intergovernmental task force to report on issues relating to the code's implementation, including application of the code to very small businesses. The ORR's report to the Council for the 2002 NCP assessment stated that the Australia New Zealand Food Standards Council decided not to exempt small businesses from the Code.

The Australia New Zealand Food Standards Council decided in July 2000 to regulate the labelling of genetically modified food and food ingredients (with the new labelling regulations to take effect from 7 December 2001). Prior to this decision, the ORR had found that the RIS did not satisfy CoAG requirements. In its report to the Council for the 2002 NCP assessment, the ORR stated that the Commonwealth has not conducted the stakeholder discussions that were suggested when the regulatory decision was made. Ministers have agreed, however, to a transitional arrangement whereby the labelling provisions will not apply to foods manufactured and packaged before

7 December 2001. These products are now allowed to remain in food outlets until sold (but not beyond December 2002). The ORR believes this measure will reduce transitional costs for food product businesses.

In November 2000, the Australian Transport Council released the National Road Safety Plan for 2001 and 2002. Some options in the plan, from which States and Territories may select to achieve the targeted reduction in fatalities, are regulatory. None of these options had been subject to RIS analysis. The ORR reported in 2001 that such analysis could be undertaken before States act on any of the options, which would help to establish each option's cost effectiveness. In its report to the Council for the 2002 NCP assessment, the ORR stated that no further decisions on specific measures in the Road Safety Plan were made in the last year. The Australian Transport Council complied, however, with CoAG's RIS requirements in other regulatory decisions made during the period of the second ORR report.

In November 2000, the Australian National Training Authority Ministerial Council made two regulatory decisions for which RISs should have been prepared. One decision related to the Australian Recognition Framework for skills, while the other requires the adoption of 'model clauses' for the legislative framework for vocational and educational training. In the latter case, the Ministerial council undertook to prepare a RIS before implementing the clauses; preparation of this RIS is under way.

The above four areas of regulation are important, and the Council is concerned that Ministerial councils did not originally follow the CoAG guidelines. Government actions taken over the past year mitigate the adverse effects of this noncompliance, but do not eliminate them. The four cases underline the importance of Ministerial councils adhering to the CoAG principles and guidelines.

Assessment

The compliance indicators exhibited significant improvement in the period 1 April 2001 to 31 March 2002, with the ORR finding that CoAG's requirements were not met in only one instance. The Council encourages Ministerial councils and standard-setting bodies to ensure they continue this good approach to making regulation. Officials in the secretariats of Ministerial councils can help to sustain the recent compliance performance by ensuring Ministers and new officials are briefed regularly on the CoAG principles and guidelines for standard setting and regulatory action. Such action would alleviate the adverse impact on institutional memory of the significant rate of turnover in the Ministerial council secretariats.

16 The Conduct Code Agreement obligations

In addition to the legislation review and reform obligations in the Competition Principles Agreement (CPA), there are National Competition Policy (NCP) commitments that are designed to improve the effectiveness of regulation in the Conduct Code Agreement. Clause 2(1) of the Conduct Code Agreement requires the Commonwealth, State and Territory governments to send written notice to the Australian Competition and Consumer Commission (ACCC) of legislation or provisions in legislation that rely on s. 51(1) of the *Trade Practices Act 1974* (the TPA) within 30 days of the legislation being enacted or made.

Section 51(1) of the TPA provides that conduct that would be an offence under the Act's restrictive trade practices provisions may be permitted if specifically authorised under a Commonwealth, State or Territory Act. As such, legislation that is relevant to clause 2(1) of the Conduct Code Agreement is new legislation restricting competition, so it needs to satisfy the tests in clause 5 of the CPA.

Each of the National Competition Council's assessment reports lists the legislation relevant to clause 2(1) that governments enacted since the previous assessment along with the date of notification to the ACCC. Since 1 July 2001 (the period of the current NCP assessment), only the New South Wales government has enacted legislation relying on s. 51(1) of the TPA. The legislation notified by New South Wales is listed in the following section.[1]

The Conduct Code Agreement also required (under clause 2[3]) governments to have notified the ACCC by 20 July 1998 of all continuing legislation reliant on s. 51(1) of the TPA.[2] All governments stated as part of the 1999 NCP assessment that they had notified the ACCC of all relevant legislation.

