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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 'improve the well being of all Australians through growth, innovation and rising productivity, and by promoting competition that is in the public interest'.

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.

Table of contents

Appendixes

Boxes

Tables

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 Limited
CASA	Civil Aviation Safety Authority
CBH	Cooperative Bulk Handling Limited
CCNCO	Commonwealth Competitive Neutrality Complaints Office
CIA	Competition Impact Analysis
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
EP&A Act	*Environmental Planning and Assessment Act 1979* (NSW)
ETEF	Electricity Tariff Equalisation Fund
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)
ICRC	Independent Pricing and Regulatory Commission (ACT)
IPART	Independent Pricing and Regulatory Tribunal
MDBC	Murray–Darling Basin Commission
NCC	National Competition Council
NCP	National Competition Policy
NECA	National Electricity Code Administrator
NEM	National electricity market
NEMMCO	National Electricity Market Management Company
NEVDIS	National Exchange of Vehicle and Driver Information System
NSWRMB	New South Wales Rice Marketing Board
NT	Northern Territory

OECD	Organisation for Economic Co-operation and Development
ORR	Office of Regulation Review (Commonwealth)
PAWA	Power and Water Authority
PBS	Pharmaceutical Benefits Scheme
PBT	Public benefit test
PC	Productivity Commission
RFA	Regional Forest Agreements
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
TAB	Totalisator agency board
TAC	Total allowable catch
TAFE	Technical and Further Education
TPA	*Trade Practices Act 1974*
VEETAC	Vocational Education, Employment and Training Committee
VORR	Office of Regulation Reform (Victoria)
WEA	Wheat Export Authority
WRP	Water Resource Plan
WSAA	Water Services Association of Australia

1 Primary industries

This chapter assesses governments' fulfilment of their Competition Principles Agreement (CPA) obligations in relation to:

- agricultural commodities;
- fisheries;
- forestry;
- agriculture-related products and services; and
- mining.

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 commodities

This section assesses Governments' compliance with the CPA obligation to review and reform the regulation of the production and marketing of the following commodities:

- grains;
- dairy;
- eggs;
- poultry meat; and
- other commodities regulated by single jurisdictions — dried fruit, rice, sugar and potatoes.

Governments have a long history of involvement in the marketing of agricultural products. The Productivity Commission recently reviewed this history (PC 2000e). 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, prompting State governments to legislate compulsory membership of, formerly voluntary, co-operatives. 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 1.1 sets out the principal agricultural activities with single desks at the time governments introduced the NCP.

Table 1.1: Key agricultural commodities with statutory marketing arrangements, 1995

Product	*Jurisdiction(s)*
Dairy	Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and the ACT
Dried fruit	Commonwealth
Eggs	Queensland, Western Australia and Tasmania
Grains	Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia and the Northern Territory
Potatoes	Western Australia
Poultry meat	New South Wales, Victoria, Queensland, Western Australia and South Australia
Rice	New South Wales
Sugar	Queensland

Legislative restrictions on competition

Jurisdictions have restricted competition in markets for agricultural commodities in two principal ways. First, legislation may restrict entry by traders and processors. In some cases, only one entity (usually a grower-controlled marketing authority) can acquire produce from growers. Often the enabling legislation vests ownership of the produce in the marketing authority upon harvest, in exchange for a grower entitlement to share in the net proceeds from the marketing authority's sale of the commodity. Examples of this include:

- the existing regulation of rice marketing in New South Wales, which prohibits growers from selling their produce to anyone other than the Rice Marketing Board; and

- the former regulation of milk supply in all States and the ACT, which vested ownership of milk in statutory industry authorities.

In other cases, the restriction on entry is partial or conditional. Most remaining grain marketing regulation, for example, allows competitive entry to the market for on-selling to domestic consumers or processors, or the market for exporting in small quantities. In the chicken meat industry, entry into the processing market in Western Australia requires approval by the Minister for Agriculture.

Second, legislation may provide for direct controls on price or production of an agricultural commodity. New South Wales, Queensland and Western Australia controlled the production of milk for fresh consumption through milk quotas. In Queensland, grower representatives bargain with the local cane mill operator to determine the price received by sugarcane growers and the land area available to grow sugar cane.

A common feature of these arrangements is that they require individual growers 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, growers expect to benefit from earning a higher net income over the long term.

Regulating in the public interest

The Productivity Commission argued that a 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 (PC 2000d, p. XV).

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 (that is, markets for the product, substitutes, intermediate goods, associated services and factor markets) as much as possible.

The Commission notes that 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 it 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.

Grain

Grain is by far the most important agricultural commodity produced in Australia. In 2001-02 A$5766 million of wheat, A$2984 million of oilseeds (such as canola, cottonseed, linseed and soybeans) and A$2362 million of coarse grains (barley, oats, sorghum and maize) were produced. Most grain is exported – grain exports in 2001-02 were A$7201 million (ABARE 2003).

For many years, the Commonwealth Government 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 1.2). The central aim of these statutory grain marketing monopolies was to establish market power and thereby raise prices received for the regulated commodities.

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.

Table 1.2: Grain 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

Much changed in the eight years from the signing of the CPA. Victoria, Queensland and the Northern Territory removed all their restrictions on grain marketing. New South Wales removed all marketing restrictions from some grains and the remainder sunset on 30 September 2005. Western Australia allows competitive grain marketing except to those export markets where restricting access is shown to earn a significant premium. South Australia may adopt reforms similar to those in Western Australia. The Commonwealth Government allows limited wheat exports that do not compete with those of AWB Limited.

Table 1.3 summarises government's progress in reviewing and reforming grain marketing legislation.

Commonwealth

The Commonwealth's Wheat Marketing Act prohibited the export of wheat by anyone other than the Australian Wheat Board without the board's consent. In addition, the Act guaranteed the board's borrowings until July 1999 and provided for the accumulation of the Wheat Industry Fund to eventually replace the statutory guarantee.

In 1997 and 1998, the Commonwealth Government amended the Act to facilitate the establishment of a grower-owned and -controlled company, AWB Limited, and its export pool subsidiary, AWB International Limited (AWBI), to assume responsibility for wheat marketing and financing from July 1999. The amendments also:

- established the Wheat Export Authority (WEA) to control the export of wheat and to report to the Minister before the end of 2004 on the performance and conduct of AWBI;
- conferred on AWBI the power to export wheat without the WEA's consent; and
- exempted anything done by the AWBI in exporting wheat from part IV of the Trade Practices Act 1974 (TPA).

The power of the WEA to control the export of wheat is constrained. The amended Act requires the WEA to consult AWBI before consenting to the export of wheat; for proposed exports in bulk, the WEA cannot consent without AWBI's approval.

Review and reform activity

In early 2000, the Commonwealth Government commissioned a three-member committee to review the 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 than continuing the export controls to deliver greater net benefits to growers and the wider community (Irving et al. 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 A$71 million per year to a loss of A$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 'that the new more commercial arrangements for wheat marketing might achieve more clearly demonstrable

net benefits than was evident during this review' (Irving et al. 2000, p. 7). The committee therefore recommended that:

- the Commonwealth retain the single desk until the 2004 review required by the Act;
- the 2004 review incorporate NCP principles and be the final opportunity to show a net community benefit from the arrangements; and
- the Commonwealth Government convene a joint industry/government forum to develop performance indicators for the 2004 review.

The committee also recommended that the 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 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 does not clearly separate the regulatory and commercial functions of the former Australian Wheat Board. 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 Government responded on 4 April 2001, stating that it would retain the single desk but would not conduct the 2004 review under NCP principles. The Minister argued that the latter decision is necessary to avoid further uncertainty in the industry and for wheat growers.

The Commonwealth Government also declined to amend the Act to ensure the independence of the WEA, particularly in relation to the export consent arrangements. It argued that removing AWBI's role in these arrangements 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 Government agreed to the development of rigorous and transparent performance indicators to ensure the 2004 review accurately measures the benefits to industry and the community. A working group — comprising the WEA, the AWBI, the Department of Agriculture, Fisheries

and Forestry, and the Grains Council of Australia — was formed to develop the performance measurement framework, taking into account the views of the other industry representatives. The authority released the framework on 4 September 2001; it has since reported annually on its monitoring results to the Minister for Agriculture and the Grains Council of Australia, and released a summary report to the public.

The Commonwealth Government also agreed to improve the export consent system based on the licensing arrangements proposed in the review. The working group prepared the proposed changes, which the WEA announced on 28 September 2001. The changes included clearer consent criteria, a quarterly application cycle, a 12-month consent for shipments to niche markets and a three-month consent for other shipments.

In June 2003, following an inquiry by the Senate Rural and Regional Affairs and Transport Legislation Committee, the Parliament passed amendments to the Act that provided for:

- funding the WEA until June 2006 from a levy on the export of wheat;
- clarifying that the role of the WEA in administering export consents is to complement the objective of AWBI in maximising net pool returns, while facilitating the development of niche and other markets for the benefit of growers and the wider community;
- clarifying the ability of the WEA to vary the terms of export consents; and
- establishing an independent panel to conduct the 2004 statutory review with assistance from the WEA.

Assessment

The Council assessed in 2002 that the Commonwealth Government had not met its CPA clause 4 and 5 obligations arising from the Wheat Marketing Act. It is satisfied that the Government's review of the Wheat Marketing Act was open, independent and rigorous. The review 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. The review did not show that retaining the wheat export single desk is in the public interest; rather, as noted above, it found that allowing competition is more likely to be of net benefit to the community.

The wheat export single desk will be subject to review again — this time by an independent panel — in 2004. Nevertheless, as repeatedly stated by the Minister for Agriculture (most recently in the media release on 27 June 2003), the 2004 review will not be an NCP review and will not consider the continuation of the single desk. The Council therefore confirms its conclusion that the Commonwealth has not met 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. Contrary to the 2000 review's recommendation, the revised arrangements do not grant 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 individual export shipments, although it now allows exporters to make one application 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 the 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 on the revised arrangements leave considerable uncertainty for exporters about whether a proposed shipment will be granted consent and for what volume. In determining the eligibility of an exporter, the WEA is to consider 'Australia's reputation in overseas markets as a reliable supplier of wheat' and 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' (WEA 2001). 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, the 2000 review or the Commonwealth Government response on 4 April 2001.

The Commonwealth Office of Regulation Review reported in November 2001 that the regulation impact statement prepared for the revised export consent guidelines was inadequate (PC 2001a).

In relation to CPA clause 4, while the Commonwealth has now undertaken the review that it was obliged to do before privatising the the former Australian Wheat Board, 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 Limited's then proposed listing on the Australian Stock Exchange. This argument underlines the Commonwealth Government's failure to conduct a CPA clause 4 review before privatising the former Australian Wheat Board. The Council therefore finds that the Commonwealth Government has not met its CPA clause 4 obligations.

New South Wales

The *Grain Marketing Act 1991* vested ownership of all barley, sorghum, oats, canola, safflower, sunflower, linseed and soybeans grown in New South Wales in the New South Wales Grains Board.

Review and reform activity

In 1998, the New South Wales Government commissioned a review of the Act by a review group composed of four Government representatives and four industry representatives. The review group reported to the Government in July 1999. A majority of the review group recommended:

- removing restrictions on competitive domestic marketing by no later than 31 August 2001 for malting barley and no later than 31 August 2000 for all other grains;
- removing restrictions on competitive export marketing except for sales of feed and malting barley to Japan and sales of malting barley to China (or for all export sales of feed and malting barley if discriminating between countries proves to be impractical); and
- further reviewing retained restrictions by August 2004.

Subsequently, the solvency of the Grains Board came under mounting speculation. On 16 August 2000, the then 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 (Amery 2000a).

The Grains Board nevertheless collapsed in September 2000, leaving growers preparing for harvest without a buyer. 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 …*
>
> *… this agency agreement will operate within the framework of the NSW Grain Marketing Act until 2005.*
>
> *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.* (Amery 2000b).

Grainco bid A$25.2 million for the right that it exercises under a Deed with the Government and the Administrator of the Grains Board. Soon after, all restrictions on the marketing of sunflower, safflower, linseed and soybeans, and domestic marketing restrictions for feed barley, canola and sorghum were removed administratively.

The *Grain Marketing Amendment Act 2001* formalised the removal of these restrictions and set down 30 September 2005 for the expiry of all remaining restrictions (that is, restrictions on domestic marketing of malting barley and export marketing of feed barley, malting barley, sorghum and canola). The Council understands that no further review is planned.

Assessment

The Council assessed in 2002 that the New South Wales Government had not met its CPA clause 5 obligations arising from the Grain Marketing Act. The only restrictions that the 1999 review found to be in the public interest were those on the marketing of feed and malting barley to Japan and malting barley to China. The evidence presented to support these restrictions was inadequate, however.

- The premium prices observed in the Japanese market, and thought to possibly exist in the Chinese market, were not shown to result either solely or in part from the Grains Board's exercise of market power. Other possible explanations, such as high product quality, service or supply reliability, were not disproven.

- Econometric analysis by the Department of Agriculture showed that the Grains Board had imposed a small net public cost by raising domestic prices for malting barley above export prices.

As agreed by the Council of Australian Governments (CoAG) in November 2000, the temporary retention of competition restrictions beyond June 2002 is compliant with the CPA clause 5, so long as it is under a firm transitional arrangement and justified by a public interest assessment.

In its 2002 NCP annual report, the New South Wales Government presented evidence for the temporary retention of restrictions.

- The sudden insolvency of the Grains Board had the potential to undermine the State's entire coarse grain industry.

- Introducing arrangements that were substantially different from the existing legislative framework would have imposed significant delays when the government needed to act quickly.

It did not show, however, why other marketers could not have quickly moved to fill the gap left by the Grains Board. The same provisions of the Act under which Grainco was authorised to act as the board's agent could have been used to authorise many marketers. Similarly, many marketers could have collected the levy collected by Grainco to recoup payments made to growers for money owed from the 1999-2000 pools.

New South Wales reported in its 2003 NCP annual report that bringing forward the expiry of the remaining restrictions from 30 September 2005 is not possible because the restrictions are the subject of a court-ordered Scheme

of Arrangement and binding Deeds of Agreement between Grainco Australia, the Administrator of the Grains Board and the New South Wales Government.

Nevertheless, the Government presented no new evidence that its original decision to retain these restrictions was in the public interest. The Council therefore confirms its previous assessment that New South Wales has not satisfactorily fulfilled its CPA clause 5 obligations arising from the Grain Marketing Act.

Victoria

The Victorian *Barley Marketing Act 1993*, jointly with the South Australian Act, prohibited the sale or delivery of barley grown in either State to anyone other than the Australian Barley Board.

Review and reform activity

In 1997, the State governments of Victoria and South Australia commissioned an independent review of the Acts by the Centre for International Economics. Accounting for uncertainty about price sensitivities, the review found that 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 would 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'; and
- restructure the Australian Barley Board as a private grower-owned company.

By mid-1999, the domestic marketing monopoly was removed and the Australian Barley Board was transferred to grower ownership as ABB Grain Limited. Victoria passed legislation sunsetting ABB Grain Limited's export monopoly over barley from July 2001.

The new State Government reconsidered the sunsetting of the barley export monopoly and, on 15 December 2000, confirmed that Victoria's barley export monopoly would cease on 30 June 2001. Victorian barley growers have since had unrestricted choice as to whom they sell their barley.

There has been no 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 debate remains 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 growers 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 the Council reported in its 2001 NCP assessment, the reform and subsequent sunsetting of the Barley Marketing Act on 30 June 2001 meant that Victoria has met its CPA clause 5 obligation in this area.

Queensland

Queensland's *Grain Industry (Restructuring) Act 1993* vested ownership in Grainco of all barley and wheat grown in the State.

Review and reform activity

In 1997, the Government of Queensland submitted the Act to review by a panel of industry and Government representatives, including one from Grainco. 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 so the vesting of ownership of barley (and wheat) in Grainco did not apply to grain harvested after 30 June 2002. Consequently, Queensland barley growers have not been restricted in their choice of buyer for grain harvested since that date.

Assessment

In 2002 the Council assessed Queensland as having met its CPA clause 5 obligation relating to the Grain Industry (Restructuring) Act.

Western Australia

The *Grain Marketing Act 1975* prohibited anyone other than the Grain Pool of Western Australia from exporting barley, canola and lupins grown in the State.

Review and reform activity

In 1999, the then Western Australian Government initiated a review of the Act by the Department of Agriculture. A draft report released later that year recommended that the Government retain the coarse grain export marketing monopoly held by the Grain Pool pending the Commonwealth removal of the AWBI's wheat export marketing powers. The State Government deferred a decision in light of criticisms of the draft report's analysis.

The new Government returned the Act to review by the department. On 12 April 2002, the department released a discussion paper, which noted that:

- various studies of grain marketing show that it is difficult to conclusively identify 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 the AWBI 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 that the State Government 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 those of the Grain Pool.

In addition, export of grains in bags and small containers would be unrestricted, formalising current practice.

On 14 August 2002, the Council and the State Government reached an understanding on arrangements for the future regulation of grain export marketing in Western Australia.

- The State Government would immediately legislate to remove the bulk grain export marketing monopoly once the Commonwealth Government removed the bulk wheat export marketing monopoly.
- In the interim, the legislation would not restrict the export of grain in bags and shipping containers, and the State Government would establish a Grain Licensing Authority to license exports of grain in bulk by parties other than the Grain Pool.
- Consistent with the Government's support for removing restrictions on export marketing, the authority would:

  - be predisposed to grant export licences to parties other than the Grain Pool unless satisfied that this would significantly impact on a price premium arising from the market power of the single desk (but not on premiums arising from other factors such as grain quality that are available to all licence holders);

  - consult the Grain Pool when considering granting export licences for exports to markets in which a demonstrated price premium arises from the market power of the single export desk, but the Grain Pool would have no power of veto;

  - not be required to consult the Grain Pool for proposed exports to other markets; and

  - be permitted to grant export licences for a specified period rather than on a case basis.

- The Authority will obtain an annual independent assessment of the existence and extent of price premiums resulting from the market power of the single desk.

- To consider the overall interests of the community, the majority of the authority's membership would be independent of growers and would include one official of the Department of Treasury and Finance. The two grower representatives would be selected to ensure a broad scope of grower opinion is available to the authority.

Subsequently, the Government introduced the Grain Marketing Bill 2002 to Parliament. Passed into law in November 2002, the legislation:

- prohibits the bulk export of barley, canola and lupins unless under licence (section 24);

- gives the main export licence to the Grain Pool – now a subsidiary of the grower-owned Cooperative Bulk Handling Ltd (section 27);

- establishes the Grain Licensing Authority, comprising a chair, two grower representatives, an official of the Department of Agriculture and an official of the Department of Treasury and Finance (section 6);

- provides for the authority to grant special export licences (with effect from November 2003 or later) to persons other than the main export licence holder, provided that the authority first consults the main export licence holder if the proposed export is to a market in which the licence holder earns a price premium from the exercise of market power, and that the authority will not grant a special export licence if it considers that the export would significantly reduce the price premium (section 29 to 34);

- exempts from the TPA the main export licence holder's export of grain, and related conduct (section 41); and

- provides for the Minister to set an expiry date for the Act if the Commonwealth Government removes restrictions on the export of wheat (section 49).

Exports of barley, canola and lupins in bags and containers are unrestricted.

The Minister announced the appointments to the authority on 20 May 2003. The Minister has undertaken to consult the Council in developing regulations and Ministerial guidelines for the authority.

Assessment

The Council assessed in 2002 that Western Australia had met its CPA clause 5 obligations arising from the Grain Marketing Act, subject to the arrangements under the new legislation fulfilling the understanding reached between the Government and the Council.

The *Grain Marketing Act 2002* is consistent with the understanding reached in August 2002. At the time of reporting, however, the arrangements under the legislation (including Regulations and Ministerial guidelines) still had to be finalised. These arrangements are central to ensuring that the Authority will:

- be predisposed to grant export licences to parties other than the Grain Pool unless satisfied that this would have a significant impact on a price premium arising from the market power of the single desk; and

- obtain an annual independent assessment of the existence and extent of price premiums resulting from the market power of the single desk.

The Council therefore assesses that review and reform of grain marketing arrangements in Western Australia is incomplete and, hence, that the Government is still to fulfil its obligations under CPA clause 5.

South Australia

The South Australian *Barley Marketing Act 1993* and the Victorian Act prohibited the sale or delivery of barley grown in either State to anyone other than the Australian Barley Board. The South Australian Act also prohibited competition in the acquisition of oats grown in that State.

Review and reform activity

The independent review jointly commissioned with Victoria recommended that the South Australian Government:

- remove the domestic barley marketing monopoly and the oats 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.