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1 For legislation passed between 11 April 1995 (earliest date stated in the agreement) and 30 June 1999 and notified by jurisdictions see NCC 1999b, pp. 172-7. For legislation passed between 1 July 1999 and 30 June 2001 notified by jurisdictions see NCC 2001, p. 26.2.

2 For this list, see NCC 1999b, pp. 172–7.

Legislation notified to the ACCC under clause 2(1)

In accordance with clause 2(1) of the Conduct Code Agreement, New South Wales notified the ACCC of three pieces of legislation passed since 1 July 2001 that rely on s. 51(1) of the TPA:

- *Coal Industry Act 2001*, notified on 10 January 2002;
- *Industrial Relations Amendment (Public Vehicles and Carriers) Act 2001*, notified on 10 January 2002; and
- *Industrial Relations (Ethical Clothing Trades) Act 2001*, notified on 10 January 2002.

For each of these Acts, notification occurred within 30 days of the Act being passed.

Appendix A National Competition Policy contacts

For further information about National Competition Policy, please contact the National Competition Council or the relevant Commonwealth, State or Territory competition policy unit.

National

National Competition Council
Level 12, Casselden Place
2 Lonsdale Street
MELBOURNE VIC 3000
Telephone: (03) 9285 7474
Facsimile: (03) 9285 7477
www.ncc.gov.au

Commonwealth

Structural Reform Division
Markets Group
The Treasury
Langton Crescent
PARKES ACT 2600
Telephone: (02) 6263 2745
Facsimile: (02) 6263 2937
www.treasury.gov.au

New South Wales

Inter-governmental &
Regulatory Reform Branch
The Cabinet Office
Level 37
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000
Telephone: (02) 9228 5414
Facsimile: (02) 9228 4408
www.nsw.gov.au

Victoria

Economic, Social and Environmental Group
Dept. of Treasury and Finance
10th Floor, 1 Macarthur Street
MELBOURNE VIC 3002
Telephone: (03) 9651 1239
Facsimile: (03) 9651 2048
www.vic.gov.au

Queensland

Regulatory and Inter-Governmental Relations Branch
Queensland Treasury
100 George Street
BRISBANE QLD 4000
Telephone: (07) 3224 4996
Facsimile: (07) 3221 4071
www.treasury.qld.gov.au

Western Australia

Competition Policy Unit
WA Treasury
Level 12, 197 St George's Terrace
PERTH WA 6000
Telephone: (08) 9222 9162
Facsimile: (08) 9222 9914
www.treasury.wa.gov.au

South Australia

National Competition Policy
Implementation Unit
Cabinet Office
Department of Premier & Cabinet
Level 14,
State Administration Centre
200 Victoria Square
ADELAIDE SA 5000
Telephone: (08) 8226 1931
Facsimile: (08) 8226 1111
www.premcab.sa.gov.au

Tasmania

Economic Policy Branch
Department of Treasury and Finance
Franklin Square Offices
21 Murray Street
HOBART TAS 7000
Telephone: (03) 6233 3100
Facsimile: (03) 6233 5690
www.tres.tas.gov.au

Australian Capital Territory

Micro Economic Reform Section
Dept. of Treasury
Level 1, Canberra-Nara Centre
1 Constitution Avenue
CANBERRA CITY ACT 2600
Telephone: (02) 6207 0290
Facsimile: (02) 6207 0267
www.act.gov.au

Northern Territory

Policy & Coordination Division
Dept. of Chief Minister
4th Floor, NT House
22 Mitchell Street
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Telephone: (08) 8999 7712
Facsimile: (08) 8999 7402
www.nt.gov.au/ntt/

Appendix B Commonwealth Office of Regulation Review: report on compliance with national standard setting

This appendix contains the Commonwealth Office of Regulation Review's *Report to the National Competition Council on the setting of national standards and regulatory action: 1 April 2001 — 31 March 2002*. The Office of Regulation Review provided this report to the Council on 6 June 2002.

The Office of Regulation Review works closely with Ministerial councils and other standard-setting bodies, advising them on applying COAG principles and guidelines for setting standards and regulations. The office advises these bodies on the adequacy of their proposed regulatory impact statements before they are circulated to affected parties, and again before the final standard-setting decisions are made. The office's involvement with the Ministerial councils and standard-setting bodies informs the preparation of its report to the Council.

Prior to providing its report to the Council, the office circulated a draft report to relevant Ministerial councils and other national standard setting bodies for comment. The office also provided the draft report to the Department of Prime Minister and Cabinet and competition policy units in the Commonwealth, States and Territories. This consultation process assists the final report's accuracy and its appraisal of the regulatory impact analysis process undertaken before a decision is made on each new national standard or regulation.

The Office of Regulation Review's report to the Council is discussed in chapter 15.

1 The COAG Principles and Guidelines and the advisory and reporting role of the Office of Regulation Review

1.1 COAG's Principles and Guidelines

In April 1995 the Council of Australian Governments (COAG) agreed that regulatory proposals considered by Ministerial Councils and national standard-setting bodies should be subject to a nationally consistent assessment process. This agreement was prompted by the objective that regulations or standards employed by governments be the minimum necessary to achieve agreed outcomes and not impose excessive or unnecessary requirements on business. The agreed assessment process was set out in the COAG Agreement *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG 1997 as amended).

The major element of the assessment process is the completion of Regulatory Impact Statements (RISs). A RIS provides a structured approach to regulation making which aims to achieve better quality regulation. It does this by considering and documenting alternative approaches to resolve identified problems. A RIS assesses the impacts of each option on different groups and the community as a whole. RISs are used as part of community consultation and are considered by decision making bodies.

For purposes of applying these requirements, COAG (1997, p. 4) defined regulation broadly as including:

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

1.2 The role of the Office of Regulation Review (ORR)

The role of the Office of Regulation Review (ORR) is to advise decision makers on application of the COAG *Principles and Guidelines* and monitor and report on compliance with these requirements. This includes assessing RISs prepared for these intergovernmental bodies. The ORR assesses the RISs at two stages: before they are distributed for consultation with parties affected

by the proposed regulation and again just prior to a decision being made by the responsible body. The ORR is required by the COAG Guidelines to assess:

- whether the Regulatory Impact Statement Guidelines have been followed;
- whether the type and level of analysis is adequate and commensurate with the potential economic and social impact of the proposal; and
- whether alternatives to regulation have been adequately considered.

The ORR must advise the relevant Ministerial Council or standard setting body of its assessment.

This is the second ORR report to the NCC dealing with regulation making by Ministerial Councils and national standard setting bodies. The first ORR report to the NCC covered the period 1 July 2000 to 31 May 2001. For this second ORR report to the NCC the reporting period has been modified to cover the period 1 April 2001 to 31 March 2002.

This change in the reporting period was made to allow adequate time for RIS compliance data to be collected by the ORR and provided in draft form — for information and comment – to the following organisations:

- relevant Ministerial Councils and national standard setting bodies;
- the Department of Prime Minister and Cabinet;
- competition policy units in each jurisdiction; and
- New Zealand Ministry of Economic Development (section 1.3 only).

1.3 Emerging 'strategic' issues for consideration

Overall, the COAG RIS requirements appear to be working reasonably well in meeting the objective of ensuring that decision making forums — and the community — are provided with quality information documenting the policy development process. Ministerial Councils and national standard setting bodies now have a high level of awareness about COAG's RIS requirements. As a consequence, RISs are playing an increasing role in informing decisions about regulations made by these forums.

One issue which has arisen — especially over the last year — is the role of New Zealand.

The COAG *Principles and Guidelines* represent best practice in regulatory decision making as agreed by the nine Australian jurisdictions. Increasingly, regulatory review and reform by such decision making forums is being undertaken in cooperation with New Zealand. Therefore, New Zealand

participation in these decision making processes is an emerging strategic issue.

The RIS processes in each country are broadly comparable. In addition, New Zealand is already part of the formal decision making process in relation to those areas of regulation covered by the Trans-Tasman Mutual Recognition Arrangement (TTMRA). Under the TTMRA reviews of regulation must have regard to the COAG Principles and Guidelines.

However, there are questions about how COAG RISs can best include the impacts on New Zealand (including consultation with New Zealand stakeholders) and how best to meet the technical requirements for regulatory impact assessment which are employed in each country. Where this issue arises the ORR seeks to address these matters on a case-by-case basis, including considering the merits of Australia and New Zealand taking a consistent approach to impact assessment, particularly where the same or similar regulations are considered.

Nevertheless, there is scope for both countries to further harmonise regulation making processes, including the application of RISs. The TTMRA will be reviewed in 2003. This review provides the opportunity to consider how decision making process are working and explore scope for reforms to such processes.