By mid-1999, the domestic marketing monopoly was removed and the Australian Barley Board was transferred to grower ownership as ABB Grain Limited. South Australia passed legislation sunsetting ABB Grain Limited's export monopoly over barley from July 2001. However, following a finding by economic forecasters and advisers Econtech that the export barley marketing monopoly returned an A$15 million gain to the community (principally from exports to Japan), the State Government announced it would extend the monopoly indefinitely. The South Australian Parliament subsequently passed the *Barley Marketing (Miscellaneous) Amendment Act 2000* which removed the sunset clause but required a review of the export monopoly after two years.

On 6 November 2002, the Minister for Agriculture, Food and Fisheries initiated a new review into single desk export marketing of South Australian barley. The review was conducted by a three-member panel — led by Professor David Round of the University of South Australia, and included a former senior State Government official and the deputy chair of the Grains Council of South Australia — and charged with determining whether the single desk is clearly and credibly in the public interest. It was to undertake this task by:

- updating earlier studies by the Centre for International Economics and Econtech; and

- examining the Victorian experience of deregulation.

The review panel reported to the Minister on 18 June 2003. It noted that the resources made available to it by the Government had been insufficient to update the earlier studies, but that it had accepted an offer from ABB Grain Limited to fund modelling work by Econtech under the panel's direction. It also had obtained an independent review of Econtech's modelling by Professor MacAulay of Sydney University. The panel concluded:

> *… that the Econtech estimates have a high degree of uncertainty attached to them which cannot be quantified in any normal statistical sense, and the future net public benefit from the continued operation of the single desk, while not certain, is likely to be relatively small. When this is added to the absence of any comparative cost benchmarking of ABB, and the large number of non-quantifiable benefits and costs associated with the single desk, the Panel believes that the test established by clause 5 of the CPA has not been met in full — that is, it has not demonstrated to the Panel's satisfaction in any convincingly rigorous way that the single desk delivers benefits to the Australian community as a whole that outweighs the costs, and that the objectives*

> *of the legislation in granting single desk powers to ABB can only be achieved by restricting competition*. (Round et al. 2003, p. 73)

The panel recommended 'controlled deregulation' in which the single desk is exposed to competitive challenge through reform — along the lines of Western Australia's Grain Marketing Act — whereby ABB Grain Ltd would retain a principal barley export licence and, a year after the passage of reform legislation, an independent authority would license barley exports by other marketers that the authority determines do not threaten the price premiums that ABB Grain Ltd achieves as a result of its market power.

On 2 July 2003, the Minister announced the outcome of the review and the Government's in-principle approval of the recommendations. The Government is now seeking to agree with key industry players how the recommendations can be implemented. It intends to have a draft bill ready for the 2004 autumn session of Parliament.

Assessment

The Council assesses that South Australia has not met its CPA clause 5 obligations relating to the Barley Marketing Act. Restricting the export marketing of barley grown in South Australia has not been found to be in the public interest, and remains to be reformed.

The Council has given some consideration to the reform approach recommended by the review panel. This approach, characterised by the review panel as 'controlled deregulation', will nevertheless retain some degree of restriction of competition in barley export marketing for an indeterminate period. The panel argued that the alternative, 'instant' deregulation', would cause 'some massive adjustment problems and costs, especially in fragile rural communities, much the same as those caused by the across the board tariff cut instituted by the Whitlam Government in 1973' (Round et al. 2003, p. 78). The Council finds this claim difficult to accept. The Panel presented no analysis of the possible effects of deregulation on incomes in rural communities in South Australia. Further, it did not consider the experience of full deregulation of barley exporting in either Victoria or Queensland, which does not appear to have caused significant adjustment problems.

A careful and robust analysis of possible adjustment costs and risks would probably find that these can best be addressed by such measures as:

- announcing reform in clear and positive terms so that those affected know what will happen, why it will happen, and believe it will happen;
- setting an implementation timetable that gives those affected sufficient time to adjust without unduly delaying realisation of the benefits of reform; and

- assisting those who may have difficulty adjusting to improve their own capacity to operate successfully in the post-reform environment or to make alternative choices.

This reform approach, adopted by Victoria and Queensland, was not discussed in the review report.

Nevertheless, as the Government has decided to proceed with the panel's recommended reform approach, the Council highlights two matters that it considers to be critical to the success of this approach.

As acknowledged by the panel the recommended reform approach places a very large responsibility on the shoulders of the licensing authority. The licensing authority should grant export licence applications unless it is satisfied that to do so would significantly reduce price premiums convincingly demonstrated to result from the exercise of export market power. The principal licence holder must bear the burden of demonstrating the existence of such premiums and their sensitivity to competition from other exporters.

The panel did not discuss a key principle of the Western Australian reform approach — that the remaining restrictions expire upon the Commonwealth Government removing its remaining restrictions on the export of wheat. This principle recognises that the former state grain monopolies are likely to enter the wheat exporting market and that, at that point, removal of remaining state grain exporting restrictions is very unlikely to cause additional adjustment problems for growers. It also serves to underline that the end-point of deregulation is a fully competitive market for Australian grain.

Northern Territory

The Northern Territory's *Grain Marketing Act 1983* granted a monopoly to the Grain Marketing Board over domestic and export marketing of all barley and coarse grains grown in the Territory.

The Northern Territory Government completed an NCP review of the Act in 1997, which recommended repeal of the Act. Accordingly the Act was repealed later that year.

In 2001 the Council assessed that the Northern Territory had met its CPA clause 5 obligations arising from the Act.

Table 1.3: Review and reform of legislation regulating the marketing of grains

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Wheat Marketing Act 1989*	Prohibits the export of wheat except with consent of the WEA or by AWBI	Review 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, however, 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 WEA consult AWBI when consenting to the export of bagged and containerised wheat; and • removing for a three-year trial the requirement that the WEA obtain written approval from AWBI for the export of durum wheat.	In April 2001, the Government announced it would retain the export monopoly, but it: • declined to incorporate NCP principles in the 2004 review; • retained the requirement that the WEA consult with AWBI when consenting to the export of bagged and containerised wheat; and • retained the requirement for AWBI's written approval of the export of durum wheat.	Does not meet CPA obligations (June 2002)

(*continued*)

Table 1.3: continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Grain Marketing Act 1991*	Grants a monopoly to the 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: • removing restrictions on domestic sales by no later than 31 August 2001 for malting barley and by no later than 31 August 2000 for all other grains; • retaining restrictions on export sales of feed and malting barley for only overseas markets where market power or access premiums can be demonstrated, subject to a further review by 31 August 2004; and • removing restrictions on export sales of all other grains 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 an agent to the insolvent Grains Board. An Independent Monitoring Committee will scrutinise prices achieved by Grainco Australia.	Does not meet CPA obligations (June 2002)
Victoria	*Barley Marketing Act 1993*	Granted a monopoly to the Australian Barley Board over domestic and export marketing of all barley grown in the State.	Review of this Act and the South Australian Act was completed in 1998, 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 the monopoly on: • domestic barley from 1 July 1999; and • export barley from 1 July 2001. The board was transferred to grower ownership on 1 July 1999. It has no regulatory powers.	Meets CPA obligations (June 2001)

(*continued*)

Table 1.3: continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Grain Industry (Restructuring) Act 1993*	Granted a 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 a monopoly to the Grain Pool of Western Australia over export marketing of all barley, lupins and canola grown in the State	Departmental review was completed in 2002, recommending that the Government: • establish a licensing authority to issue permits for bulk grain exports by parties other than the Grain Pool; and • allow free export of grain in bags and containers.	The Grain Marketing Act 2002 establishes a bulk grain export licensing scheme and repeals the former Act. It will expire following the removal of the Commonwealth's wheat export restrictions. Ministerial guidelines for the Grain Licensing Authority are still to be completed.	Review and reform incomplete
South Australia	*Barley Marketing Act 1993*	Grants a monopoly to Australian Barley Board over domestic and export marketing of all barley and oats grown in the State	Review of this Act and the Victorian Act completed in 1998 (see above). Following the removal of the June 2001 sunset, a further review was completed in June 2003, recommending 'controlled deregulation' via a licensing authority similar to that being established in Western Australia.	No reform is expected until 2004 autumn session of Parliament.	Review and reform incomplete
Northern Territory	*Grain Marketing Act 1983*	Granted a 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)

Dairy

The dairy industry is a major rural industry in Australia. Based on a farmgate value of production just over A$3.7 billion dollars in 2001-02, it ranks third behind the wheat and beef industries. Over 55 per cent of Australian milk production is exported — primarily as manufactured products — at international market prices for a value of A$3.3 billion dollars in 2001-02 (ADC 2002).

Commonwealth

At the time the CPA came into being, the Commonwealth Government regulated the dairy industry principally under the *Dairy Produce Act 1986*. This Act established the Australian Dairy Corporation and provided for the operation of the Domestic Market Support scheme and the licensing of dairy exports to markets with access restrictions — namely:

- cheese, skim milk powder and butter to Japan; and
- cheese to the European Union.

Through the 1980s and 1990s, the Domestic Market Support scheme made annual payments to dairy farmers based on their production of milk for manufacturing into processed dairy products other than drinking milk. In 1999-2000, the payment was around 0.95 cents per litre. The scheme was funded by a levy on sales of drinking milk and milk used for manufacturing dairy products sold in the domestic market. The net effect of the scheme was to subsidise the export of manufactured dairy products.

The Commonwealth also restricted some cheese imports by applying a tariff quota system.

Review and reform activity

As scheduled the Domestic Market Support scheme ceased on 1 July 2000. The Commonwealth had scheduled the Dairy Produce Act for review by the Productivity Commission in 1998-99. In 1999, it deferred the review in light of other industry reforms then under way. Later, the Australian Dairy Corporation announced the end of licensing for cheese exports to Japan from July 2002, and the review of other export restrictions. From July 2003, the Australian Dairy Corporation was converted to a company limited by guarantee constituted under the *Corporations Act 2001*. Additionally, all the assets and liabilities of the Dairy Research and Development Corporation were transferred to the new company, Dairy Australia. As a result of these reforms, the remaining restrictions for a small number of cheese products exported to the EU and US will be managed by the Commonwealth

Department of Agriculture, Fisheries and Forestry. The Commonwealth now intends to reconsider the remaining export restrictions, including consideration of the appropriate nature and scope of any review, in light of these latest reforms.

Assessment

The Council assesses the Commonwealth Government as not having met its CPA clause 5 obligations relating to the Dairy Produce Act because some restrictions remain which have not been reviewed.

States and the ACT

For 20 years or more, the States and the ACT governments controlled the pricing and supply of milk for drinking (known as 'market milk'). Each vested ownership of milk in a statutory dairy marketing authority that paid eligible dairy farmers a fixed price for market milk. This price was more than twice what dairy farmers received for freely traded 'manufacturing milk' (milk for processing into dairy products such as butter, cheese and milk powder). In New South Wales, Western Australia and south east and central Queensland, a dairy farmer had to own market milk quotas to receive the higher market milk price. In Victoria, north Queensland, South Australia and Tasmania, all farmers received a share of the higher market milk price, in proportion to their share of all State milk production. The ACT maintained post-farmgate restrictions and licensing of home vending.

Review and reform activity

All States and the ACT removed their controls on the pricing and supply of market milk from 30 June 2000. This followed several important events.

- In April 1999, the Australian Dairy Industry Council proposed nationwide deregulation with adjustment assistance.
- In July 1999, the Victorian Government released the report of an independent review of its *Dairy Industry Act 1992*, which recommended the removal of price and supply management arrangements.
- In September 1999, recognising the likely severe impact of deregulation on some dairy farmers and communities, the Commonwealth Government announced that it would make available a substantial adjustment assistance package if national deregulation proceeded.
- In early 2000, the Victorian Government confirmed that it would proceed with deregulating its statutory milk marketing arrangements.

- In March 2000, all Australian agriculture Ministers agreed that deregulation was inevitable and that they would rapidly proceed to introduce the necessary legislation to deregulate market milk arrangements on a 'best endeavours' basis.

- On or about 30 June 2000, all States and the ACT passed deregulatory legislation.

As part of the legislative reforms, State governments wound up or transferred to industry the commercial functions of their dairy authorities, and established their food safety regulatory function within food safety authorities.

Assessment

The Council concluded in its 2001 NCP assessment that all States and the ACT had fulfilled their CPA clause 4 and 5 obligations in relation to the regulation of milk supply and prices, and the reform of the statutory dairy authorities. The changes made to food safety regulation of the dairy industry have been assessed alongside other reforms of food regulation (see the section 'Agriculture-related products and services').

Table 1.4 summarises government's progress in reviewing and reforming dairy industry legislation.

Table 1.4: Review and reform of legislation regulating the marketing of milk and dairy products

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Dairy Produce Act 1986*	Licensing of dairy exports; support for domestic manufacture of dairy products	Review of export licensing arrangements deferred due to ongoing deregulatory changes and industry reforms. The Commonwealth now intends to consider the nature and scope of any review.	The domestic market support scheme expired on 30 June 2000. Licensing of cheese exports to Japan ended on 30 June 2002. Other restrictions may remain.	Review and reform incomplete
New South Wales	*Dairy Industry Act 1979*	Vesting of ownership of milk in the Dairy Corporation; farmgate price-setting for market milk; market milk quotas; licensing of farmers and processors	Review by a joint government–industry panel was completed in November 1997. Chair and industry members recommended retaining restrictions subject to review again in 2003. Other government members recommended removing restrictions within three to five years if national reform did not occur.	Act was repealed by the *Dairy Industry Act 2000* following national agreement to deregulate. Food safety regulation was previously integrated under *Food Production (Safety) Act 1998*.	Meets CPA obligations (June 2001)
Victoria	*Dairy Industry Act 1992*	Vesting of milk in Victorian Dairy Industry Authority; farmgate price-setting for market milk; pooling of market milk returns; licensing of farmers, processors, distributors and carriers	Review by independent consultant was completed in 1999. It recommended the removal of all restrictions except those that safeguard public health. It further recommended third party auditing of dairy food safety regulation subject to acceptance of importing countries.	Act was repealed by *Dairy Act 2000* following national agreement to deregulate. New Act establishes Dairy Food Safety Victoria to regulate dairy food safety.	Meets CPA obligations (June 2001)

(*continued*)

Table 1.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Dairy Industry Act 1993*	Vesting of milk in Queensland Dairy Industry Authority; farmgate price-setting for market milk; market milk quotas; licensing of farmers and processors	Review by a joint government–industry panel was completed in 1998. It recommended: • retaining farmgate price regulation for five years to December 2003, but reviewing it again before 1 January 2001; and • extending quota arrangements from south Queensland into central and north Queensland for five years.	Vesting, price-setting and quota provisions were removed by the *Dairy Industry (Implementation of National Adjustment Arrangements) Amendment Act 2000* following national agreement to deregulate. Food Safety Queensland assumed responsibility for dairy food safety under the *Food Production (Safety) Act 2000.*	Meets CPA obligations (June 2001)
Western Australia	*Dairy Industry Act 1973*	Vesting of milk in the Dairy Industry Authority; farmgate price-setting for market milk; market milk quotas; licensing of farmers and processors.	Review by officials, assisted by an industry working party, was completed in 1998. It recommended repeal of the Act upon deregulation by Victoria.	Act was repealed by the *Dairy Industry and Herd Improvement Legislation Repeal Act 2000* following national agreement to deregulate.	Meets CPA obligations (June 2001)
South Australia	*Dairy Industry Act 1992*	Vesting of milk in Dairy Authority of South Australia; farmgate price-setting for market milk; pooling of market milk returns; licensing of farmers, processors and vendors	Price-setting restrictions reviewed in 1999 by officials. The review recommended removal of these. Food safety provisions remain under review by officials.	Vesting, price-setting and pooling provisions were removed by the *Dairy Industry (Deregulation of Prices) Amendment Act 2000* following national agreement to deregulate.	Meets CPA obligations (June 2001)

(*continued*)

Table 1.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Dairy Industry Act 1994*	Vesting of milk in Tasmanian Dairy Industry Authority; farmgate price-setting for market milk; pooling of market milk returns; licensing of farmers, processors, manufacturers and vendors	Review by a government–industry panel was completed in 1999. It recommended deregulation after five years subject to outcome of Victoria's dairy legislation review and national reforms.	Vesting, price-fixing and pooling provisions were removed by the *Dairy Amendment Act 2000* following national agreement to deregulate.	Meets CPA obligations (June 2001)
ACT	*Milk Authority Act 1971*	Retail price controls; licensing of home vending; requirement that Canberra Milk Authority buy milk from sole ACT producer	Review by officials was completed in 1998. It recommended: • separating the authority's regulatory and commercial roles; • retaining retail price controls until mid-2000; • reforming home vending arrangements; and retaining compulsory acquisition of ACT milk.	The Government initially endorsed the review recommendations. Act was repealed by the *Milk Authority Repeal Act 2000* following national agreement to deregulate.	Meets CPA obligations (June 2001)

Eggs

Queensland, Western Australia and Tasmania scheduled for NCP review their legislation restricting competition in the egg industry. In its 2002 NCP assessment, the Council assessed Queensland as having met its CPA obligations in relation to its egg industry legislation.

Table 1.5 summarises government's progress in reviewing and reforming egg marketing legislation.

Western Australia

Western Australia regulates its egg industry under the *Marketing of Eggs Act 1945*. The Act restricts egg supply through producer licensing and production quotas and grading, and prohibits producers from supplying eggs to anyone other than the Egg Marketing Board.

Review and reform activity

The State Government commenced a review of the Act in 2002 with the release of a discussion paper inviting comment on four options:

- keeping the status quo (conducting 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.

In August 2003 the Government endorsed the removal of competitive restrictions on the supply and marketing of eggs by July 2007. At the time of reporting the Government was still considering the precise timing and mode of reform. It had not released the final report of the review.

Assessment

The Council assesses that Western Australia has not met its CPA clause 5 obligations arising from the Marketing of Eggs Act as fulfilment of its review and reform obligation is incomplete and the Government has not provided public interest evidence to support a delay to reform.

Tasmania

Tasmania regulated its egg industry via the *Egg Industry Act 1988*. The Act restricted egg supply through producer licensing and production quotas, and vested ownership of eggs in the Egg Marketing Board.

Review and reform activity

The Tasmanian Government completed a review of the Act in July 1999. The review recommended removing producer licensing, production quotas, the vested ownership and minimum quality standards.

The Act was repealed and replaced by the *Egg Industry Act 2002*, which establishes a mandatory quality assurance scheme for producers with 20 or more hens. The quality assurance scheme provisions will not commence until assessed as being in the public interest via a regulatory impact statement.

Assessment

The Council assesses that Tasmania has met its related CPA clause 5 obligations in this area by removing the restrictions imposed by the former Egg Industry Act.

Table 1.5: Review and reform of legislation regulating the marketing of eggs

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Egg Industry (Restructuring) Act 1993*	Producer licensing; production quotas; vesting and marketing monopoly	Not reviewed.	The Act was repealed on the sunset date of 31 December 1998.	Meets CPA obligations (June 2002)
Western Australia	*Marketing of Eggs Act 1945*	Producer licensing; production quotas; marketing monopoly	The Government decided in July 2003 to remove the restrictions by July 2007 but has not finalised implementation.	No reform yet.	Review and reform incomplete
Tasmania	*Egg Industry Act 1988*	Producer licensing; production quotas; vesting and marketing monopoly	Review was completed in July 1999, recommending removal of all restrictions on competition.	Act was repealed and replaced by the Egg Industry Act 2002. Commencement of quality assurance scheme subject to a RIS.	Meets CPA obligations (June 2003)

Poultry meat

The Australian poultry meat industry is composed of breeders, hatcheries, growers, wholesalers and retailers. There is a high degree of vertical integration in the industry. Processors own and operate breeding farms, hatcheries, feed mills, processing plants and some growing farms. Other growing farms are independently owned. However, they are contracted to provide growing services to individual processors using day-old chicks, feed and other inputs provided by processors.

Australian poultry meat consumption was 704 000 tonnes (or 34.5 kilograms per head) in 2001-02. Poultry consumption in Australia is second only to beef consumption at 35 kilograms per head (McDonald et al 2003). New South Wales is the State with the largest production of chicken meat, followed by Victoria, Queensland and South Australia.

New South Wales, Victoria, Queensland, Western Australia and South Australia have all regulated the commercial relationships between poultry growers and processors. This regulation has traditionally required growers and processors to bargain through representatives on a central industry committee. In practice, independent members of the committee usually arbitrate on price and other contract conditions.