2 Reporting to the NCC: the scope and focus of the ORR's reports

COAG's Guidelines apply to agreements or decisions by Ministerial Councils and national standard-setting bodies which will have a regulatory impact. The agreements and decisions made by these forums may be given effect in a variety of ways. These include principal or delegated legislation, administrative decision or other measures. Voluntary codes and other advisory instruments are also included, where there is a reasonable expectation by businesses or individuals that they should comply. In most cases, there is general consensus between the ORR and these decision makers on which types of agreements and decisions are covered — and are not covered — by COAG RIS requirements.

In its first report to the NCC — covering the period 1 July 2000 to 31 May 2001 — the ORR excluded two types of decisions. The first category involves decisions of an administrative rather than a regulatory nature. These decisions are essentially about the application and administration of regulation for which the broader regulatory framework has already been established and there are consequently no regulatory options. The second category of decisions excluded were those which have a low significance in terms of the scope and magnitude of impacts, to which the RIS process would

add little additional value. In both of these cases the ORR advises that a COAG RIS is not necessary.

Over the last year there has been dialogue between the ORR, Ministerial Councils and national standard setting bodies about the scope of COAG's RIS requirements. Issues covered in these discussions included the following:

2.1 Do the COAG Guidelines apply to broad decisions, plans or strategies?

The development of broad plans and strategies may represent the first part of a staged process of policy development which is then followed by the development of specific measures, some of which are regulatory.

The ORR's interpretation of COAG's *Principles and Guidelines* is that RIS analysis should be undertaken early in the policy development process. Indeed, the COAG Guidelines require that a number of fundamental threshold questions be addressed in a RIS, such as:

- what is the problem that needs addressing?
- is there market failure?
- can this market failure be addressed without recourse to government regulation?
- what are the costs, risks or benefits of maintaining the status quo? (COAG 1997, p. 5).

Accordingly, the ORR has advised Ministerial Councils and national standard setting bodies that the COAG *Principles and Guidelines* apply to decisions on broad plans and strategies which may have regulatory implications, as well as to the more specific regulatory measures which may be developed at a later stage.

2.2 Do the COAG Guidelines apply to 'best practice' regulatory measures?

In some cases Ministerial Councils and national standard setting bodies agree on regulatory measures which establish 'best practice' requirements. This can include model legislative provisions which aim to influence the conduct and behaviour of regulated organisations or individuals. The ORR has advised that COAG's requirements apply to such best practice measures if there is an expectation of compliance and if such requirements generate regulatory impacts.

2.3 Possible duplication of RIS processes

In relation to instruments for national implementation, the view has been put to the ORR that the subsequent development of legislation in each jurisdiction will itself be subject to individual RISs, so a COAG RIS should not be required.

The ORR has taken the contrary view. The preparation of a COAG RIS can provide a solid analytical base with a nationwide perspective for the later preparation of more focused RISs by each jurisdiction. Moreover, a COAG RIS can serve to guide legislative reforms in each jurisdiction from a carefully analysed starting point. It is also the case that states and territories may forgo their own RIS requirements where applicable if an adequate COAG RIS has been prepared.

3. Compliance with the COAG RIS requirements

This second report to the NCC covers decisions made in the period 1 April 2001 – 31 March 2002. The ORR has identified twenty four matters that were subject to the COAG RIS requirements. Of these, the RIS requirements appear to have been met in all but one case.

Table B.1 documents the twenty three cases where the COAG RIS requirements apply and were met. This table includes a brief description of the regulatory measure, decision making body and date of decision.