The common argument for regulating the industry is that growers have unusually weak bargaining power in negotiating agreements with processors because:

- in most regions there are many growers and few (occasionally just one) processors; and

- growers' investment in growing sheds and plant has little value other than for growing chickens and may be tailored to the specific requirements of one processor.

However, the problem of weak bargaining power may be exaggerated. Potential entrants to chicken growing are not encumbered by existing investment and are free to pursue an agreement with whichever processor they wish, or to withdraw. Similarly, those existing growers who must substantially reinvest to remain in the industry (whether due to technological obsolescence or changes in surrounding land uses) are less encumbered. Processors rely on growers investing in new capacity to allow them to increase their sales and to replace capacity rendered obsolete by technological innovation or threatened by land use changes.

Generally, therefore, growers have adequate bargaining power and invest only if they are confident that processors are offering sufficient and secure returns for their investment and labour. There may, nevertheless, be circumstances where a processor could deal with individual existing growers inequitably without materially harming the processor's own future interests.

The TPA provides remedies for small businesses subject to unconscionable conduct by larger businesses. However, individual growers have limited resources to pursue such remedies. Voluntary grower associations can assist affected members to pursue these remedies and, over the longer term, assist all members to pursue agreements with processors that reduce the scope for unconscionable conduct. Voluntary collective action is anticompetitive, but may be authorised by the Australian Competition and Consumer Commission (ACCC) if it considers the benefits to the community outweigh the costs. Alternatively, States may legislate to provide a similar voluntary collective bargaining framework.

Table 1.6 summarises government's progress in reviewing and reforming legislation regulating chicken growing services.

New South Wales

The *Poultry Meat Industry Act 1996* in New South Wales establishes a central industry committee of grower, processor and independent members that sets a standard pricing formula and standard growing contract.

Review and reform activity

The State Government submitted the Act to review by a group of grower, processor and government representatives in 1998. This group was unable to agree, so the State Government commissioned Hassall & Associates in March 2001 to undertake a net public benefit analysis. The State Government has not released this analysis, but reported the finding that the Act imposes a small net public cost equivalent to 1 per cent of the retail price of chicken meat.

The State Government announced on 13 November 2001 that it would not remove the restrictions on competition because they are necessary to countervail the market power of processors. Later in 2002, the Act was amended to authorise the anticompetitive conduct of the industry committee under the TPA and to allow additional pricing flexibility within limits approved by the committee.

Assessment

The Council found in the 2002 NCP assessment that the New South Wales Government had not satisfactorily met its CPA clause 5 obligation relating to this Act (NCC 2002, pp. 4.24–4.25). Notwithstanding the additional flexibility afforded by the 2002 amendments, the Act continues to restrict competition between processors and between growers by setting base rates for growing fees centrally and by prohibiting agreements unless approved by the industry committee. For the 2002 NCP assessment, the State Government failed to

show that these restrictions were in the public interest and, moreover, failed to conduct an open NCP review process.

The State Government has since presented the Council with additional arguments for not removing centralised bargaining. It argued that:

- growers' bargaining power is weak and likely to remain so beyond the five-year term of authorisations by the ACCC; and
- centralised bargaining arrangements, as amended, do not produce substantially different outcomes from those that could be expected otherwise.

The Council considers that these arguments are not sufficient to justify retaining centralised bargaining.

Two features of the centralised bargaining arrangement particularly concern the Council. First, the arrangement involves collective bargaining by processors — a restriction on competition for which there is no benefit to the community but from which significant risks may arise if it leads to collusive or exclusive conduct in the downstream chicken meat product and related markets. Second, the arrangement is compulsory, so growers cannot bargain on their own account. This feature is likely to significantly hamper new grower entry and innovation in production and supply management practices. Growing prices and investment under centralised bargaining are unlikely to be similar to the growth that would occur without the restriction.

The State Government also claims that centralised bargaining will facilitate orderly industry adjustment over the period to June 2004 when existing grower contracts expire. The Council accepts that the State's chicken meat industry faces a period of substantial adjustment. However, centralised bargaining is likely to raise adjustment costs for at least some growers, as growing and processing capacity are shifted to jurisdictions that have less restrictive regulatory regimes (such as Victoria and Queensland). Alternative measures, such as advisory assistance for growers and a scheme for mediation of disputes under existing contracts, could improve growers' confidence and ability to adjust more effectively and for less cost than under centralised bargaining.

The Council thus reaffirms its 2002 assessment that the New South Wales State Government has not met its CPA clause 5 obligation relating to centralised bargaining under the Poultry Meat Industry Act.

Victoria

Victoria's *Broiler Chicken Industry Act 1978* establishes a central industry committee of grower, processor and independent members, and empowers the committee to set a standard growing price and to prescribe standard contract terms and conditions.

Review and reform activity

Victoria completed a review of the Act in November 1999. Independent adviser KPMG found that the price determination arrangements impose a net cost on the community as a whole and are likely to breach the TPA. It recommended that producers seek authorisation from the ACCC for growers to bargain collectively with their respective processor, and that the Victorian Government repeal the Act and its Regulations.

Subsequently, Marven Poultry and five other Victorian processors applied to the ACCC for authorisation. The ACCC granted an authorisation on 29 June 2001 for five years.

The State Government has not repealed the Act, but the Act no longer restricts competition because the industry committee has ceased to be involved in contract negotiations.

Assessment

In 2002, the Council assessed that Victoria had met its CPA clause 5 obligation in relation to the Broiler Chicken Industry Act.

Queensland

Prior to reform, Queensland's *Chicken Meat Industry Committee Act 1976* established a central industry committee of grower, processor and independent members and empowered the committee to approve contracts between growers and processors and to negotiate growing prices.

Review and reform activity

Queensland completed a review of the Act in 1997. The review recommended:

- shifting the industry committee's role from a prescriptive one to a facilitative one, whereby it convenes representative groups of producers to negotiate with each processor and refers disputes to mediation or arbitration; and
- specifically prohibiting the industry committee from recommending or providing information on growing fees.

The State Government agreed to these recommendations in December 1998. The necessary amendments took effect from October 1999.

Assessment

In 1999, the Council assessed that Queensland had met its CPA clause 5 obligation in relation to the Chicken Meat Industry Act.

Western Australia

Western Australia's *Chicken Meat Industry Act 1977* establishes a central industry committee of grower, processor and independent members, and empowers the committee to set a standard growing price, prescribe standard contract terms and conditions, and approve the establishment of growing facilities. The Act also prohibits the establishment of new processing facilities without the approval of the Minister.

Review and reform activity

Western Australia reviewed the Act in 1997. 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
  - further reviewing this restriction in five years;
- removing controls on entry to the processing and growing sectors.

A Bill to amend the Act and remove the committee's power to prescribe contracts was introduced in 2000 but lapsed at the 2001 State election. These amendments are again before Parliament within the Acts Amendment and Repeal (Competition Policy) Bill 2002 and are expected to be passed in the 2003 spring session of Parliament.

Assessment

The Council assesses that Western Australia has not yet met its CPA clause 5 obligation relating to the Chicken Meat Industry Act as reforms to restrictions on competition imposed by the Act are still to be passed.

When these reforms are passed, the Act will continue to provide for collective bargaining between growers and processors via a central industry committee. As noted above, no community benefit arises from restricting competition between processors, and significant costs may arise if collective bargaining fosters collusive or exclusive conduct by processors in the downstream chicken meat product and related markets. However, no such collective bargaining activity is exempt from action under the TPA, so the Council expects the industry committee to withdraw from involvement in contract negotiations. Nevertheless, it would be preferable if such provisions were repealed.

South Australia

South Australia's *Poultry Meat Industry Act 1969* establishes a central industry committee of grower, processor and independent members, and empowers the committee to set a standard growing price, approve growing contracts and approve the establishment of growing facilities.

Review and reform activity

South Australia reviewed the Act before the CPA commenced in 1995. The review found that general competition law is sufficient to protect growers and that industry-specific legislation is not required. In 1996, the then State Government decided to repeal the Act but did not proceed following opposition in Parliament. Nevertheless, with the extension of the TPA via the Competition Code Agreement, the industry committee ceased to operate and the Act has not been enforced.

In 1997, the major processors applied for and obtained five-year ACCC authorisations for their growers to voluntarily bargain collectively. Inghams Pty Ltd, the only remaining major processor, obtained a new authorisation in January 2003 for five years.

In July 2003 the South Australian Parliament passed the *Chicken Meat Industry Act 2003*. The new legislation:

- repeals the former Act;
- authorises growers to bargain collectively with individual processors;
- provides for compulsory arbitration of disputes arising in the collective bargaining of growing service contracts; and
- allows a grower not offered a new growing agreement to refer the exclusion to compulsory mediation and arbitration.

The legislation also provides for a statutory review of its impact within six years of its passage.

In accordance with the CPA clause 5, the Government presented its public interest arguments through the conduct by officials of an NCP review of the draft Bill, consultation with interested parties and the general public, and the release in November 2002 of a final report. The review found that the then proposed restrictions met the public interest test.

Assessment

The Council assessed in 2002 that South Australia had met its CPA clause 5 obligations relating to the Poultry Meat Industry Act, given that the

legislation, while not reformed, no longer restricted competition in the market for chicken growing services.

The Council now assesses that South Australia, in introducing new competition restrictions into the chicken growing services market, has not met its CPA clause 5 obligations, as these restrictions are not in the public interest.

According to the review report, the restrictions will benefit the community by improving relationships between growers and their processor, improving the accuracy of pricing and ensuring industry rationalisation occurs at an appropriate pace (Bartsch et al. 2002, p. 43). The review provided little evidence to support these claims, however. The Council is not convinced of these benefits.

- It is reasonable to expect that the availability of compulsory mediation and, in particular, arbitration would tend to drive the negotiating parties apart more than bring their positions together, because neither party is likely to put its best offer on the table if it expects a third party to impose a compromise between the parties' respective offers.

- There is no reason to expect that a third party, with less expertise and stake in the outcome of negotiations, can more accurately determine efficient prices than the negotiating parties themselves.

- The review does not explain what pace of rationalisation is appropriate, but it cannot be assumed that a slow pace is of benefit to the community. The community may be worse off if the new legislation holds back resources from reallocation to more productive uses.

Compulsory arbitration and mediation of disputes over new contracts and over processor selection of growers are likely to increase the transaction costs of forming and renewing commercial relationships and could lead to higher grower fees. The latter effect may be in the short-term interests of some growers (particularly those who intend to exit before the next contracting round), but would not be in the long-term interests of growers if processors consequently consider South Australia to be a relatively less attractive location for processing investment. The additional adjustment costs resulting from reduced processor demand for chicken growing services in South Australia is likely to outweigh any benefit to the community.

The Council acknowledges that the South Australian industry is facing a period of substantial adjustment, irrespective of regulatory change, due to the relocation of some production outside the State, changes in technology and changes in land use in some areas where growing facilities are concentrated. There may be a place for government intervention that lowers adjustment costs and improves growers' confidence in their ability to prosper in a competitive environment. Such objectives can be achieved without restricting competition, such as through direct assistance for growers via training and professional advice in business planning, bargaining and obtaining land use planning approvals.

The Council is also concerned that, with the passage of this legislation, there is a prospect of similar or more restrictive arrangements being introduced in jurisdictions that earlier opened their markets to greater competition. The wider reintroduction of restrictions in the chicken meat growing services market would reduce competition between States for industry capacity and investment and could lead over time to higher retail prices for chicken meat products and hence increasing net costs to the community from such regulation.

Table 1.6: Review and reform of legislation regulating chicken growing services

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Poultry Meat Industry Act 1986*	Prohibits supply of chickens unless under a growing fee formula and 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 meet CPA obligations (June 2002)
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 that the industry committee convene groups of producers to negotiate with processors, but 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 1.6 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 1997, recommending that the Government retain industry-wide collective bargaining (subject to allowing growers to opt out and to reviewing the arrangement after five years) and remove controls on grower and processor entry.	Act is to be amended in 2003 as recommended. Collective bargaining not exempt from the TPA.	Review and reform incomplete
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.	Industry committee ceased to operate in 1996 following the Competition Code Agreement. Repealed in July 2003 by the *Chicken Meat Industry Act 2003* (see below).	Meets CPA obligations (June 2002)
	Chicken Meat Industry Act 2003	Authorises collective bargaining by growers with individual processors; compulsory arbitration of disputes over proposed new contracts and processor selection of growers.	Review by officials in drafting the legislation completed in November 2002, finding that the then proposed restrictions were in the public interest.	The Act was passed in July 2003.	Does not meet CPA obligations (June 2003)

Other commodities

Other key primary products subject to anticompetitive marketing regulation have been:

- dried fruit;
- potatoes;
- rice; and
- sugar.

In its 2002 NCP assessment, the Council found that Queensland had met its CPA clause 5 obligation relating to the regulation of the sugar marketing. Still outstanding at June 2002 was review and reform activity relating to marketing regulation for dairy exports, dried fruit exports, potatoes and rice. Table 1.7 summarises government's progress in reviewing and reforming legislation governing the marketing of other primary products.

Dried fruit

The Commonwealth Government has regulated the production and export marketing of various horticultural products. It listed for NCP review 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;
- the *Dried Vine Fruits Legislation Amendment Act 1991*; and
- Regulations under the *Australian Horticultural Corporation Act 1987* that restrict the export of dried vine fruit.

The Australian Horticulture Corporation Act and other Regulations under the Act were not listed for NCP review. This legislation 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.

Review and reform activity

The Dried Vine Fruits Equalization Act, the Dried Sultana Production Underwriting Act and the Dried Vine Fruits Legislation Amendment Act were repealed without review.

The dried fruits export control regulations made under the Australian Horticultural Corporation Act expired at the beginning of 2003 as part of the transition from this Act, which has been repealed, to the *Horticulture Marketing and Research and Development Services Act 2000*. New dried fruit export licensing arrangements are now in place that require businesses exporting 100 tonnes or more of product to meet various quality standards, to obtain export credit insurance and to provide data for the collation of export statistics. As required under the new Act the Secretary of the Commonwealth Department of Agriculture, Fisheries and Forestry approved these controls only after the preparation of a satisfactory regulatory impact statement. Horticulture Australia Limited must report on the performance of export controls annually and, with the department, review its powers under NCP principles every three years.

Assessment

The Council assesses the Commonwealth as having met its CPA clause 5 obligations in relation to dried vine fruit legislation via its repeal.

Potatoes

The growing and marketing of potatoes in Western Australia are controlled under the *Marketing of Potatoes Act 1946*. The Act prohibits the production of potatoes in Western Australia for fresh domestic sale unless licensed by the Potato Marketing Corporation. These licences restrict land available for growing potatoes for fresh consumption but not for processing or export. The Corporation pools returns from the sale of potatoes to wholesalers and pays growers the proceeds after deduction of its own costs. Grower payments reflect grading and volume but not variety.

Review and reform activity

The Department of Agriculture completed a review of the legislation in December 2002. The review found that:

- removal of the Corporation's supply management and marketing powers would allow the entry of larger producers with lower costs of production but bring substantial adjustment costs for existing growers;

- benefits to the community from restricting potato supply and fixing potato prices exceed costs; and

- alternatives to the restrictions, such as establishing a grower-owned co-operative, would not achieve the objectives of the legislation because they would not restrict supply.

The review concluded that evidence for a net public benefit from deregulation remained inconclusive because retail prices may not fall and there would be substantial adjustment costs.

It recommended the Government maintain the current regulated supply system given the lack of evidence that any major changes would result in improvement in the public interest. It also recommended the Government investigate ways to improve the operation of the Act.

On 5 August 2003 the Minister for Agriculture announced that the State Government would retain the marketing powers of the Potato Marketing Corporation.

Assessment

The Council assesses that Western Australia has not met its CPA clause 5 obligations relating to the Marketing of Potatoes Act. The review, in finding that evidence for the net public benefit was inconclusive, reversed the presumption required by the CPA clause 5 – that legislation should not restrict competition unless this is in the public interest. It also failed to adequately demonstrate that the supply management and price-fixing powers of the Potato Marketing Corporation are in the public interest.

According to the review the community benefits from these powers arise through:

- enabling growers to countervail the market power of retailers;

- stabilising retail prices for consumers;

- reducing wastage;

- guaranteed payments to growers; and

- more effective disease control.

The Council does not accept that providing countervailing market power is of itself a community benefit, although in some circumstances it may have beneficial consequences, such as reducing the opportunities for unconscionable conduct by large businesses towards small businesses, and

assisting small businesses to become more efficient. However, it may also impose costs on the community, such as higher prices for consumers and reduced product choice.

The review did not claim that, in the absence of the Corporations powers, potato growers would face a significant degree of unconscionable conduct by wholesalers or retailers, or that growers would be less efficient. In any case, such benefits can be achieved without restricting entry to potato growing or the area of land available for potato growing: for example, through grower associations and co-operatives.

The review argued that, due to the Corporation's powers, growers receive higher returns, but prices paid by consumers are probably no higher, as:

- the Corporation competes in the Western Australian market with potato imports from interstate – principally South Australia and Queensland – which prevents the Corporation pricing above import price parity; and

- retailers accept lower margins than they would in the absence of these powers.

The review also drew on analysis prepared for the Corporation which indicated that, between January to June 2003, Perth potato prices were below the average of prices in other capital cities in all months except September 2002.

The Council is not satisfied by the evidence available that consumers are not disadvantaged by the Corporation's powers.

In an open market potato prices could be significantly lower than import price parity given relatively low costs of substitution by growers between fresh, seed and processing markets and the growing of other vegetable crops (most licensed potato growers already grow potatoes for seed and processing and grow other vegetables). Essentially, domestic fresh potato prices may be restrained by low costs of entry into this market for other Western Australian growers, rather than by potato imports from South Australia, which the review notes face freight costs of 20 cents per kilogram or around 15% of retail prices.

The review does not explain why retailers might be accepting lower margins on potatoes than they would in the absence of the Corporation's powers. This claim is not supported by experience in the fresh milk sector. The ACCC, in its study of the impact of farmgate deregulation in the milk industry, found that retail margins fell significantly.

> *From the June to December 2000 quarter, the gross margin on aggregate milk sales in supermarkets declined by 19 per cent with retail prices falling at a greater rate than wholesale prices. Despite sales volumes increasing by around six per cent, substantial reductions in per litre revenue led to an overall decrease in aggregate milk sales revenue for Australian supermarkets during this period. In*

> *convenience stores, sales volumes declined by around 24 per cent in the September quarter. With the per litre cost of milk remaining relatively constant in convenience stores, aggregate revenue decreased by around 24 per cent as consumers bought more of their milk from supermarkets.* (ACCC 2001a, p. 95)

Without the Corporation's powers fresh potato retail margins may be higher or lower than they are at present. It seems most unlikely; however, that retailers would capture all savings in wholesale prices; and that consumers would see no savings.

In addition the Corporation's interstate price survey is not conclusive. Details of the survey method have not been made available to the Council. The Council understands the survey was limited to loose washed potatoes sold in three supermarket chains in the capital of each state and the Northern Territory. The sample did not include bagged washed potatoes or dry-brushed potatoes, or other retail outlets. Consequently the Council is not convinced that the survey sample was sufficiently representative.

The Council also notes that consumers outside of Western Australia have greater choice of potato variety (itself a cost of the Corporation's powers). The survey results may be biased if average prices measured in other capitals reflect in part more preferred varieties that are lower yielding and hence more expensive to grow.

Finally, while the Council has no evidence, the Corporation may have temporarily moderated its pricing in response to the threat of deregulation, and particularly for the duration of its price survey. Such conduct is by no means unprecedented amongst statutory marketing authorities. For example, the inquiry into the collapse of the New South Wales Grains Board by the Public Accounts Committee of the New South Wales Parliament found that the Board changed its business strategy in response to the threat of deregulation:

> *In its later years, the Grains Board's growth strategy required generous prices being paid to growers to achieve the volume. This placed the Grains Board's financial performance at risk. The growth strategy was motivated and directed at fighting market deregulation proposed by the national competition review.* (Public Accounts Committee [New South Wales Parliament] 2001, p. viii)

Turning to the other claims of benefits to the community, the Council does not believe these hold or are significant.

- The Council accepts that Western Australian retail potato prices exhibit less volatility than retail prices elsewhere, but is not convinced that this is of significant value to consumers, as potatoes make up a small share of the household budget and are readily substitutable (for example, with pasta and rice).

- It is not clear why the community would value guaranteed payments for growers of potatoes for fresh consumption but not for other producers.

- Any reduction in wastage of potatoes from the Corporation matching supply to expected demand must be offset against lower overall productivity of Western Australian growers due to the relatively small scale of most potato growing operations and higher fertiliser and other inputs.

- Restricting supply and fixing prices are not necessary to control plant disease.

The review identifies various costs to the community from the Corporation's powers. As noted above, retail prices are probably higher than they would otherwise be – this is strongly indicated by trades in area licences averaging $7000 per hectare or $25 per tonne (Department of Agriculture [Western Australia] 2002, p. 12) – and consumer choice and grower productivity are certainly lower. In addition, the powers impose additional costs on the community via:

- the Corporation's costs in administering and enforcing the supply restrictions – estimated by the review to be up to $2.7 million per annum; and

- growers' costs in complying with supply restrictions.

The review also notes scientific evidence of adverse impacts on groundwater quality from high fertiliser application in response to land area licensing.

In light of the important weaknesses identified in the evidence of benefits to the community, the clear evidence for some costs and the probability of others, the Council concludes that the review has not demonstrated that the Corporation's powers to control potato supply and fix wholesale prices are in the public interest, and that the restrictions should be removed.

Removing the restrictions would have two principal impacts on potato growers supplying the fresh consumption market. It would reduce farmgate potato prices and grower incomes, causing particular hardship for growers who have recently paid for area licences or who have small scale operations. Those growers who choose to remain in the industry would also need to consider how to change their business to compete, including how best to market their produce. There may be a case for the Government to consider offering financial assistance to growers facing particular hardship and to offer business management and marketing training and advice more widely. Any financial assistance could be paid over several years to spread the fiscal impact and secured by contract to provide security for growers and their financiers.

Rice

Regulations and Proclamations under the *Marketing of Primary Products Act 1983* enable vesting of ownership of all rice grown in New South Wales in the New South Wales Rice Marketing Board (NSWRMB). They prohibit anyone other than the board and its agents from marketing such rice on either domestic or export markets. The board delegates its marketing functions to the Ricegrowers Co-operative Limited 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

New South Wales commissioned a group of government and industry representatives to review the rice marketing arrangements under NCP. Completed in November 1995, 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 because 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 the Ricegrowers Co-operative Limited 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 and practical and not jeopardising export premiums;

- accounting for industry arguments on the need for a transition period before implementation and a further period during which Ricegrowers Co-operative Limited would hold an exclusive export licence; 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. The Commonwealth and New South Wales governments then 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 Government. The Council considered the State had made insufficient progress and thus recommended withholding part of the 2000-01 NCP payments 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 NCP assessments.

Following further development of the model, New South Wales agreed on 27 March 2001 to the Commonwealth Government commencing consultation on the model with other States and Territories. New South Wales requested that the consultations be based on:

- 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 Government subsequently consulted other States and Territories. The Commonwealth is yet to advise the Council on the outcome of these consultations or its position on the model.

In August 2003 the New South Wales Government announced that it would extend the rice vesting arrangements for a further five years beyond their expiry in January 2004.

Assessment

New South Wales is yet to fulfil its CPA clause 5 obligations relating to the regulation of rice marketing. The NCP review was completed almost eight years ago and yet the recommended deregulation of domestic rice marketing still has not occurred. This delay is partly because of the time taken by New South Wales in agreeing to explore the possibility of a Commonwealth-based reform model. More recently, delays have occurred in conducting the Commonwealth Government's consultations with the other States and Territories. The review estimated the annual cost of regulation to domestic consumers of rice at A$2–12 million per year (Government of New South Wales 1995), equivalent to A$16–96 million in the eight years since the

review. Also seriously disadvantaged are those growers who wish to make their own processing and marketing decisions, including several growers of organic rice.

The Council understands the Government will undertake a new full NCP review of the rice vesting arrangements. The Council expects New South Wales to undertake an independent and rigorous review and, if it recommends reform, to implement such reform without delay except to the extent there is a clear public interest in a reform transition against a firm timetable.

Sugar

Queensland's *Sugar Industry Act 1991* restricted competition in a variety of ways, including:

- restricting the supply of cane to land 'assigned' to sugarcane production by the Queensland Sugar Corporation on advice from local boards of grower and mill representatives;

- compelling all growers and mill owners to bargain collectively, and prohibiting growers from transferring their cane supply between mills without consent from the local boards of both mills; and

- vesting ownership of raw sugar produced in Queensland in the Queensland Sugar Corporation, thereby reserving to the corporation a monopoly on the sale of this sugar into domestic and export markets, allowing it to pool returns to mills and growers and to control sugar quality.

In addition, the Commonwealth imposed an import tariff of A$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 the 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 A$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.

The sugar industry has since faced several seasons of much reduced returns due to low world sugar prices, poor seasonal conditions and cane disease. The prospects for better returns look poor without substantial gains in industry productivity.

In 2002, the Commonwealth commissioned Mr Clive Hildebrand, Chair of the Sugar Research and Development Corporation, to assess options for improving the productivity of the industry. The Queensland State Government also commissioned the Centre for International Economics to review the effect of Sugar Industry Act 1999.

On 29 April 2003, the State Government introduced extensive amendments to the Sugar Industry Act 1999 to Parliament. The key changes:

- remove the cane production area ('assignment') system;

- allow growers to bargain with millers either individually or in one or more collectives;

- provide a voluntary system of mediation and arbitration of disputes over agreements between growers and millers;

- allow for case exemptions from vesting for the sale of sugar on the domestic market or of alternative products such as ethanol and bio-plastics; and

- remove the Ministerial direction on the export parity pricing of raw sugar sold within Australia.

If passed, these amendments would come into effect on 1 January 2004. The amended vesting arrangements will still be reviewed again under NCP in 2006.

Assessment

The Council assessed in 2002 that Queensland had substantively implemented the recommendations of the 1996 Sugar Industry Review Working Party and, therefore, had met its related CPA clause 5 obligations. The transfer of the marketing assets and liabilities of the former Queensland Sugar Corporation to Queensland Sugar Limited, and the transfer of 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 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, 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 these growers/mills' joint ownership of the company.

Table 1.7: Review and reform of legislation regulating marketing of other agricultural products

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Dried Vine Fruits Equalization Act 1978, Dried Sultana Production Underwriting Act 1982, Dried Vine Fruits Legislation Amendment Act 1991* Dried vine fruit export control Regulations under the *Australian Horticulture Corporation Act 1987*	Equalises returns from the export of dried vine fruit; underwrites the production of sultanas; restricts the export of dried vine fruits	None.	The Acts were repealed without review. The regulations expired in early 2003. New dried fruit export licensing arrangements have minor restrictive effects and were subject to a RIS.	Meets CPA clause 5 obligations (June 2003)
New South Wales	*Marketing of Primary Products Act 1983*	Grants a monopoly to the Rice Marketing Board over domestic and export marketing of all rice grown in the State	Review by a joint government–industry panel was completed in 1995. It recommended retaining the export monopoly under Commonwealth jurisdiction and removing the domestic monopoly (and State legislation). The Commonwealth has consulted other States and Territories on a proposal to establish a national rice export authority.	Vesting arrangements extended for five years pending new review.	Review and reform incomplete

(*continued*)

Table 1.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Sugar Industry Act 1991*	Grants monopoly to the Queensland Sugar Corporation over domestic and export marketing of all sugar produced in the State; provides for local boards to control cane production areas and the allocation of cane to mills	Review by a joint government–industry panel was completed in 1996. 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 involved several structural reforms of the Queensland Sugar Corporation and bulk sugar terminals.	Meets CPA obligations (clauses 4 and 5) (June 2002)
Western Australia	*Marketing of Potatoes Act 1946*	Producer licensing; production quotas; vesting of ownership and domestic marketing monopoly	Review by the Department of Agriculture completed in December 2002 recommended retaining the restrictions.	In July 2003 the Government announced that the restrictions would remain.	Does not meet CPA obligations (June 2003)

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 A$1.1 billion in 1989-90 to nearly A$2.4 billion in 1999-2000. 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 A$188 million in 1989-90 to A$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 A$1.5 billion in 1998-99 — is exported. The value of fish and fish products consumed domestically in 1998-99 was approximately A$1.4 billion, including imports valued at A$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 A$170 million. The recreational boating industry (of which 60 per cent relates to fishing) accounts for a further A$500 million in turnover. In addition to Australian fishers, international tourists spend over A$200 million on recreational fishing in Australia each year (FRDC 2002).

Legislative restrictions on competition

Commonwealth, State and Territory governments all regulate wild fisheries.[1] The Commonwealth Government is responsible for fisheries that are 3–200 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 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 other instruments, including primary legislation, subordinate legislation, management plans and licence conditions) are:

- restrictions on access — entry and/or exit — via the licensing of fishers and their boats;

[1] Approximately 60 per cent of wild fish production derives from State and Territory waters. The remaining 40 per cent is caught in Commonwealth waters.

- 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; and

- restrictions on inputs via limits on boat size and engine power or on fishing gear and methods.

Table 1.11 summarises government's progress in reviewing and reforming fisheries legislation.

Regulating in the public interest

The principal case for government regulation of fisheries was set out in the NCP review of Victoria's *Fisheries Act 1995*:

> *The general absence of well-defined property rights over fish in the sea means that competition between fishers can lead to the dissipation of any economic rents in a fishery, and ultimately the collapse in its fish population, in the absence of government regulation. Such developments can have adverse economic, social and environmental consequences. This problem, generally known as 'the tragedy of the commons', can occur where there is either unrestricted access to a community owned resource, or where either private property rights or access rights and responsibilities are incomplete or weakly prescribed. The absence of complete property rights or the existence of weakly prescribed access rights leads to market failure.*
>
> *In such situations, the actions of any one fisher, for example, in seeking to maximise his or her catch, effectively reduces the catch available to others. This situation can induce fishers to over invest in catching capacity, in order to maximise their catch and to minimise harvest time. A loss in overall economic efficiency results, along with the depletion or collapse of the resource.*
>
> *In addition to this stock externality, other externalities arise when additional fishers enter the fishery. With more and more fishers entering the fishery, a congestion externality may impact on the average costs of all fishers, raising fishing costs of all fishers. For example, vessels experience delays in ports, vessels have to wait their turn to access fishing grounds, nets become tangled, vessels can damage the equipment of other fishers, etc. In an open access fishery, individuals may fail to take full account of their own contribution to the congestion externality and the costs they impose on other fishers* (ACIL Consulting 1999a, p. 8).

There is some evidence of overfishing in Australia. The Organisation for Economic Co-operation and Development (OECD) reported that four of the

Commonwealth-managed fisheries are overfished, ten are fully fished, one is underfished and 15 are uncertain (OECD 2001).2 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 USA$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.

In addition to the threats of overfishing and congestion, degradation of the marine environment and biodiversity is a risk posed by some fishing methods, and by the different values placed on fishery resources (their value as a source of seafood and other produce, their value for outdoor recreation and their value in the traditional lifestyle of some Indigenous communities).

The main objectives of fisheries regulation, therefore, are typically 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;3

at minimum cost to the community.

The direction of fisheries regulatory development is towards the adoption of output controls and, where possible, property rights. The OECD Committee for Fisheries, in commenting on the appropriate direction of reform, stated:

> *… 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,*

2 The OECD did not report similar evidence about State-managed fisheries.

3 Occasionally, fisheries regulation also seeks to exert export market power where the potential for such power exists.

> *including lower employment opportunities, and distributional conflicts.* (OECD Committee for Fisheries 1996, p. 2)

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 towards output controls has occurred gradually, often fishery by fishery.

The OECD 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 A$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, p. 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 the 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. Governments should thus adopt a broadly based approach to fisheries management decisions, rather than take 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 1.8 outlines how the different types of fishing control 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 1.8 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 the 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. Such costs undermine the usefulness of these approaches in managing fisheries of low value species, and possibly also small fisheries.

Table 1.8: 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, and 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, 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	

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 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 the collection of 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 usually 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 nonfish 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 a fishery

Achieving an appropriate balance among 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 consumers' preferred choice of fish product;
- 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.

Benchmark for review and reform

Primary legislation for fisheries management makes available a 'toolkit' of controls, but generally does not of itself apply these controls. The application of fisheries management controls in combinations most suited to the circumstances of particular fisheries is usually the province of secondary or subordinate legislation and other regulatory instruments often referred to as management plans. This lower tier of regulation is extensive and, as noted above, can be complex to analyse. It is necessarily subject to regular review and revision in response to challenges such as new information, natural stock variation and technological advances.

In this light, the Council has adopted the following benchmark for assessing compliance with CPA clause 5 for fisheries management regulation.

- the review of primary fisheries legislation is complete, and recommendations for specific reforms to this legislation implemented, except where declined on reasonable public interest grounds;

- where an NCP review recommends further review of a specific issue relevant to competition, the further review has been completed and the government has announced a firm implementation timetable for reform (if any); and

- a public interest test derived from that required by CPA clause 5 is built into the normal processes of review and revision of subordinate fisheries legislative instruments.

Commonwealth

Commonwealth fisheries contribute about 20 per cent of fisheries production, with major fisheries being the Northern Prawn, Southern Bluefin Tuna and the South East Trawl and Non-trawl fisheries. In the Torres Strait, the key species taken are prawn, tropical rock lobster, Spanish mackerel and

barramundi. The Commonwealth's principal fisheries regulation is the *Fisheries Management Act 1991*[4] and the *Torres Strait Fisheries Act 1984*.

Fisheries Management Act

The Fisheries Management Act enables the making of management plans for Commonwealth-managed fisheries and of arrangements with the States and the Northern Territory for managing specific fisheries under the Offshore Constitutional Settlement. These management plans set out management objectives and the measures by which such objectives are to be pursued. Many measures may restrict competition between fishers — for example, licensing, total allowable catches, individual transferable quotas, area closures and controls on boats and gear. In addition, the transfer of fishing rights can be restricted.

Review and reform activity

A committee of Commonwealth officials and industry representatives reviewed the Fisheries Management Act. Completed in September 2002, the review identified circumstances in which all existing restrictive fishery controls available under the Act may be in the public interest. It presented case studies of the three most important Commonwealth fisheries — the input-controlled Northern Prawn fishery and the output-controlled Southern Bluefin and South East Trawl fisheries — which confirmed the net benefit of the restrictions applied in each case.

The review recommended that the Commonwealth Government retain all existing restrictions available under the Act, subject to using the following controls as temporary measures only while longer term measures are developed and implemented:

- competitive total allowable catches; and
- nontransferable fishing rights.

It also confirmed that individual transferable quotas are the preferred management tool where it is feasible to set and enforce practical total allowable catches.

The Commonwealth Government referred the report to the wider review of Commonwealth fisheries policy. The Federal Fisheries Minister, Senator Ian

[4] Related legislation is the *Fisheries Administration Act 1991*, the *Fisheries Legislation (Consequential Provisions) Act 1991*, the *Statutory Fishing Rights Charge Act 1991*, the *Fisheries Agreements (Payments) Act 1991*, the *Fishing Levy Act 1991*, the *Foreign Fishing Licences Levy Act 1991*, and the *Northern Prawn Fishery Voluntary Adjustment Scheme Loan Guarantee Act 1985*.

Macdonald, tabled a report of this policy review, *Looking to the future*, in Parliament on 25 June 2003. The report noted that:

- The Commonwealth Government, in consultation with relevant stakeholders, will prepare a policy paper to guide the fishing industry on how the management of Commonwealth fisheries pursues the objective of maximising economic efficiency while ensuring consistency with the principles of ecologically sustainable development.

- The Australian Fisheries Management Authority will continue to provide regulatory impact statements when developing statutory management plans.

- The Commonwealth Government will seek to amend the Fisheries Management Act to clarify the requirement that management plans explicitly include objectives consistent with those under the legislation, and include criteria and timeframes for performance review.

- The Australian Fisheries Management Authority will complete fisheries management plans for all major fisheries as soon as practicable, as required under the Fisheries Management Act.

- The Australian Fisheries Management Authority will continue to implement the Government's cost recovery policy for Commonwealth-managed fisheries.

Assessment

The Council assesses that the Commonwealth Government has met its CPA clause 5 obligations in relation to the Fisheries Management Act. All of the Act's significant restrictions on competition were found to be in the public interest. Three case studies confirmed that competition restrictions applied via statutory management plans are in the public interest; more generally, such regulation is subject to the public interest test via regulatory impact statements and regular reviews.

Torres Strait Fisheries Act

The Torres Strait Fisheries Act 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). Its objective is to manage fishing in the zone with regard to the traditional way of life and livelihood of traditional inhabitants, including those inhabitants' rights in relation to traditional fishing. The Act imposes a variety of restrictions on commercial and traditional fishing.

Review and reform activity

A committee of Commonwealth and Queensland government officials and representatives of related industries and communities reviewed the Torres Strait Fisheries Act. Presented to the Torres Strait Protected Zone Joint Authority in March 2000, the review report considered the Act's restrictions generally and as applied to the specific fisheries. It recommended:

- retaining the existing restrictions, including licensing and Ministerial powers to regulate fishing;
- setting a new statement of objectives for the Act; and
- maintaining the distinction between community and commercial fishing.

The authority referred the review findings and recommendations to the Torres Strait fisheries consultative and advisory committees for consideration.

Assessment

The Council assesses that the Commonwealth Government has met its CPA clause 5 obligations in relation to the Torres Strait Fisheries Act, because all key restrictions have been found to be in the public interest.

New South Wales

The annual commercial fishing catch in New South Wales is worth $70 million. The main commercial fisheries are the ocean prawn trawl, estuary general finfish, ocean haul fishery and abalone. In addition, the aquaculture sector, mainly oyster, is worth about $40 million annually (CIE 2002).

The primary legislation regulating fishing in New South Wales fisheries is the *Fisheries Management Act 1994*.

Review and reform activity

The State Government commissioned the Centre for International Economics to review the Act under the supervision of an inter-agency officials committee. Released in April 2002 the review concluded that:

- many of the Act's provisions restrict competition, but collectively their benefits exceed their costs, and fishery management objectives can only be achieved by restricting competition; and

- the benefits of two restrictions — fish receiver registration fees and licensing for recreational charter fishing boats — may not exceed their costs, and should be evaluated further.

The review did not evaluate the regulations and management plans made under the Act, which apply 'packages' of restrictions to individual fisheries, but found the Act and other long established requirements — such as the requirement for regulatory impact statements under the *Subordinate Legislation Act 1989* — provide appropriate planning, advisory, consultation and review processes which give reasonable confidence that the social benefits of regulatory packages that apply to each fishery exceed their costs.

The review also found that moneys collected from fishers only cover a fraction of the funds spent by the NSW Department of Fisheries.

It recommended amending the objects of the Act to recognise social and economic benefits.

Fish receiver fees are being further examined as part of a wider review of the cost recovery framework for commercial fishing. The cap on recreational charter fishing boat licences, and the nontransferability of licences for part-time operators, will be examined in the context of long-term management arrangements for the charter boat industry.

The State Government amended the objects of the Act as recommended via the *Fisheries Management Amendment Act 2001*.

Assessment

The Council assesses that New South Wales is still to fulfil its CPA clause 5 obligations arising from the Fisheries Management Act. Specifically, the Government needs to complete the review and reform of:

- the recovery of fishery management costs from users; and
- the licensing of the charter boat fishery operators.

Victoria

Victoria's fisheries produce about A$130 million of seafood annually (DPIV 2003). The major commercial fisheries in Victoria are abalone, scallops, rock lobster, and bay and inlet scalefish.

The principal instrument of fisheries regulation in Victoria is the *Fisheries Act 1995*. The Act generally limits to current licence holders the right to commercially harvest fish stocks. Supporting Regulations specify management controls such as closed seasons, minimum sizes and gear restrictions. The Act also regulates recreational fishing and aquaculture.

Review and reform activity

The Victorian Government retained ACIL Consulting to independently review the Fisheries Act. The most important recommendations of the review, which reported in 1999, were that the Government:

- review alternatives to nontransferable fishing licences;
- grant access licences for longer than one year;
- introduce full recovery of fishery management costs and consider introducing royalties or rent taxes;
- move from input controls to output controls (quota) in the rock lobster fishery; and
- remove minimum and maximum quota holding restrictions in the abalone fishery.

The State Government responded to the recommendations in December 2001. It accepted all recommendations except that to grant longer term access licences.

The Government is well advanced in implementing the accepted recommendations. It introduced quota into the rock lobster fishery via the Fisheries (Rock Lobster and Crab) Regulations 2001. The Act is to be amended in the Spring 2003 session of Parliament to implement most of the other recommendations, including removing quota holding and transfer restrictions in the abalone fishery. Other recommendations are being implemented through the development and review of fishery management plans. The main recommendations and the State Government's response are shown in table 1.9.