Table B.1: Cases where COAG RIS requirements were met

Measure	*Body responsible*	*Date of decision*
1. National Code of Practice for the Defined Interstate Rail Network Vol 1-3	Australian Transport Council (ATC)	25 May 2001
2. National Standard for Commercial Vessels — Part D, Crew Competencies	ATC	25 May 2001
3. Annual adjustment procedure for heavy vehicle charges	ATC	25 May 2001
4. Policy framework for performance based standards for heavy vehicle regulations	ATC	25 May 2001
5. Amendment to Building Code of Australia 1996 to increase the number of toilet pans for female patrons of certain theatres/cinemas	Australia Building Codes Board (ABCB)	15 June 2001
6. In-Service Diesel Vehicle NEPM	National Environment Protection Council	29 June 2001
7. National Approach to Firewood Collection	Australian and New Zealand Environment and Conservation Council	29 June 2001
8. Amendment of ADR 80 Emission Controls for Heavy Vehicles	ATC	Out-of session decision process completed by 30 June 2001
9. Minimum energy performance standards for air conditioners	Australian and New Zealand Minerals and Energy Council (ANZMEC)	Out-of-session decision process completed by mid-July 2001
10. Minimum energy performance standards for electric motors	ANZMEC	Out-of-session decision process completed by mid-July 2001
11. Approval of Joint Australia/New Zealand Standard addressing Brake Systems for Passenger Cars	ATC	6 July 2001
12. Adoption of provisions relating to BSE into the Food Standards Code	Australia New Zealand Food Standards Council (ANZFSC)	20 July 2001
13. Amend the Food Standards Code to permit the production in Australia of formulated caffeinated beverages	ANZFSC	31 July 2001
14. Temperature Compensation of Petroleum Fuels	Ministerial Council on Consumer Affairs	13 August 2001
15. Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption	Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ)	17 August 2001
16. Permission for the irradiation of herbs, spices, seeds and herbal infusions	ANZFSC	13 September 2001
17. Phase out of use of Chrysotile Asbestos in Australia	National Occupational Health and Safety Commission	21 September 2001

(*continued*)

Table B.1 continued

Measure	*Body responsible*	*Date of decision*
18. Code of Practice for the Safe Transport of Radioactive Material	Australian Radiation Protection and Nuclear Safety Agency	24 September 2001
19. Requirements to update signage for people with disabilities including requirements for braille and tactile signs	ABCB	1 October 2001
20. Automatic Annual Adjustment of Heavy Vehicle Registration Charges	ATC	8 January 2002
21. Implementation plan for Overweight Containers Strategy	Austroads	Out-of-session decision process completed by 28 February 2002
22. Revised Minimum Energy Performance Standards for Refrigerators and Freezers	Ministerial Council on Energy[1]	Out-of session decision completed during March 2002
23. Minimum Energy Performance Standards for Lighting Ballasts	Ministerial Council on Energy	Out-of session decision completed during March 2002

3.1 Case where COAG RIS requirements were not met

In only one case – the prohibition of the sale of level 2 18+ recordings to minors — were the COAG RIS requirements not met.

The Commonwealth, State and Territory Censorship Ministers met on 8 March 2002. The Office of Film and Literature Classification (OFLC) provides the secretariat for the Censorship Ministers' meetings. At this meeting it was decided to ask the Australian Record Industry Association (ARIA) to amend their Industry Code of Practice for labelling CDs and tapes that contain explicit lyrics. The amendment request was to prohibit the sale of Level 2 18+ recordings to minors. The Level 2 18+ is currently an advisory warning label designed to assist buyers (and their parents) when they purchase recordings.

This proposal had not been included on the agenda of the meeting and consequently was not an option or recommendation in the papers provided by the OFLC to the Ministers. Hence, a RIS had not been prepared to help inform this decision.

[1] The Ministerial Council on Energy was formed following COAG's meeting of June 2001, and subsumes the energy component of ANZMEC.

4. Trends in compliance with COAG RIS requirements

Recent trends in COAG RIS compliance have generally been positive, both in terms of the level of compliance and improvements in compliance over time. As just noted, of the twenty four regulatory decisions made for the year ended 31 March 2002, only one was non-compliant with COAG's RIS requirements. This translates to a compliance rate for this reporting period of 96 per cent.

In contrast, for decisions covered by the ORR's first report to the NCC, covering the period 1 July 2000 — 31 May 2001, the compliance rate was 71 per cent, with six out of the twenty one regulatory decisions made during the reporting period assessed as non-compliant.[2]

An important consideration in measuring compliance — and changes in compliance over time – is the degree of significance of the decisions made in each period. The ORR has classified each regulatory proposal that requires a RIS as of greater or lesser significance. This classification is based on:

- the nature and magnitude of the problem and the regulatory proposals for addressing it; and
- the scope and intensity of the proposal's impact on affected parties and the community.

This classification is intended to provide a better basis on which to apply the 'proportionality rule' that the extent of RIS analysis should be commensurate with the magnitude of the problem.