Table 1.9: Review and reform of the Fisheries Act (Victoria)

Fishery	*Review recommendation*	*Government response and reform*
All	Review alternatives to nontransferable fishery licences.	**Accepted**. Nontransferable licences are being phased out as licence holders exit and fisheries convert to transferable licences under fishery management plans.
	Consider the allocation of new licences and quota by mechanisms such as auctions, tender or ballots.	**Accepted**. Allocation guidelines will be included in fishery management plans.
	Grant access licences for longer periods than one year and make them automatically renewable, subject to specific conditions.	**Rejected** • Access licences are already automatically renewed subject to specific conditions. • Fishery management plans, which run for four to five years, give fishers a stable regulatory environment. • Annual licences allow more efficient management of fees and levies.
	Review existing limits on the number of persons employed.	**Accepted**. Employee limits are being removed by amendment to Regulations in all individual transferable quota (ITQ) fisheries (except abalone, where it is necessary to assure adequate compliance).
	Introduce full cost recovery, subject to formal policy development.	**Accepted**. Cost recovery will be phased in from April 2004.
	Consider the introduction of royalties or rent taxes.	**Accepted**. Royalties to be introduced once full cost recovery is achieved.
Abalone	Retain the individual transferable quota (ITQ) management system.	**Accepted**. No reform required.
	Remove or reduce minimum and maximum quota holdings and transfer restrictions.	**Accepted**. Legislative amendments are scheduled for mid-2003.
Rock lobster	Consider the introduction of an ITQ system.	**Accepted**. Quota system implemented by the Fisheries (Rock Lobster and Crab) Regulations 2001 (November).
	Remove limit on pots per boat if quota system is adopted, and remove minimum pot holdings subject to enforcement cost implications.	**Accepted**. Implementation is being considered via the development of the Fishery Development Plan due for release mid-2003.
Scallop	Retain the ITQ management system.	**Accepted**. No reform required.
	Remove the prohibition on shucking scallops at sea.	**Accepted in principle**. The scallop fishery is managed jointly by the Commonwealth and Tasmanian governments. Jurisdictional issues are to be resolved.
Bay and inlet scalefish	Retain input controls but evaluate alternatives such as quota for some species.	**Accepted**. Evaluation of alternatives for species such as black bream is occurring as part of development of the Bay and Inlet Fishery Management Plan.

Assessment

The Council assesses that Victoria, while having made considerable progress, is still to complete its CPA clause 5 obligations arising from the Fisheries Act. In particular, important reform recommendations accepted by the Government remain outstanding, including:

- introducing the full recovery of fishery management costs, which is due to begin in April 2004;
- removing employee limits in quota-managed fisheries other than abalone;
- removing minimum and maximum quota holdings and transfer restrictions in the abalone fishery, for which legislative amendments are scheduled for mid-2003; and
- removing pot limits in the rock lobster fishery, which is a change being considered in the development of the rock lobster fishery management plan.

The Council is otherwise satisfied that the remaining restrictions are to remain are in the public interest. The review was independent, robust and comprehensive. As noted above, Victoria did not accept one recommendation of its review — to grant access licences for longer periods than one year and make them automatically renewable, subject to specific conditions — but the Council is satisfied with the Government's reason for this decision. While the review argued that annual renewal involves additional transaction costs and, despite being largely automatic, increases uncertainty, the Government argued that:

- access licences are already automatically renewable subject to specific conditions; and
- annual renewal allows more efficient management of fee and levy structures.

In principle, longer term licences are preferable because they reduce uncertainty, fostering investment in productivity improvements and strengthening the stake of licence holders in managing fisheries sustainably. However, annual licences that are automatically renewable may be regarded by licence holders, investors and financiers as having a similar degree of security to that of longer term licences where a government acts as if annual licences are longer term (for example, where a government buys back licences to reduce access, rather than merely refusing to renew them).

Queensland

The gross value of fish harvested in Queensland is about A$295 million per year. In addition, the production of fish by the aquaculture industry is valued at about A$55 million per year.

Queensland's principal fisheries legislation is the *Fisheries Act 1994*. The Act prohibits the harvesting of fish except by those holding an authority issued under the Act. It allows the imposition of measures to control fishing effort and to protect habitat and biodiversity.

Review and reform activity

An interdepartmental review committee, assisted by ACIL Consulting and a stakeholder reference panel, completed a review of the Act and its Regulations in June 2001. The key recommendations were to:

- include the principles of ecologically sustainable development in the Act's objectives;
- replace a variety of vessel and occupational licences with a single long-term fishery access licence;
- allow the temporary transfer of licences and quota (permanent transfers were generally already possible);
- increase the recovery of fishery management costs from fishers and reduce cross-subsidies between fishers;
- embed NCP principles in the ongoing fisheries management review cycle;
- reduce fishing effort in the East Coast Trawl fishery through means other than the 'two-for-one' boat replacement policy; and
- remove pot holding limits, minimum quota holdings and quota transfer approvals in the Spanner Crab fishery.

The review also recommended that the Government review controls in a variety of other fisheries to more efficiently and effectively reduce latent effort. The main recommendations, and the State Government's response, are shown in table 1.10.

Table 1.10: Review and reform of the Fisheries Act (Queensland)

Fishery	*Review recommendation*	*Government response and reform*
All	Include the principles of ecologically sustainable development in the Act's objectives.	**Accepted**. The Act was amended accordingly in late 2002.
	Allow the temporary transfer (leasing) of fishing rights.	**Accepted**. The Act was amended accordingly in late 2002.
	Increase the recovery of fisheries management costs from fishers and reduce cross-subsidies between fishers.	**Accepted in principle**. A major review of cost recovery and licensing is expected to be completed in 2004.
	Replace vessel, fisher, assistant fisher and crew licences with a single access licence of a term longer than one year.	**Partially accepted in principle**. A major review of cost recovery and licensing is expected to be completed and legislative change made in 2004. Annual licensing is to be retained for administrative simplicity.
	Embed public interest analysis in the ongoing cycle of fisheries regulatory review and reform.	**Accepted**. The Government has adopted a statement of principles for fisheries regulatory design, and has allocated responsibilities to agencies for assessing regulatory proposals against these principles and the public interest test.
East Coast Trawl	Reduce fishing effort through means other than the 'two-for-one' boat replacement policy.	**Accepted**. In January 2001, the Government capped access to this fishery, granted fishers tradable 'effort units', and replaced the 'two-for-one' boat replacement policy with a buy-back scheme.
Spanner Crab	Remove pot holding limits, minimum quota holdings and approvals for quota transfer.	**Partially accepted**. Quota transfer restrictions removed (Fisheries Amendment Regulation No. 4 2002). Minimum quota holding proposed for removal in 2004. Pot holding limits retained to avoid stock depletion in specific areas.
Beche-de-mer	Remove the requirement that licence holders be present during fishing, and the restrictions on licence and quota transfers.	**Accepted**. Restrictions removed by the Fisheries Amendment Regulation No. 4 2002.
Reef line	Review management to cap and reduce fishing effort more efficiently and effectively than do the existing input controls.	**Accepted**. The Government is consulting on proposed changes to the management of the Reef Line Fishery, which are to be implemented in late 2003.
Finfish and other	Review management to cap and reduce latent effort.	**Accepted**. The Government has scheduled a review to start in late 2003 and, in the interim, has introduced total allowable catches for tailor and spotted mackerel, and prohibited net fishing for the latter.

The Government accepted most of the recommendations and implementation is well under way. In early 2001, the Government introduced an effort cap and transferable effort units to the East Coast Trawl fishery, with a buy-back scheme replacing the 'two-for-one' boat replacement policy. In early 2002, the Government initiated reviews of cost recovery and licensing, and expects to implement the outcomes in 2004. In late 2002, the Act was amended to implement the review recommendations on its objectives and the temporary transfer of licences and quota. Also in 2002 the Government removed restrictions on quota transferability in all quota-managed fisheries and removed the requirement the holders of licenses for the Beche-de-mer fishery be present during fishing operations. The Government has also released for consultation proposed new management plans and accompanying regulatory impact statements for various fisheries.

Assessment

The Council assesses that Queensland is advanced in meeting its CPA clause 5 obligations in relation to the Fisheries Act, but has not yet completed its review and reform activity in this area. Specifically, Queensland is yet to complete the following recommended reforms:

- replacing the variety of vessel and occupational licences with a single fishery access licence — implementation is subject to a further review that is under way;

- increasing the recovery of fishery management costs from fishers and reducing cross-subsidies between fishers — implementation is subject to a further review that is under way; and

- removing the minimum quota holding for the Spanner Crab fishery — proposed to be removed in 2004 subject to the preparation of and consultation on a regulatory impact statement.

The review also recommended removing the need for prior approval of quota transfers because this restriction is not necessary to maintain the quota register. The Government argues that prior approval is necessary to prevent persons convicted of offences under the legislation from avoiding suspension of their quota by transferring the quota to an associated person or entity. It is not clear to the Council at this point whether this is sufficient grounds for retaining prior approval of transfers. The Council will discuss this further with Queensland.

The Council is otherwise satisfied that the remaining restrictions on competition are in the public interest because the NCP review took independent advice and was robust and comprehensive.

The Government will have met its obligations when it completes the outstanding reforms or demonstrates a public interest case for retaining an underlying restriction on competition.

Western Australia

Commercial fishing, including pearling and aquaculture, contributes more than A$1 billion to the Western Australian economy. Annual fisheries exports are valued at more than A$500 million. The fishing industry provides employment for more than 5000 people (Department of Fisheries 2003). Western Australia regulates its fisheries principally via the *Fish Resources Management Act 1994* and the *Pearling Act 1990*.

Fish Resources Management Act

The Fish Resources Management Act provides a framework for the management of Western Australia's wild fisheries and aquaculture. Most of the specific restrictions are imposed by subsidiary legislation such as Regulations, management plans, notices and licences.

Review and reform activity

The Fish Resources Management Act and subsidiary legislation were subject to two reviews. All parts of the legislation (other than those relating to the processing of rock lobster) were reviewed by the Department of Fisheries. Completed in December 1999, this review recommended that the Government:

- integrate NCP principles into the ongoing fisheries management review cycle;
- in the rock lobster fishery:
  - commission an independent update of earlier work on the net benefits of moving to an output-based management regime;
  - in the interim, remove the minimum and maximum limits on pot holdings, and separate pot licences from boat licences; and
- in other fisheries, retain existing restrictions on competition for now because the costs and risks of change outweigh any gains from moving to more efficient arrangements.

The State Government announced its response to the recommendations in March 2002. As indicated, it removed the 150-pot maximum limit on rock lobster pot holdings from July 2003. It is also preparing an amendment to regulations to decouple pot entitlements from boat licences. The existing controls on this fishery will otherwise remain until at least December 2006, while the Department of Fisheries and the Rock Lobster Industry Advisory Committee review the appropriateness of moving to output controls.

In relation to other fisheries, the Government announced that it would review controls on licence numbers and transferability by the end of 2003 and implement a new framework by December 2004. It has completed reviews of these provisions in respect of the Kimberley gillnet and barramundi fishery and the south west trawl fishery, and conducted a similar review for the south coast estuarine fishery. It is scheduling reviews of the remaining plans over the next 12–18 months. The Department of Fisheries has developed and implemented an NCP assessment and compliance report for use with all proposed regulatory initiatives and reviews.

Those parts of the legislation relating to rock lobster processing were separately reviewed by ACIL Consulting, which reported in December 1998. This review recommended that the Government:

- remove limits on the number of processing licences, and convert existing 'restricted' processing licences to 'unrestricted' licences; and
- allow licence holders to establish facilities at multiple locations.

In March 2002, the Government announced a partial acceptance of the recommendations. From 1 July 2003, licences for processing rock lobster for domestic market consumption are unlimited, and holders of 'unrestricted' processing licences may operate multiple receival facilities. The processing of rock lobster for export remains restricted, but this restriction will be reviewed again in five years.

In June 2003 the Department of Fisheries concluded a review of the regulation of the aquatic tour industry under the Act. Entry to the industry was restricted from June 2001 through the allocation of transferable licences to operators incumbent at September 1997 but the Government had not previously evaluated this and related restrictions under CPA clause 5. The review recommended retention of the restrictions as a cautious management approach is required until scientific analysis of the impact of the industry on the fishery is available.

Assessment

The Council assesses that Western Australia has not completely fulfilled its CPA clause 5 obligations arising from the Fish Resources Management Act. While the Government removed some restrictions on competition, it retained other important restrictions without making a public interest case.

First, the Government has not satisfactorily explained its decision to retain the input-based rock lobster fishery controls until at least December 2006. It has argued that moving to output-based fishery controls before this date is extremely risky because of problems related to compliance and industry culture. It has not substantiated such claims however. Until the Government decides whether and how output-based controls are to be introduced, investment and innovation in the industry — and, consequently, the

industry's contribution to the State — are likely to be lower than they otherwise would be.

Second, the Government has not provided adequate evidence that limiting the licences for processing rock lobster for export is in the public interest. Licensing of the processing sector is important for maximising compliance with rock lobster fishery controls and, therefore, for assuring the long term yield and sustainability of the fishery. It is not clear, however, why this objective necessitates limiting the number of export processing facilities.

Third, the review of aquatic tour regulation did not adequately evaluate less restrictive alternatives to limiting operator numbers. It claimed that unlimited entry would almost double the number of operators, leading to reduced operator viability, increased catch rates and increased fishery management costs. However, the analysis of operator numbers was inadequate, based merely on expressions of interest received, which is likely to overstate actual entry. Further, catch effort can be controlled at relatively low cost and without significantly restricting competition by such measures as:

- adjusting bag and size limits, including setting specific limits for aquatic tours; and
- imposing a levy on aquatic tour customers.

Unlimited entry is unlikely to threaten the viability of most operators, and fishery management costs can be recovered through licence fees. Finally, New South Wales is the only other jurisdiction to limit the number of aquatic tour operators, and this is being reconsidered following the NCP review of New South Wales' Fisheries Management Act.

Pearling Act

The Pearling Act regulates the supply of cultured pearls from Western Australia. Most pearls are exported. The industry consists of three main sectors: the wildstock harvesting sector, the hatchery sector and the farming sector. The Act's restrictions on competition are many and often complex but the key restrictions are that:

- the volume of wildstock harvested is limited by a total allowable catch and associated individual transferable quota;
- access to pearl oyster wildstock and cultivation is restricted to holders of pearling licences with at least 15 quota units;
- the volume of hatchery-produced oysters is limited by individual transferable quota (known as hatchery quota/options);

- entry to the hatchery sector is restricted to holders of hatchery licences with a pearling licence or a commercial relationship with a pearling licence holder;
- export sales of hatchery spat and oysters are prohibited;
- hatchery-produced oysters must be no greater than 40 millimetres when sold to pearl farms; otherwise, they are deemed to be wildstock and subject to wildstock quota;
- entry to the farming sector is restricted to holders of pearl farming leases also holding either a pearling or hatchery licence;
- oysters transferred to a pearl farm become the property of the farm lease holder; and
- foreign ownership of licence/lease holders is prohibited.

In addition, the executive director of the Department of Fisheries has considerable discretion in exercising responsibilities such as approving entitlement transfers. There is no administrative tribunal to review decisions of the executive director.

Review and reform activity

The Government commissioned the Centre for International Economics to review the Pearling Act. Completed in November 1999, the review advocated substantial regulatory change. Specifically, it recommended:

- removing the minimum limit on holdings of pearling quota;
- decoupling pearl farming licences from pearl fishing licences;
- auctioning temporary increases in wildstock quotas;
- removing hatchery quotas without delay;
- codifying in Regulation the criteria for fishery management decisions; and
- establishing an independent review tribunal.

On 25 March 2002, the Minister for Agriculture, Forestry and Fisheries announced that the Government had accepted most of the recommendations, but not those to remove limits on hatchery quotas without delay and to auction temporary increases in wildstock quotas.

The hatchery policy expires in December 2005. The Government has formed a steering committee to develop over the next two years a new policy for determining and allocating hatchery quota. According to the Minister:

> *The Government is taking a more measured approach to deregulation that will lead to the implementation of a new hatchery policy.*
>
> *The aim will be to free-up access to hatchery production of shell to new entrants and provide for allocation through market mechanisms, possibly by auction, after 2005.* (Chance 2002)

The Government has also agreed to review the management of wildstock quota in 2005.

The State Government is now developing new pearling legislation, which it expects to introduce to Parliament in the autumn 2004 session. This legislation will decouple pearl farm licences from fishing licences and remove other minor restrictions. During its development of the legislation, the Government will review the 15-quota unit minimum holding for pearling licensees.

Assessment

The Council assesses that Western Australia has not adequately fulfilled its CPA clause 5 obligation in relation to the Pearling Act. Specifically:

- the Government has not provided sufficient evidence for continuing to restrict the hatchery production of pearl shell via hatchery quota until at least December 2005 when the current policy expires; and
- other reforms recommended in November 1999 will not be legislated until 2004 at the earliest.

The first point needs further explanation. The 1999 review by the Centre for International Economics found no clear net public benefit from retaining the hatchery policy. While it was also not clear that removing hatchery quotas would bring a significant gain, the review noted that the NCP presumption in favour of competition should prevail.

In announcing the Government's decision to retain hatchery quota, the Minister said this would 'ensure the protection and growth of valuable export markets through continued regulation of supply levels and quality controls' (Chance 2002).

The Government further argued, in responding on 11 June 2002 to questions by the Council, that:

> *The pearling industry is currently facing an extremely difficult trading environment with the price of pearls falling significantly over the past 12 months. This is due to both increases in supply and decreases in demand resulting from unfavourable economic conditions in world markets.*

> *Given the relatively high risk of deregulation to all industry stakeholders and without a clear case that the public benefits of deregulation exceed the costs, the current hatchery policy is to remain in place until the end of 2005.*

The Government's decision relies on a Pearl Producers Association submission to the NCP review of the Act. This submission, prepared by ACIL Consulting (now ACIL Tasman), estimated an annual benefit of the hatchery quotas of A$16–25 million, with a most likely annual value of A$21 million (ACIL 1999b, pp. 11 and 98). However, the assumptions underpinning this claimed net benefit are questionable.

First, the submission argued that the existing restrictions have slowed 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 1999b, p. 7). Moreover, the submission proposed that quota generally be set above existing levels of supply, to allow for market expansion.

Second, the submission argued that the existence of the quota helps maintain the scarcity premium of current prices via its impact on expectations of future demand growth.

> *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)

ACIL cited a study that concluded that wholesale pearl buyers believe that the quota system constrains the supply of Australian pearls (ACIL 1999b, 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 1999b, p. 55). It is not clear, however, why such an expectations effect would endure beyond the short term when, as acknowledged in the submission, the real constraints on the supply of Australian pearls are nonregulatory in nature.

Hatchery regulation may be the more risky course if it hinders Australian producers (other than the dominant few) from achieving the scale economies needed to meet the declining prices that result from increased pearl supply in other countries (an increase often assisted by the adoption and expansion of hatchery technology). If prices continue to decline, as seems likely, and the Government decides in 2005 to ease hatchery restrictions, then the four-year lead time for producing quality pearls means that smaller and new Western Australian producers may not reach efficient production scale until 2010.

Turning to wildstock quota, the Council is now satisfied with the evidence for continuing the allocation of temporary increases in total allowable catch to existing quota holders. This practice is similar to that in other output-based fishery management regimes, where quota is specified not as an absolute

tonnage but as a relative share in a total allowable catch, which is adjusted over time. This approach has lower transaction costs than those of the alternative of auctioning and buying back quota, and improves quota holders' incentives to minimise the impact of their operations on the fishery.

South Australia

The gross value of production from South Australia's commercial fisheries was A$166.8 million in 1999-2000 (PIRSA 2002). The major commercial marine species fished in the State are prawns, rock lobster, abalone, whiting, snapper, garfish, yellow-eye mullet, squid and shark.

South Australia's principal fisheries legislation is the *Fisheries Act 1982* — the oldest major piece of fisheries legislation in Australia. The Act provides for the typical variety of access, input and output controls.

In addition, South Australia has regulated parts of the industry via the *Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act 1987* and the *Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act 1987*. These Acts provide for the surrender or cancellation of access licences to reduce fishing effort, and for compensation of those leaving the fishery.

Review and reform activity

The review panel of officials appointed to review the Fisheries Act reported in October 2002. The panel found that most restrictions imposed by the Act are in the public interest. The exceptions were:

- prohibitions on any person from holding more than one fishery licence;
- prohibitions on persons other than vessel masters from holding fishery licences;
- prohibitions on corporate and foreign ownership of fishery licences;
- licence terms of one year;
- prohibitions on permanent transfers of quota;
- minimum and maximum quota holdings;
- some personnel limits;
- winter closure in the Southern Zone rock lobster fishery; and
- various restrictions in the Blue Crab fishery.