Of the twenty four regulatory decisions reported here, six were assessed by the ORR as of greater significance according to these criteria. They are as follows:

- two decisions by the Australian Transport Council (ATC) — to adopt a policy framework for performance based standards for heavy vehicle regulations, and to amend Australian Design Rule 80 in relation to emission controls for heavy vehicles;
- the decision by the Ministerial Council on Consumer Affairs to require temperature compensation for petrol and diesel fuel loaded at refineries and terminals across Australia, which is expected to promote competition in the industry;

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[2] While there is some overlap between the reporting period for these reports, only four decisions (including one on a significant matter) are covered by both reports. All decisions covered in both reports were compliant with COAG's requirements. Therefore, this modest overlap is not significant for the purposes of comparing compliance between the two periods.

- ARPANSA's decision to adopt an updated Code of Practice for the Safe Transport of Radioactive Material, which impacts on the mining, medical and scientific industries; and

- the decision by the Ministerial Council on Energy to revise Minimum Energy Performance Standards for Refrigerators and Freezers which, by reducing the required electricity consumption, is expected to generate a net benefit of between $300 million and $400 million over the period to 2015.

The RISs for these five decisions were compliant with COAG's requirements and contained a level of analysis commensurate with the significance and impact of the proposal. In addition, the decision by the Australia New Zealand Food Standards Council to adopt into the *Food Standards Code* provisions relating to bovine spongiform encephalopathy (BSE) was a significant matter, which was decided as an emergency issue. While emergency decisions are exempt from COAG's requirement for a RIS to inform the decision, the preparation of a RIS is required after the decision. A RIS is currently being prepared.

In summary, the compliance result for matters of 'greater significance' for this reporting period is therefore 100 per cent. In contrast, the ORR's first report to the NCC (for 1 July 2000 — 31 May 2001) included nine matters of greater significance, of which four were non-compliant, giving a compliance rate for such matters of 56 per cent.

These comparisons of compliance results for the first and second reporting periods suggest that compliance by Ministerial Councils and national standard-setting bodies with COAG's RIS requirements has improved significantly in the year to March 2002.

5. Follow-up on matters for which COAG requirements were not met during the first reporting period

The ORR's first report to the NCC, covering the period 1 July 2000 — 31 May 2001, identified six matters for which the COAG RIS requirements were not met. The ORR's report also noted that, for most of these, there were processes either established or foreshadowed that may lead to an improvement. The NCC has requested that the ORR consider the outcomes of these processes.

In November 2000 the Australia New Zealand Food Standards Council (ANZFSC) decided to adopt the joint Food Standards Code. In this case a RIS was prepared for this significant proposal, but it did not demonstrate net benefits. As part of this decision, Ministers recommended that an intergovernmental task force be established to report on issues such as

whether very small businesses should be exempted and on strategies for practical and low cost implementation of the Code. The ORR understands that the ANZFSC has considered these issues and decided not to exempt small businesses from the requirements of the new Code.

In July 2000 ANZFSC decided to regulate the labelling of genetically modified food and food ingredients. The decision was to take effect from 7 December 2001. In this case the RIS did not meet the COAG requirements. The ORR's first report to the NCC noted that the Commonwealth Minister had indicated – at the time of the decision — that the Commonwealth would be consulting further with stakeholders to assess the impact on costs and export competitiveness. The ORR understands that there have not been any specific discussions in this regard. However, since the decision Ministers have agreed to a transitional arrangement. The labelling provisions that would otherwise apply from December 2001 will not apply to those foods manufactured and packaged before 7 December 2001. These products will be allowed to remain on supermarket shelves and other food outlets until sold, but cannot remain for sale beyond December 2002. The ORR considers that this measure is likely to result in a reduction in the transitional costs on business of implementing the new labelling requirement.

The November 2000 decision by the Australian Transport Council (ATC) to adopt the National Road Safety Action Plan contained a number of regulatory options, none of which were subject to RIS analysis. The ORR noted in its first report to the NCC that there remains the opportunity to undertake impact analysis before tangible action is taken on individual options listed in the Plan. While no further decisions have been made over the last year dealing with specific measures in the Plan, the ORR notes that the ATC has been compliant with COAG's requirements in relation to other regulatory decisions made during the period covered by the second report.

In November 2000, the Australian National Training Authority Ministerial Council made several regulatory decisions. One was to adopt 'model clauses' for the legislative framework for vocational and educational training. The other was to strengthen the Australian Recognition Framework for skills by, for example, introducing auditable standards and by implementing a nationally consistent set of sanctions. A RIS was not prepared for these decisions. The ORR's first report to the NCC noted that the Council had undertaken to prepare a RIS prior to implementation of the model clauses. Preparation of this RIS is currently under way.

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