The panel recommended that the Government:

- remove the prohibition on any person from holding more than one fishery licence;
- further review:
  - the prohibition in the marine scale fishery on persons other than vessel masters from holding fishery licences;
  - issues such as the case for stronger property rights, licence tenure, corporate and foreign ownership of commercial fishing licences, and permanent transfer of quota; and
- refer other restrictions in specific fisheries to the respective industry consultative committee.

In November 2002, the Government released a green paper seeking comment on possible changes to the Act. It intends, after considering submissions, to prepare a statement of Government policy on fisheries, release this statement for further consultation, and introduce amendments to the Act in the 2003 spring session of Parliament (expecting the Act to take effect on or after 1 July 2004). Regulations will then need to be reviewed.

The South Australian Government has repealed the Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act and intends to repeal the Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act on reaching a settlement with the remaining licensee.

Assessment

The Council assesses that South Australia has fulfilled its CPA clause 5 obligations in relation to the Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act, but not such obligations in relation to the Fisheries Act and the Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act. The latter two Acts contain competition restrictions that are not in the public interest, but the Government is still to complete reform.

Tasmania

The gross value of Tasmania's marine production reached over A$189 million in 1996-97, of which the wild fisheries accounted for 58 per cent of value and marine farming accounted for the remaining 42 per cent (DPIWE 1999). Tasmania's wild fisheries are dominated by the two relatively low volume and high value fisheries: abalone and rock lobster. The scalefish sector has a gross annual value of about A$10 million. The marine farming sector has exhibited rapid growth. Production of Atlantic salmon dominates the value of marine

farming output, but oysters and mussels are important products in their own right.

The major Tasmanian Acts governing fisheries are the *Living Marine Resources Management Act 1995*, the *Marine Farming Planning Act 1995* and the *Inland Fisheries Act 1995.*

Living Marine Resources Management Act

The Living Marine Resources Act prohibits commercial marine fishing, marine farming, fish handling and processing without a licence, for which an annual fee is payable. The Act allows the closure of fisheries and, via management plans, the imposition of controls such as quota, size limits, gear specifications and unloading restrictions.

Review and reform activity

A group of officials and a community representative, led by an independent chair, reviewed the Act, reporting in April 2000. The review was limited to the Act because all related subordinate regulation (in the form of management plans and other rules) had been introduced after the Act and thus had already been reviewed via the regulatory impact statement process required by Tasmania's *Subordinate Legislation Act 1992*. The review found all of the Act's restrictions on competition are in the public interest, so recommended their retention.

Assessment

The Council assesses that Tasmania has fulfilled its CPA clause 5 obligations in relation to the Living Marine Resources Management Act.

Inland Fisheries Act

The Inland Fisheries Act prohibits commercial freshwater fishing, fish farming and fish hatchery activities without a licence. Those wishing to operate private fisheries, and those who wish to sell, process or treat fish, must be registered.

Review and reform activity

The review of the Inland Fisheries Act, conducted by a panel of government, industry and community representatives, was completed in August 1999. The panel recommended that the Government retain the various licensing, registration and conduct restrictions, but also:

- abolish the assistant fisher's licence, making commercial fishers responsible for regulatory compliance by their employees;
- replace separate registrations for fish dealers and importers with a generic registration for those who buy or sell certain kinds of fish; and
- include in licences for fish farming and private fisheries the permission to possess fertilised salmonid ova.

The Government implemented these recommendations through amendments to the Act and changes to the respective licences.

Assessment

The Council assesses that Tasmania, having reviewed the Inland Fisheries Act and removed those competition restrictions not in the public interest, has met its related CPA clause 5 obligations.

Marine Farming Planning Act

The Marine Farming Planning Act prohibits marine farming outside of declared zones and provides for the Minister to allocate area within declared zones to persons wishing to engage in marine farming. Under the Act orders may be made in response to threats to farming operations and public health and safety.

Review and reform activity

A group composed of officials and a community representative, led by an independent chair, reviewed the Act and reported in April 2000. It found that all restrictions contained in the Act are in the public interest and thus recommended their retention.

Assessment

The Council assesses that Tasmania has not met its CPA clause 5 obligations in relation to the Marine Farming Planning Act. In particular, the Council considers that the Government has not adequately demonstrated a public interest case for retaining the Minister's discretion to allocate water area via leases.

The Act (s. 53) provides that the Minister may decide the method of allocating a lease and the criteria for selecting a person who is to be allocated a lease. The review considered the alternative of requiring the allocation of water area by tender, but argued that this:

- would likely lead to reduced economic benefits because there would be no mechanism for checking that persons winning tenders have the necessary technical expertise or financial backing to successfully develop leases; and

- could result in environmental degradation through inappropriate marine farming practices by inexperienced operators.

In general, the competition restriction that arises from the administrative discretion in resource rights allocation is not necessary to maximise the economic benefits of resource development; such discretion may even hamper development. Further, the administrative discretion is not necessary to minimise environmental degradation. Other controls, such as the licensing of marine farmers, are available and arguably more enduring.

The Council also raises the following concerns for further consideration by Tasmania.

- The transfer of leases is subject to Ministerial approval and the Minister appears to have restrained discretion to refuse a transfer. The review did not examine this restriction on competition.

- Marine farming development plans appear to have a regulatory effect, but were not subject to review. It is not clear whether these were subject to a gatekeeper process.

The ACT

There is no commercial fishing from public waters in the ACT. The ACT's principal fishery regulation is the *Fisheries Act 2000*, which provides for limiting the gear and catch of recreational fishers of specified species, so as to conserve fish and their habitat. The legislation was scrutinised for competition issues via the ACT's legislation gatekeeping process. The Council assesses that the ACT has complied with its CPA clause 5 obligations in this area.

The Northern Territory

The value of production by the Northern Territory's commercial fishing and aquaculture industries was estimated at A$78.9 million for 1997-98 (ACIL 2000). Aquaculture, mainly for pearls, exceeds the value of the wildcatch. The main fisheries are mudcrab and various finfish.

Fishing and aquaculture in the Northern Territory are regulated by the *Fisheries Act*. The Act restricts entry through licensing, permits and season closures; restricts vessels and gear used; and restricts catch through total allowable catches, minimum sizes and bag limits.

Review and reform activity

The Northern Territory Government commissioned ACIL Consulting to conduct an independent review of the Act. Completed in October 2000, the review made 28 recommendations, including:

- adding a clear statement of objectives to the Act;
- exploring the potential for replacing input controls with individual transferable quotas in all Northern Territory fisheries, beginning with Spanish mackerel and crab fisheries;
- removing various restrictions around licensing, including number, eligibility, allocation, foreign ownership, transferability and renewal;
- beginning a process of increasing the recovery of fishery management costs from fishers; and
- considering the adequacy of resources devoted to enforcing fishery controls.

In April 2003, the Government agreed to implement some recommendations, to progress others via further reviews, and to further consider the public interest arguments for some (mainly around licensing).

Assessment

The Council assesses that the Northern Territory has not met its CPA clause 5 obligation in relation to the Fisheries Act. Some restrictions on competition imposed by the legislation were recommended for removal, but the legislation is still to be reformed.

The Council also highlights one matter for further consideration by the Northern Territory. The review found that the restriction of competition in the Northern Territory pearling industry via hatchery quotas maximises community benefit due to the considerable market power of Australian pearl producers in international markets. As reported above, the review of the Western Australian regulation (which is similar to the Northern Territory regulation) found no demonstrable net public benefit from retaining the hatchery policy. The Northern Territory reviewer, ACIL, prepared a submission to the Western Australian review on behalf of the Pearl Producers Association which argued for the retention of hatchery quota. The Council thus urges the Northern Territory Government to reconsider the review finding of a net public benefit from restrictions on competition in the pearl hatchery industry.

Table 1.11 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 1.11: 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 (of which the transfer is subject to various restrictions), size limits, prohibitions on the taking of certain species and restrictions on bycatch	Review by officials and industry representatives was completed in September 2002, finding all restrictions to be in the public interest (although competitive total allowable catches and nontransferable licences should be used only temporarily while longer-term measures are developed).	No reform was recommended.	Meets CPA obligations (June 2003)
	Torres Strait Fisheries Act 1984	Licensing of community and commercial fishers; wide Ministerial powers to prohibit taking of certain species and fish under certain sizes, and to impose a variety of input controls	Review by Commonwealth and Queensland officials was completed in 1999. It recommended: • setting a new statement of objectives for the Act; • maintaining the distinction between community and commercial fishing; • retaining the licensing of fishing; and • retaining wide Ministerial powers to regulate fishing.	No reform recommended.	Meets CPA obligations (June 2003)

(*continued*)

Table 1.11 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 completed in 2002. It found most restrictions to be in the public interest, but was unable to reach firm conclusions about fish receiver fees and the cap on charter boat licences. These matters are under further review.	Parliament passed legislation to amend objects of Act.	Review and reform incomplete
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 by independent economic advisers was completed 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 most recommendations except that related to licence terms.	Full cost recovery is to be introduced progressively from April 2004. Royalties are to be considered later. Abalone quota transfer and holding restrictions are to be removed mid 2003. Quota was introduced to the rock lobster fishery in 2001.	Review and reform incomplete

(*continued*)

Table 1.11 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 by officials committee, assisted by independent consultant, was completed in June 2001. It recommended: • simplifying fishery access licensing; • increasing recovery of fishery management costs; • embedding NCP in the ongoing management cycle; • reducing effort in the East Coast Trawl fishery more efficiently than through '2-for-1 boat' replacement; • removing quota holding restrictions in the spanner crab fishery; and • reviewing controls in other fisheries to more efficiently and effectively control effort.	Reviews of licensing and cost recovery are under way. Procedures are in place to review the proposed controls against NCP principles. Tradable effort units introduced to the East Coast Trawl fishery in early 2001. Act was amended in late 2002 to clarify objectives and allow temporary transfers of licences and permits. Management plan reviews are under way. Some restrictions in Spanner crab fishery retained with insufficient evidence	Review and reform incomplete

(*continued*)

Table 1.11 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
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	Reviews were completed by 1999. The key recommendations were: • all fisheries — embed NCP principles in the ongoing cycle of fisheries management review; • rock lobster fishery — independently update the earlier study of benefits of moving to individual transferable quota (ITQ) management, and in the interim remove minimum and maximum limits on pot holdings; and • rock lobster processing — remove limits on the number of processing licences, and allow licensees to establish at multiple locations.	Procedures in place for NCP review of proposed new fishery controls. Maximum holding limit of 150 pots removed from rock lobster fishery from July 2003, but minimum limit of 63 pots retained. Officials and industry representatives considering ITQ for rock lobster by December 2006. Licences for rock lobster processing for domestic market unlimited, but not for export market.	Does not meet CPA obligations (June 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 was completed in 1999. 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.	No reform yet, but most recommendations were accepted and drafting of new legislation is under way. The Government intends to retain hatchery quotas.	Review and reform incomplete

(*continued*)

Table 1.11 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 fish processors; input controls on gear and fishing methods; output controls such as catch limits, size limits and prohibitions on the taking of certain species	Review by officials was completed in October 2002. It recommended removing the 'one person, one licence' restriction and further reviewing various other restrictions. A general review of the Act is under way.	No reform yet, but the Government intends to introduce amendments to the 2003 spring session of Parliament.	Review and reform incomplete
	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 was completed in 1999. Act achieved the objective of reducing licence numbers.	Act is to be repealed once settlement with remaining licence holders is finalised.	Review and reform incomplete
	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 was completed. Act achieved the objective of reducing licence numbers.	Act was repealed.	Meets CPA obligations (June 2002)

(*continued*)

Table 1.11 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Inland Fisheries Act 1995*	Licensing of commercial fishers and fish farms; registration of private fisheries, fish processors and sellers	Review was completed in December 2000, recommending various changes to simplify licensing arrangements.	Act and licences have been amended as recommended.	Meets CPA obligations (June 2003)
	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 was completed in January 2000. It recommended retaining all restrictions.	No reform was recommended.	Meets CPA obligations (June 2003)
	Marine Farming Planning Act 1995	Prohibition on marine farming outside marine farming zones; administrative discretion in allocation of water leases to marine farmers; lease transfers subject to Ministerial approval	Review was completed in April 2000. It recommended retaining all restrictions. but did not review some.	No reform was recommended. The Council has concerns about the evidence for retaining administrative discretion in allocating farming zones.	Does not meet CPA obligations (June 2003)

(*continued*)

Table 1.11 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Fisheries Act 2000*	No restrictions (no commercial fishing in the ACT)	Act was considered via legislation gatekeeping process.	New legislation.	Meets CPA obligations (June 2002)
Northern Territory	*Fisheries Act*	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 by independent advisers was completed in October 2000. Key recommendations were to: • explore potential for replacing input controls with ITQ; • remove various restrictions around licensing; • begin the process towards recovering fishery management costs from fishers; and • consider the adequacy of enforcement resources.	No reform as yet but the Government has accepted some recommendations and is considering others.	Review and reform incomplete

Forestry

Native forest covers 164 million hectares or 21 per cent of Australia's land area (ABS 2002a). 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 1.12: 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 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 (AFFA 2002). Other forest–related industries produce honey, wildflowers, natural oils, gums, resins, medicines, firewood, craft wood, grazing and minerals.

Plantations have provided progressively more of the wood resource required by Australia's wood and paper industries in recent years. In August 2002, ABARE released projections which forecast that this trend would continue, and at a rate faster than previously expected. For example, it is possible that forest plantations could be providing 75 per cent of domestic industrial wood supplies by 2010, compared with earlier expectations of around 62 per cent (ABARE 2002).

Governments intervene in forestry via both regulation and ownership. Hence the CPA clauses most relevant to forestry are clause 5 (legislation review) and clause 3 (competitive neutrality).

Legislation review

Legislative restrictions on competition

All governments other than New South Wales and the Northern Territory scheduled legislation related to forestry for review under NCP. This legislation features a variety of potential restrictions on competition, for example:

- setting minimum standards for how certain forest operations are to be conducted;
- licensing the export of wood chips and unprocessed wood;
- licensing the processing of timber; and
- capping the volume of particular timbers that may be harvested in a given period.

There are two classes of legislation that the Council has determined are not a priority for assessment.

All State governments have legislation providing for the management of publicly–owned forests available for the production of timber and other commodities. This legislation generally provides for:

- designating public land as State forest;
- vesting management and control of State forests in a government agency;
- prohibiting certain unauthorised activities in State forests and issuing various rights to access to State forests and/or to extract resources from them.

This legislation does not affect forestry activity on private land and generally does not of itself restrict competition in the supply of timber and other forest

commodities except insofar as it leaves State forest agencies with considerable discretion in how they price and allocate these commodities. This discretion has in the past arguably allowed valuable supply rights to be allocated in an anticompetitive manner — for example, to incumbent timber processors promising certain employment benefits or additional processing investment in return for concessionary log royalties.

Such practices are less likely to reoccur now because all State forest agencies:

- have been reformed (to varying degrees) into government business enterprises in accordance with CPA clause 3 obligations and, hence, are required to earn a return from managing State forests and selling forest commodities; and

- are, since the Conduct Code Agreement, subject to the prohibitions on anticompetitive trade practices under part IV of the Trade Practices Act, including anticompetitive agreements, misuse of market power and exclusive dealing.

The Council has therefore chosen to focus its assessment of competitive reform of public forestry on the fulfilment of CPA clause 3 obligations relating to government forest businesses. This is the subject of the following section.

Lastly, several States have in place 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. However, allocation decisions of this kind are typically not governed by legislation, and therefore not directly subject to review under CPA clause 5, although there are other important grounds why such allocation decisions should be made in an open and competitive manner. The legislation itself generally merely ratifies allocation decisions already made and no change is possible without disturbing the underlying rights.

Table 1.13 summarises government's progress in reviewing and reforming forestry legislation.

Regulating in the public interest

As noted earlier, forests provide a wide range of benefits to the community, from the conservation of biological diversity, soil productivity and water quality to recreational experiences, timber production and stock grazing.

Governments intervene in forest use principally because some of these benefits are difficult for forest owners to trade as 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 tradable are, above a certain of intensity use, competitive with nontradable (for example, ecological) benefits. Consequently, without government intervention, community welfare will tend to be reduced because forest owners have an incentive to produce too little of, for instance, biological diversity and aesthetic amenity, and too much of timber and grazing.

Historically, where nontradable forest values are particularly prominent, such that almost no intensity of say timber production is possible without seriously compromising the adequate availability of such values, governments have retained forests in public ownership and often reserved them as national parks or similar. More recently, governments have encouraged owners of significant private forests to place protective covenants on their land.

Nevertheless, important nontradable forest values occur outside such areas. Here governments intervene via regulation to protect the adequate availability of nontradable forest values while maximising economic benefits to the community from the exploitation of tradable forest values. Governments also regulate to control costs imposed on others by certain activities associated with timber production. For example, heavy traffic associated with the harvesting of a forest may damage minor roads. Generally, a sound forest regulatory regime will:

- impose minimum restrictions to effectively protect particular nontradable forest values and mitigate or remedy any clearly identified harms;
- provide for compliance monitoring by independent accredited persons and the auditing of such monitoring; and
- be stable and predictable so that forest owners and downstream businesses can have confidence their long term investments have a reasonable prospect of generating the return they initially expected.

Export controls

The Commonwealth controls the export of wood and woodchips via regulations under the *Export Control Act 1982*. These regulations are the Export Control (Unprocessed Wood) Regulations, the Export Control (Hardwood Wood Chips) Regulations 1996 and the Export Control (Regional Forests Agreements) Regulations.

The regulations prohibit the export of:

- hardwood wood chips from public and private native forests unless:
  - from a region covered by a Regional Forest Agreement; or
  - the exporter holds a restricted shipment licence granted by the Minister on a shipment–by–shipment basis for wood chips from other regions;

- other unprocessed wood from public or private native forests unless from a region covered by a Regional Forest Agreement; or

- other unprocessed wood from plantations, whether hardwood or softwood, on private or public land, unless:

  – from a State or Territory with a code of forest practice for plantation management that the Minister accepts satisfactorily protects environmental and heritage values; or

  – the exporter is the holder of a licence to export that wood granted by the Minister.

Regional Forest Agreements (RFA) are agreements between the Commonwealth and respective State Governments to protect environmental and other values by maintaining a comprehensive, adequate and representative national forest reserve system and to give forest industries a firm base for investment. There are 10 RFAs in four States: Western Australia, Victoria, Tasmania and New South Wales.

Codes of forest practice for plantation management are now in place for all jurisdictions other than Queensland and the Northern Territory.

Review and reform activity

The Commonwealth completed the review of various regulations under the Export Control Act affecting wood in July 2001. The review, principally by Department of Agriculture, Fisheries and Forestry (Australia) 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;

- remove export controls over plantation–sourced wood if reviews of plantation codes of practice for Queensland and the Northern Territory find these meet National Plantation Principles[5]; and

- either remove export controls over native forest–sourced hardwood chips, or allow such exports from non–RFA regions under licence.

The Government is removing the controls on exporting sandalwood in 2003. Reviews of the Queensland and Northern Territory codes of forest practices identified some shortcomings. The Government is consulting with the respective governments about improvements to these codes before it removes the export controls on plantation–sourced wood. It will consider the last recommendation thereafter.

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5 Standing Committee on Forests, *National Principles for Forest Practices Related to Wood Production in Plantations*, March 1996.

Assessment

The Commonwealth has not met its CPA clause 5 obligations arising from export controls on wood as reform of the controls is not yet complete. In particular the Commonwealth is still to remove controls on the export of sandalwood and native forest–sourced hardwood chips.

Forest practice standards

Tasmania regulates the establishment, maintenance and harvesting of forests, native and plantations, on public and private land, via the *Forest Practices Act 1985*. The Act aims to protect natural and cultural values on land subject to forest operations.

The Act restricts competition in forest-related markets principally by:

- setting various minimum standards for timber harvesting and other forest practices (the Forest Practices Code);
- prohibiting timber harvesting unless a timber harvesting plan has been approved by a forest practices officer as consistent with the Code;
- appointing as forest practices officers only persons with certain qualifications, experience and training; and
- requiring timber processors to submit certain planning documents to the Forest Practices Board allowing the Board to consult with processors and local government on roading impacts.

Review and reform activity

Tasmania completed a review of the Act in 1998. The review, by a group of officials and industry representatives making up the Forest Practices Advisory Council (a consultative forum), found all restrictions on competition to be in the public interest.

The Forest Practices Code is subject to public review and revision every five years.

Assessment

Tasmania has met its CPA clause 5 obligations relating to the Forest Practices Act.

Timber harvesting limits

Western Australia and South Australia have regulated the harvest of sandalwood from private and public land via the *Sandalwood Act 1929* (Western Australia) and the *Sandalwood Act 1930* (South Australia). Sandalwood is a very slow–growing tree native to both States and valued for its aromatic qualities. Most sandalwood is exported to Asian markets as logs which are powdered and used to make incense sticks and ornamental works.

The legislation in each State is similar. It controls the harvesting of sandalwood on private and public land (other than from plantations in Western Australia). The key restrictions on competition are that:

- the State Government may restrict the total volume of sandalwood harvested from public and private land in any given period;
- no more than 10% of total approved sandalwood harvest in any year may be sourced from private land; and
- no person may harvest sandalwood unless licensed to do so.

Licences to harvest on public land carry controls on areas of land accessible and tree sizes. Licences to harvest on private land are allocated by order of application and an assessment of volume available.

Review and reform activity

The review of Western Australia's Sandalwood Act by the Department of Conservation and Land Management, completed in November 1997, recommended:

- removing the 10% cap on the amount of sandalwood which can be harvested from private land; but
- retaining total harvest quotas and licensing of sandalwood harvesters.

Legislation currently before the Parliament, the Acts Amendment and Repeal (Competition Policy) Bill will, once passed, remove the former restriction.

The review of South Australia's Sandalwood Act in 1999 recommended its repeal. The Act was duly repealed in April 2001.

Assessment

Western Australia has not met its CPA clause 5 obligations arising from its Sandalwood Act. Firstly, it is yet to remove the 10% cap on harvest from private land. Secondly, it has not adequately demonstrated that restricting sandalwood harvesting from private land via the total quota and licensing is in the public interest.

The review argued that private landowners frequently over–estimate their sustainable harvest and that restricting the harvest of privately–owned sandalwood prevents over–exploitation. However, according to the review privately–owned sandalwood is estimated to make up around only 1.5% of the total resource, and the net present value of this small part of the resource may be maximised by allowing increased production to the point of exhaustion. Except where important environmental values are threatened, and markets for such values have not developed, decisions by private owners about how to manage their resources are unlikely to conflict with the public interest.

South Australia has met its CPA clause 5 obligations arising from its Sandalwood Act.

Sawmill licensing

Under the *Sawmills Licensing Act 1936,* Queensland prohibits the operation of a sawmill without a licence. The Act provides the chief executive of the Department of Primary Industries with absolute discretion over the issue of licences and the conditions to be attached to them. Generally, licences require operators to keep records and return information to the Chief Executive.

A review of the Act was completed in December 2000, recommending its repeal. The Government has agreed-in-principle to repeal the Act and may include this in its next Primary Legislation Amendment Bill which is currently proposed for introduction in the first half of 2004..

The Government considers that the legislation, while remaining in force, does not impose a restriction on competition as it is presently administered, because there are no limits on the issue of mill licences (either in relation to number or capacity), nor are there any impediments to the transfer of licences or the entry of new operators. In addition, the annual licence fee is set at a minimal amount.

The Council accepts that the legislation is not presently restricting competition but the discretion it allows to the chief executive could be administered anticompetitively. Because the reform has not been completed, the Council assesses that Queensland is yet to meet its CPA clause 5 obligations arising from the Sawmills Licensing Act as reform has not been completed.

Table 1.13: Review and reform 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 exports Licensing of hardwood chip 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.	None yet. Sandalwood controls to be removed in 2003. Removal of other controls still under consideration.	Review and reform incomplete
Queensland	*Sawmills Licencing Act 1936*	Licensing of sawmills at absolute discretion of the Chief Executive (or delegate) of the department	Reviewed in 2000, recommending repeal. Government has agreed in principle.	None yet, but may occur in the first half of 2004.	Review and reform incomplete
Western Australia	*Sandalwood Act 1929*	Caps the quantity of naturally–occurring sandalwood harvested from Crown and private land Harvest from private land capped at 10 per cent of the total Licensing the harvesting of sandalwood	Review completed. It recommended removing the restriction on the proportion of the annual sandalwood harvest that may be taken from private land but retaining the overall cap on the quantity sandalwood harvested, and retaining licensing.	None yet but bill before Parliament to amend Act accordingly.	Review and reform incomplete
South Australia	*Sandalwood Act 1930*	Same as above	Reviewed in 1999. The review recommended repeal of the Act.	Act repealed in April 2001.	Meets CPA obligations (June 2003)
Tasmania	*Forest Practices Act 1985*	Prescribes forest practices under Forest Practices Code Prohibits timber harvesting without a certified forest practices plan Major processors must submit certain planning documents	Reviewed in 1998 by Forest Practices Advisory Council. The review recommended no changes to the Act.	None required.	Meets CPA obligations (June 2003)

Competitive neutrality

All State Governments and the ACT Government own substantial forestry-related businesses, managing and growing forests for the production of wood products in competition (current or potential) with private forest owners.

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).

As noted in chapter 2 of volume 1, competitive neutrality principles aim to ensure Australia's resources are used efficiently by removing any net competitive advantage that public businesses accrue from their government ownership.

The governments of the States and the ACT, as owners of significant forestry businesses, are obliged by clause 3 of the CPA to, where appropriate, either:

- corporatise these forestry businesses and impose on these businesses tax, debt and regulatory obligations equivalent to those faced by privately–owned competitors; or
- ensure that prices charged by these businesses take into account tax, debt and regulatory imposts and reflect the full costs of their activities;

to the extent that the benefits of implementing these principles outweigh the costs.

Each government is free to determine its own agenda for implementing these principles.

Governments are also obliged to publish an annual report on the implementation of these principles including allegations of noncompliance.

The Council's general approach to assessing each government's compliance with its competitive neutrality obligations, as set out in chapter 2 of volume 1, is to look for coverage of all significant government business activities to the extent that the benefits outweigh the costs, and for effective processes for investigating and acting on allegations of noncompliance by significant government business activities. The Council has also considered the financial performance of government trading enterprises (large business activities).

Most government forestry businesses are substantial suppliers of forest commodities and dominate their regional markets. In these circumstances the public interest is likely to be best served by implementing competitive neutrality principles to their fullest extent.

Implementation

All government forestry businesses have been subject to reform since 1995. Those in New South Wales, Western Australia, South Australia and Tasmania have been corporatised and now operate as distinct entities governed by boards of directors. Those in Victoria, Queensland and the ACT are departmental business units charged with a commercial focus. All but Victoria's forestry business provide public reports on their commercial performance.

Competitive neutrality reform in forestry is continuing. The Victorian Government announced in February 2002 that it will establish Forestry Victoria as a separate commercial entity (DNRE 2002). Western Australia is currently reviewing competitive neutrality implementation for its Forest Products Commission.

Implementation of competitive neutrality policy and principles in public forestry to date is outlined in table 1.14.

All government forestry businesses with the exception of Forestry Victoria are liable for State/Territory taxes and Commonwealth tax equivalents.

The imposition of local taxes such as land rates on government businesses is not specifically mentioned in CPA clause 3. Nevertheless, it is consistent with the objective of competitive neutrality policy (CPA clause 3(1)). Only the Forest Products Commission (WA), ForestrySA and ACT Forests currently pay land rates. Some government forestry businesses contribute to local government roading investment. The New South Wales and Tasmanian Governments are currently reviewing their policy on the liability of government businesses for local taxes.

The government forestry businesses of New South Wales, Queensland, Western Australia and Tasmania had interest–bearing borrowings at 30 June 2002. In each case they pay a margin above the respective government's cost of borrowing to ensure their borrowing costs are equivalent to those paid by similar private businesses.

Government forestry businesses face similar or more onerous regulatory requirements than those faced by private forestry businesses. In the ACT and all States other than Queensland, a code of forest practices generally applies to both public and private plantation and native forestry, requiring operators to carry out timber growing and harvesting operations in a way that is compatible with conservation of the wide range of environmental values associated with forests and promotes the ecologically sustainable

management of native forests proposed for continuous timber production. Monitoring and enforcement of such codes is generally the responsibility of environmental protection agencies. In Queensland, a code of practice administered by the Environmental Protection Agency applies to forestry operations in state-controlled native forest only. A broader code of practice is being developed.

Table 1.14: Implementation of competitive neutrality in public forestry

State	*New South Wales*	*Victoria*	*Queensland*	*Western Australia*	*South Australia*	*Tasmania*	*ACT*
Agency	State Forests of NSW (SFNSW)	Forestry Victoria (FV)	DPI Forestry (DPIF)	Forests Products Commission (FPC)	Forestry SA (FSA)	Forestry Tasmania (FT)	ACT Forests (ACTF)
Business	Native forests and plantations	Native forests	Native forests and plantations	Native forestry and plantations	Plantations	Native forests and plantations	Plantations
Legal status	Authority constituted by the *Forestry Act 1916*	Business unit of the Department of Sustainability & Environment	Business unit of the Department of Primary Industries	Authority constituted by the *Forest Products Act 2000*	Corporation constituted by the *SA Forestry Corporation Act 2000* and subject to the *Public Corporations Act 1993*	Corporation constituted by the *Forestry Act 1920* and subject to the *Government Business Enterprises Act 1995*	Business unit of the Department of Urban Services
Tax:							
– Commonwealth tax equivalent	Liable	Not liable	Liable	Liable	Liable	Liable	Liable
- State/territory taxes	Liable	Not liable	Liable	Liable	Liable	Liable	Liable
- land rates and other local taxes	Not liable but under review in 2003	Not liable	Not liable but contributes to specific related roading investments	Liable for other than forest land	Liable	Not liable but under review in 2003	Liable
Debt	Cost of borrowing based on independent assessment of standalone credit rating	No interest–bearing debt	0.5% margin above Government rate	Market rate – 8% on borrowings from Treasury Corp	No interest–bearing debt	Interest differential established based on assessed business risk.	No interest–bearing debt

Table 1.14: continued

State	*New South Wales*	*Victoria*	*Queensland*	*Western Australia*	*South Australia*	*Tasmania*	*ACT*
Agency	State Forests of NSW (SFNSW)	Forestry Victoria (FV)	DPI Forestry (DPIF)	Forests Products Commission (FPC)	Forestry SA (FSA)	Forestry Tasmania (FT)	ACT Forests (ACTF)
CSO payments	A$9.6 million in 2001–02	–	–	A$0.5 million in 2001–02	A$3.5 million in 2001–02	–	A$1.2 million in 2001–02
Historical return on assets[6]	2% average over 5 years	Not available	3% average over 5 years	Insufficient history	Insufficient history	1% average over 3 years	Not available
Complaints mechanism	Covered. No complaints referred to IPART.	Covered. One complaint addressed by participation in CN review.	Covered. No complaints received to date.	Covered. No complaints received to date.	Covered. No complaints received to date.	Covered. No complaints received to date.	Covered. No complaints received to date.

6 Estimates based on results reported in annual reports of government forestry businesses.

Competitive neutrality requires not only that government businesses face the same tax, debt and regulatory burden of similar private businesses, but that over the medium to long term they are profitable. In other words, they recover the risk adjusted opportunity cost of capital invested in the business through earning a commercial return on fairly valued assets. Poor returns may indicate that they are charging prices lower than private sector competitors, which must fully recover costs to remain viable over the longer term, or that the resources employed in the business could be used more productively elsewhere.

In forestry, however, rates of return may not be sufficient to provide assurance that the aim of competitive neutrality is being achieved.

Following the introduction in June 2000 of Australian Accounting Standard AAS35, which concerns the valuation of self generating and regenerating assets held for profit, private and public forestry businesses now value forests at their net market value at each reporting date. The net market value of self generating and regenerating assets is the observable price in an active and liquid market or, where no such price is available, the best indicator of net market price in an active and liquid market. Often active and liquid markets for 'whole' forests do not exist. Forestry businesses often adopt either of the following methods to estimate net market value:

- the observed market price for standing timber volumes less disposal costs — known as net realisable value; or

- the net present value of expected future cash inflows and outflows associated with the asset.

Using these methods the net market value is a reflection of timber prices and, in the case of net present value, management costs. There is thus a degree of circularity between timber prices, financial results and forest valuations. Consequently rates of return must be considered alongside information on forest valuation assumptions and changes to make meaningful assessments of the financial performance of forestry businesses.

In some regions, forestry businesses supply a single timber processor which has some monopsony power in markets for unprocessed timber due to high timber transport costs and economies of scale in timber processing. Such processors may be able to drive timber prices below competitive levels unless forestry businesses respond effectively through means such as:

- offering by auction or tender timber supply contracts with security sufficient to attract competitive bids from potential entrants willing to invest in new processing capacity; or

- using independent benchmarks, such as processed timber prices and processing cost information from competitive processing markets, in contract negotiations with incumbent processors.

The problem for governments in monitoring the financial performance of their forestry businesses is that, because of circularity between prices and forest values, underpricing of timber due to 'weak selling' or discrimination may not be revealed in reported rates of return.

Possible solutions to this problem may be that governments require their forestry businesses to:

- use independent timber price benchmarks for forest valuation purposes, rather than the prices they realise, where these differ; and/or
- make available for public scrutiny, via disclosure in annual reports, the timber prices assumed for forest valuation purposes.

AAS 35 requires forestry businesses to disclose significant assumptions made in determining net market values where these are based on amounts other than market prices observed in active and liquid markets. The audited financial reports of Government forestry businesses generally note that forest valuations are based on current realised prices. They do not, however, disclose the actual amounts.

In 2003 for the first time the Productivity Commission included government forestry businesses in its report on the financial performance of government businesses (PC 2003a). It found that all forestry businesses (other than Victoria's which does not report separately from the wider department) reported a positive return on assets[7] in 2001–02 (see table 1.15).

Table 1.15: 2001-02 profitability of government forestry businesses[8]

Forestry business	*State Forests of NSW*	*DPI Forestry (Qld)*	*Forests Products Commission (WA)*	*ForestrySA*	*Forestry Tasmania*	*ACT Forests*
Operating profit before tax $m	58	110	24	39	9	4
Return on assets %	2.4	10.6	8.7	4.6	1.6	4.0

Source: PC 2003a.

The Commission noted, however, that annual rates of return need to be assessed in the context of longer term trends and other relevant information, owing to their sensitivity to market cycles and asset valuation assumptions (as discussed earlier).

7 The Commission defines return on assets as earnings before interest and tax and after abnormals (including asset valuation changes) over average total assets.

8 The correction of errors in earlier forest valuations increased the 2001-02 profit of the Forest Products Commission (WA) by A$10.2 million and decreased the profit of Forestry Tasmania by A$12.25 million.

Longer term performance data is available only for State Forests of NSW, DPI Forestry (Queensland) and Forestry Tasmania which have been established in their current form for some years now (see table 1.14). Averaged over five years the highest return on assets was earned by DPI Forestry, at 3 per cent a year. State Forests of NSW and Forestry Tasmania have made average returns of 2 per cent a year over five years and 1 per cent a year over three years respectively.

The Commission noted that in 2001–02 the risk–free rate of return, taken to be the 10 year Commonwealth Government bond rate, was 5.9 per cent (PC 2003, p. 9). Given the market risk inherent in any business it is reasonable to expect government forestry businesses to earn a return significantly above this rate.

The implementation of competitive neutrality by a government forestry business has drawn one formal complaint — in Victoria, relating to pricing of hardwood sawlogs. The complaint was addressed by allowing the complainant to participate in a major review undertaken of CN implementation in forestry. As noted above the Victorian Government announced in 2002 that it will corporatise Forestry Victoria.

Assessment

The Council assesses that, with the exception of Victoria, all States and the ACT are well advanced in implementing the obligations of CPA clause 3 to the extent that benefits exceed costs, having corporatised or 'commercialised' their government forestry businesses. Victoria is less well advanced but the State Government is committed to the reform of Forestry Victoria and is engaged in the design of new institutional arrangements for the business.

At this point, however, the Council is unable to confidently assess any government as fully meeting their obligations under CPA clause 3 arising from their forestry businesses, as these businesses are yet to establish track records of earning adequate profits. The Council also notes that State Forests of NSW, Forestry Victoria, DPI Forestry and Forestry Tasmania are not currently liable for land rates and related local taxes and charges, but that New South Wales and Tasmania are reviewing this matter.

Lastly, the Council notes that, even if government forestry businesses establish satisfactory track records of profitability, circularity between timber prices realised by government forestry businesses and their forest valuations may allow underpricing to persist. The existing level of disclosure by government forestry businesses of their forest valuation assumptions may meet the minimum standard required by AAS 35 and, hence, auditors of financial reports. However, a higher standard of disclosure of timber prices assumed for valuation purposes may be required to be confident that the aims of competitive neutrality are being achieved.

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;
- farm debt finance;
- 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, inhibit weeds and modify plant development. Veterinary chemicals are applied to animals to prevent or treat disease or injury, or 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 Australian Pesticides and Veterinary Medicines Authority (formerly 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*. Each State and Territory adopts the Agricultural and Veterinary Chemicals Code into its own jurisdiction by referral.

Beyond the point of sale, these chemicals are regulated by 'control of use' legislation. This legislation typically covers the licensing of chemical spraying contractors, aerial spraying and permits allowing uses other than those for which a product is registered (that is, off-label uses).

Table 1.16 summarises governments' progress in reviewing and reforming legislation regulating agvet chemicals.

Regulating in the public interest

Agvet chemicals pose 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, ensure they are fit-for-purpose, and 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 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 achieving compensation from 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 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 passed on to consumers through higher prices and reduced choices. For this reason, chemical regulation should:

- 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 (now the Australian Pesticides and Veterinary Medicines 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 a determination that labelling is 'true' (removing the 'and appropriate' criterion);
- allowing the National Registration Authority to continue operating 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 TPA.

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, and manufacturers exempted, pending further review by the Commonwealth; and
- removing the 'appropriate' criterion from the efficacy review. This recommendation is believed to be inconsistent with minimising chemical use and the associated risks.

The Commonwealth Government has considered the recommendation concerning compensation for third party access to chemical assessment data, and agreed an enhanced data protection mechanism is needed. The Government has consulted key industry stakeholders on the proposed reform package. Legislation to give effect to these reforms is being drafted.

A task force examined review recommendations on the regulation of low risk chemicals, and the Commonwealth Government subsequently introduced the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2002, which Parliament passed in March 2003.

Working groups were established to progress the following issues:

- how to set fees and levies to ensure the Australian Pesticides and Veterinary Medicines Authority continues to operate on a cost-recovery basis. The Primary Industries Standing Committee endorsed the outcome of this investigation in late 2002.

- how to monitor the quality of assessment services that the Australian Pesticides and Veterinary Medicines Authority purchases from alternative providers. The Primary Industries Standing Committee also endorsed the outcome of this investigation in late 2002; and

- whether licensing of agricultural chemical manufacturers is in the public interest. The final report of this working group was sent to the Primary Industries Standing Committee in June 2003.

'Control of use' legislation

Review activity is complete, but several jurisdictions have delayed finalising the necessary legislative changes. The national review coordinated by Victoria also examined 'control of use' legislation in Victoria, Queensland, Western Australia and Tasmania. (Similar legislation in New South Wales, South Australia and the Northern Territory was reviewed separately.) The national review recommended that these governments:

- establish a task force to develop a nationally consistent approach to off-label use;

- continue to exempt veterinarians from provisions relating to the supply and use of veterinary chemicals, but remove the exemption in relation to agricultural chemicals; and

- retain the minimum necessary licensing (business and occupational) for agricultural chemical spraying.

Ministers in these jurisdictions established a Control of Use Taskforce as recommended. The development of a policy for off-label use proved difficult, and the taskforce considered that more work is needed to specify the circumstances in which a chemical can be used on another crop, and that this work should be undertaken along with an investigation of different methods of application and different noncrop situations. This work will be progressed through the Primary Industries Standing Committee in consultation with the Australian Pesticides and Veterinary Medicines Authority's Labelling Working Group, which is working to improve chemical labelling.

The Control of Use Taskforce agreed to remove the veterinarian exemption from provisions on agricultural chemicals and to reform the licensing of agricultural chemical sprayers. Victoria amended its legislation accordingly, but retained a licence condition that aerial sprayers must hold an approved insurance policy. The review recommendations that relate to aerial spraying are being addressed by the Agricultural and Veterinary Chemicals Policy Committee Aerial Spraying Licensing Group which is considering whether the licence condition is in the public interest.

Queensland intends to amend the State's 'control of use' legislation (to cater for low regulatory risk chemicals) in conjunction with the amendments to the Commonwealth's Agriculture and Veterinary Code Act. The Government

proposes to allow for reduced controls over the use of the lowest risk products, providing the use accords with conditions set by the Australian Pesticides and Veterinary Medicines Authority for Agricultural and Veterinary Chemicals. Also, Queensland amended the *Agricultural Chemicals Distribution Control Act 1966*) and *Chemical Usage (Agricultural and Veterinary) Control Act 1988* to implement all relevant NCP reforms within the State's area of responsibility. The amendments extend the current business licensing arrangements from aerial to ground businesses, introduce controls over the use of agricultural and veterinary chemicals by veterinary surgeons, and make other minor changes in line with the NCP review requirements. The amendments ensure Queensland's legislation is consistent with similar legislation in other States and Territories.

Queensland advised it is progressing changes to Regulations required to give full effect to the Agricultural Chemicals Distribution Control Act amendments. The issues examined in the NCP review of the principle Act should mean that a further review of the Regulations is not required.

Western Australia will implement review recommendations through amendments to its legislation. The Agricultural Amendment Bill is being drafted, and the Veterinary Preparation and the Animal Feeding Stuffs Amendment Bill 2003 was introduced to Parliament in 2003.

Tasmania incorporated the recommendations from the national review of 'control of use' legislation into the Agricultural and Veterinary Chemicals (Control of Use) Amendment Bill 2002. This Bill passed the Legislative Assembly in November 2002, but is yet to be considered by the Legislative Council. The Bill removes the requirement for a permit for low risk off-label use of agricultural chemicals, and limits the exemption of pharmaceutical chemists when they are acting under the instructions of a veterinary surgeon.

The only significant outstanding matter for New South Wales concerns the advertising restrictions in the *Stock Medicines Act 1989*. The Government reported that it is considering a proposal to amalgamate chemical residues legislation, including the Stock Medicines Act. The proposed legislation, which would contain no advertising restrictions, was planned for introduction later in 2003, but has been delayed due to the delay in establishing the national agvet chemicals code.

South Australia's Parliament passed *Agricultural and Veterinary Products (Control of Use) Act 2002* in August 2002. The Act repealed the *Agricultural Chemicals Act 1955,* the *Stock Foods Act 1941* and the *Stock Medicines Act 1939*. The restrictions in the Act were reviewed and found to be in the public interest. Further, all proposed major Regulations have been the subject of public discussion and their drafting is nearing completion. The Act and Regulations are expected to come into operation later in 2003.

The ACT replaced its *Pesticides Act 1989* with the *Environment Protection Act 1997*. The replacement Act:

- prohibits off-label use of registered chemicals and any use of unregistered chemicals, unless under a permit issued by the Australian Pesticides and Veterinary Medicines Authority; and

- prohibits the commercial use of registered chemicals unless authorised by Environment ACT.

In its 2003 annual NCP report, the ACT provided further information on its authorisation system for persons engaged in agvet chemical spraying. This information shows that the ACT system for occupational licensing of spray operators does not vary from the arrangements recommended by the Victorian-led national review. Consequently, the imposition of these controls, to minimise potentially harmful operator and public health impacts and negative environmental effects, is consistent with the public benefit justifications established by the review.

The Northern Territory did not list any 'control of use' legislation for NCP review. In 2003, it released for discussion a draft Bill to control the use of agricultural and veterinary chemicals, fertilisers and stock foods. The proposed changes would bring the legislation into line with other Australian jurisdictions. Stakeholders were invited to comment on the changes, and the Northern Territory expects to pass the new legislation in 2003.

Assessment

National chemical registration scheme

The following issues from the review of the national registration scheme remain outstanding:

- cost recovery;

- the licensing of agricultural chemical manufacturers;

- the contestability of chemical assessment services; and

- compensation for third party access to chemical assessment data.

Because these issues have not been resolved, the Council assesses the Commonwealth Government as not having met its CPA obligations in relation to legislation establishing the national agvet chemicals code. Because reform of the national code has been delayed, reform of State and Territory legislation that automatically adopts the national code has not been completed and the Council therefore assesses State and Territory Governments as not having met their CPA obligations in relation to the following legislation:

New South Wales — *Agriculture and Veterinary Chemicals (New South Wales) Act 1994*.

Victoria — *Agriculture and Veterinary Chemicals (Victoria) Act 1994*.

Queensland — *Agricultural and Veterinary Chemicals (Queensland) Act 1994*.

Western Australia — *Agricultural and Veterinary Chemicals (Western Australia) Act 1994*.

South Australia — *Agricultural and Veterinary Chemicals (South Australia) Act 1994*.

Tasmania — *Agricultural and Veterinary Chemicals (Tasmania) Act 1994*.

The Northern Territory — *Agricultural and Veterinary Chemicals (Northern Territory) Act*.

The Council recognises, however, that individual jurisdictions are not reasonably in a position to progress appropriate reforms until outstanding national processes are resolved.

The Council previously identified one additional public interest issue, the Ministers' decision to retain, as part of the registration process, an assessment of whether the efficacy claimed by a supplier is appropriate. In the 2002 NCP assessment, the Council noted its understanding that other measures control the health and environmental risks arising from chemical use. The Council also questioned why consumers are unable to judge the efficacy they prefer and expressed its concern that efficacy assessment may raise the cost of chemicals and reduce consumer choice. The Council asked governments to provide for the 2003 NCP assessment a more detailed explanation of efficacy assessment's benefits, costs and alternatives.

Governments replied that limiting the Australian Pesticides and Veterinary Medicines Authority's consideration to "truth" (as per the review recommendation) would mean that the Australian Pesticides and Veterinary Medicines Authority would not directly assess flow-on or induced effects of the use of a chemical with an efficacy level as determined by the registrant. A chemical registrant could, for example, submit to the Australian Pesticides and Veterinary Medicines Authority that a chemical be marketed with a 45 per cent efficacy level and the authority could then assess efficacy without considering whether the efficacy level is appropriate.

Governments consider that such an approach would negate the wider community considerations of a product's efficacy by inducing risks to public health, risks to occupational health and safety, and an adverse impact on the environment. In assessing these risks, the Australian Pesticides and Veterinary Medicines Authority measures efficacy against standards that it has established — many of which are recognised internationally and practiced by several other nations, including OECD member countries.

Governments consider that assessing the 'appropriateness' of efficacy is necessary to meet and maintain the legislative objectives and Australia's international obligations, in relation to the protection of public health, the protection of occupational health and safety, the protection of the environment, international risk reduction and disease prevention. Given that the risks involved in using chemicals with inadequate efficacy may be considerable, and that the requirement for 'appropriateness' assessment does not appear to be a costly restriction, the Council considers that there is a net public interest case for retaining 'appropriateness' assessment.

'Control of use' legislation

In its 2002 NCP assessment, the Council assessed New South Wales as having met its CPA obligations in relation to the *Fertilisers Act 1985*, the *Pesticides Act 1978* (part 7), the *Stock (Chemical Residues) Act 1975*, and the *Stock Foods Act 1940*. The Council also assessed the ACT's application of the *Fertilisers Act 1904* (NSW) as compliant with NCP obligations.

Several jurisdictions are close to completing the reform of their 'control of use' legislation but have not passed legislation or drafted accompanying regulations. For these reasons, the Council assesses New South Wales (in relation to the Stock Medicines Act), Queensland, Western Australia, South Australia and Tasmania as not having met their CPA obligations in this area.

Victoria has implemented the reforms recommended by the national review with one exception — it has retained a licence condition that requires aerial sprayers to hold an approved insurance policy. Mandatory insurance restricts entry to the market and may raise the price of services. The review recommendations which relate to aerial spraying are being addressed by the Agricultural and Veterinary Chemicals Policy Committee Aerial Spraying Licensing Group. The Council understands that this group is considering whether the licence condition is in the public interest. The Council assesses Victoria as not having met its CPA clause 5 obligations on relation to 'control of use' legislation, but notes that Victoria's remaining restriction is under national consideration.

The ACT implemented all recommended reforms to its 'control of use' legislation. The Council thus assesses the ACT as having met its CPA clause 5 obligations in this area.

The Northern Territory has 'control of use' provisions in the *Poisons and Dangerous Drugs Act*. These provisions will be repealed with the commencement of new legislation to control the use of agvet chemicals, fertilisers and stock foods. The new legislation will bring the Northern Territory's arrangements into alignment with those of other jurisdictions. The new legislation will be subject to the gatekeeper process (see chapter 13, volume 2) and is not expected to be introduced until late in 2003. The Council thus assesses the Northern Territory as not having met its CPA clause 5 obligations in this area.

Table 1.16: 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*	Prohibition on chemicals being supplied or held unless approved or exempt; requirement for sole approval of chemicals by the Australian Pesticides and Veterinary Medicines Authority; imposition of the same approval costs on low risk chemicals as on high risk chemicals; provision for assessment services to be purchased from only certain authorities; prohibition on approval of chemicals unless the Australian Pesticides and Veterinary Medicines Authority is satisfied of appropriate efficacy; licensing of chemical manufacturers; provision for data to be protected from rivals unless compensation is paid	Review by review team of economic and legal consultants was completed in 1999. It recommended: • retaining the monopoly on approval of chemicals; • lowering regulatory costs for low risk chemicals; • including principles in the Agricultural and Veterinary Chemicals 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 Australian Pesticides and Veterinary Medicines Authority costs via a simple flat rate sales levy and cost-reflective application fees; • retaining the licensing of veterinary chemical manufacturers; • removing the 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 the provision for licensing of agricultural chemical manufacturers; and • limiting the efficacy review. In 2003 the Council accepted additional material supporting the public benefit in retaining appropriateness assessment by the Australian Pesticides and Veterinary Medicines Authority. Working groups at the national level are considering the implementation of several other review recommendations.	Review and reform incomplete

(*continued*)

Table 1.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth (continued)	*Agricultural and Veterinary Chemicals (Administration) Act 1992*	Prohibition on importing chemicals unless approved or exempt; requirement of minimum qualifications and experience for analysts; fees and levies that impose an entry barrier and discriminate among companies	See *Agricultural and Veterinary Chemicals Code Act 1994* above	See *Agricultural and Veterinary Chemicals Code Act 1994* above	Review and reform incomplete
New South Wales	*Agriculture and Veterinary Chemicals (New South Wales) Act 1994*	Importation of the Agricultural and Veterinary Chemicals Code into the State jurisdiction	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	Review and reform incomplete
	Fertilisers Act 1985	Registration of brand names; composition standards; labelling requirements	Review of Act and other State agvet legislation by a government/industry panel was completed in 1998. It recommended: • removing brand name registration and minimum content requirements; and • retaining heavy metal limits and labelling requirements.	Act was amended in November 1999 to implement review recommendations.	Meets CPA obligations (June 2002)
	Pesticides Act 1978 (part 7)	Controls on the sale, supply, use and possession of pesticides; controls on 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 review recommendations.	Meets CPA obligations (June 2002)

(*continued*)

Table 1.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales (continued)	*Stock (Chemical Residues) Act 1975*	Restrictions on the sale, movement or destruction of chemically affected stock	1998 review recommended retaining all existing restrictions that relate to detecting and controlling chemical-affected stock and controlling affected stock fodder and land.	No reform is required. This Act, the *Fertilisers Act 1985* and the *Stock Foods Act 1940* are to be replaced by new legislation.	Meets CPA obligations (June 2002)
	Stock Foods Act 1940	Labelling controls; limits on foreign ingredients	1998 review recommended retaining content labelling requirements and foreign ingredient content limits.	No reform is required. To be replaced by new legislation.	Meets CPA obligations (June 2002)
	Stock Medicines Act 1989	Prohibition on unregistered chemicals from being held or used on food-producing stock unless prescribed by a veterinary surgeon; sets minimum qualifications and experience for analysts; restrictions on advertising	1998 review recommended: • retaining restrictions on the possession and use of certain stock medicines; • retaining 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.	No reform is required. To be replaced by new legislation that will remove advertising restrictions. Introduction of the new legislation has been delayed due to delay in establishing the national agvet chemicals code.	Review and reform incomplete
Victoria	*Agriculture and Veterinary Chemicals (Victoria) Act 1994*	Importation of the Agricultural and Veterinary Chemicals Code into the State jurisdiction	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	Review and reform incomplete

(*continued*)

Table 1.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Agriculture and Veterinary Chemicals (Control of Use) Act 1992*	Conditions on the use of off-label use of chemicals; exemption of veterinary surgeons from many controls; provision 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 the maintenance of records, the employment licensed persons and the provision of necessary infrastructure; • licensing persons who spray for fee or reward, subject to the accreditation of their competency and only if they work for a licensed business; • exempting from licensing those persons who spray on their own land.	Intergovernmental response was completed in 2000. Ministers established a task force to develop a nationally consistent approach to 'control of use' regulation. The task force 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 (an issue now under consideration by a national working party); and • recognised interstate licences.	Review and reform incomplete

(*continued*)

Table 1.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Agricultural and Veterinary Chemicals (Queensland) Act 1994*	Importation of the Agricultural and Veterinary Chemicals Code into the State jurisdiction	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	Review and reform incomplete
	Agricultural Chemicals Distribution Control Act 1966	Licensing of spray contractors	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above. Results of the national review were included in a more general State review of legislation.	See Victoria's *Agriculture and Veterinary Chemicals (Control of Use) Act 1992* above. Licensing amendments are expected to be proclaimed in October 2003.along with amendments to the Act's regulation. .	Review and reform incomplete
	Chemical Usage (Agricultural and Veterinary) Control Act 1988	Placing of conditions on off-label use of chemicals; exemption of veterinary surgeons from various controls	See *Agricultural Chemicals Distribution Control Act 1966* above	Act was amended in 2003 to give effect to review recommendations.	Meets CPA obligations (June 2003)
Western Australia	*Agriculture and Veterinary Chemicals (Western Australia) Act 1995*	Importation of the Agricultural and Veterinary Chemicals Code into the State jurisdiction.	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	Review and reform incomplete
	Agricultural Produce (Chemical Residues) Act 1983	Restriction on the sale, movement or destruction of chemically affected produce; 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. The Western Australian Act is to be replaced by the Agricultural Management Bill which is being drafted.	Review and reform incomplete

(*continued*)

Table 1.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Aerial Spraying Control Act 1966*	Provision 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. The Western Australian Act is to be replaced by the Agricultural Management Bill, which is being drafted.	Review and reform incomplete
	Veterinary Preparations and Animal Feeding Stuffs Act 1976	Requirement for premises and products to be registered; restrictions on packaging and labelling; sets minimum qualifications for analysts; 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. The Western Australian Act will be amended by the Veterinary Preparation and Animal Feeding Stuffs Bill 2003, which was introduced to Parliament in May 2003.	Review and reform incomplete
South Australia	*Agricultural and Veterinary Chemicals (South Australia) Act 1994*	Importation of the Agricultural and Veterinary Chemicals Code into the State jurisdiction	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	Review and reform incomplete

(*continued*)

Table 1.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia (continued)	*Agricultural Chemicals Act 1955*	Requirement that chemicals be sold with registered label; requirement that chemicals 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.	*The Agricultural and Veterinary Products (Control of Use) Act 2002* repealed previous legislation and implemented competition reforms. Regulations are yet to be finalised.	Review and reform incomplete
	Stock Foods Act 1941	Requirement that stock foods be sold with label or certificate specifying chemical analysis; prohibition on the feeding of seed grain to stock	See *Agricultural Chemicals Act 1955* above	See *Agricultural Chemicals Act 1955* above	Review and reform incomplete
	Stock Medicines Act 1939	Requirement that stock medicines be registered	See *Agricultural Chemicals Act 1955* above	See *Agricultural Chemicals Act 1955* above	Review and reform incomplete
Tasmania	*Agricultural and Veterinary Chemicals (Tasmania) Act 1994*	Importation of the Agricultural and Veterinary Chemicals Code into the State jurisdiction	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	Review and reform incomplete
	Agricultural and Veterinary Chemicals (Control of Use) Act 1995	Prohibition on chemicals not registered under the Agricultural and Veterinary Code from being used; licensing of spray contractors; requirement of 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. The Legislative Council is yet to pass amendments implementing review recommendations.	Review and reform incomplete

(*continued*)

Table 1.16 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Pesticides Act 1989*	Prohibition on the use of unregistered pesticides		Act was repealed and replaced by the *Environmental Protection Act 1997*. The 1997 Act prohibits off-label use (unless with a permit) and requires authorisation of chemical use. The authorisation arrangements do not vary from the arrangements recommended by the Victorian-led national review.	Meets CPA obligations (June 2003)
	Fertilisers Act 1904 (NSW) in its application in the Territory	Prohibition on the sale of fertilisers without a statement of composition	Review by officials was completed in 1999.	Act is to be retained.	Meets CPA obligations (June 2002)
Northern Territory	*Agricultural and Veterinary Chemicals (Northern Territory) Act*	Importation of the Agricultural and Veterinary Chemicals Code into the State jurisdiction	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	See Commonwealth *Agricultural and Veterinary Chemicals Code Act 1994* above	Review and reform incomplete
	Poisons and Dangerous Drugs Act	Restrictions on the use of agvet chemicals		New *Agricultural and Veterinary Chemicals(Control of Use) Act* will be introduced and subject to gatekeeper requirements. Extensive public consultation was undertaken. Draft Bill is under consideration by the Government.	Review and reform incomplete

Farm debt finance

Under the *Farm Debt Mediation Act 1994* New South Wales regulates the resolution of disputes that may arise between a farmer and his/her creditor where a farmer defaults on a secured debt and the creditor proposes to enforce the mortgage securing the debt by, for example, taking possession of the mortgaged property.

Legislative restrictions on competition

The Act prohibits lenders from enforcing farm mortgages in default without first offering defaulting farmers the option of mediation. Farmers have twenty-one days notice in which to accept mediation. The lender must not enforce the mortgage until the New South Wales Rural Assistance Authority is satisfied that either:

- satisfactory mediation has taken place;
- the farmer has declined to mediate; or
- three months have elapsed since the lender gave notice and the lender has attempted to mediate in good faith.

These obligations on lenders restrict competition in the market for farm debt finance by raising the costs and risks of lending to farmers.

The Act also restricts competition by providing for the accreditation of mediators.

Regulating in the public interest

As noted in Volume 2 Chapter 6, 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. In particular, it is argued that financial products are complex and consumers have less information than financial service providers. Regulation takes several forms, including conduct and disclosure requirements which reduce information barriers and costs.

In addition, all entities which are licensed to provide financial services to retail clients must have a dispute resolution system in place to deal with consumer complaints about any of the financial products and services provided under the licence.

Such regulation 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.

Review and reform activity

A group composed of officials and representatives of the farming and banking industries reviewed the Act, reporting in December 2000. The review group found that negotiating solutions to farm debt disputes, through say mediation, is often less costly for both parties and fairer than court proceedings, but that farmers often did not seek voluntary mediation because of feelings of 'relative powerlessness'. It recommended that the State Government retain mandatory mediation of farm debt disputes, and retain accreditation of mediators. It also recommended that:

- the lender be prohibited from enforcing the mortgage for twelve months where the lender, participating in mediation, is found not to have acted in good faith; and
- decisions of the Rural Assistance Authority in relation to mandatory farm debt mediation be subject to review by the Administrative Decisions Tribunal.

The State Government accepted the recommendations in November 2001 and amendments to the Act were passed in October 2002.

Assessment

The Council assesses that New South Wales has not met its CPA clause 5 obligations arising from the Farm Debt Mediation Act. The NCP review provided insufficient evidence to support its recommendations to impose a twelve month penalty where lenders are found not to have participated in mediation in good faith, and review by the Administrative Decisions Tribunal of decisions by the Rural Assistance Authority.

As noted by the review, a twelve month penalty could be considered to interfere with lenders' substantive rights, and increases the risks of lending to farmers in New South Wales. The review did not show that failure by lenders to participate in mediation in good faith had been a significant problem. Similarly, allowing review by the Administrative Decisions Tribunal of decisions by the Rural Assistance Authority subjects lenders and farmers to risks of further delay and increased costs, and the review did not show that the Authority's own internal review procedures were inadequate. Both of these review proposals, now implemented, are likely to increase the costs to the community of restricting competition between farm lenders by mandating the mediation of farm debt disputes.

In relation to the principle restriction — mandatory mediation — the Council understands that the Government has a social objective of the fair resolution of farm debt disputes. However, the review did not adequately establish its case that the restriction improves fairness. It did not show that, without mandatory mediation, lenders would act unconscionably towards farmers to a significant extent. Nor did it show why the community might regard farmers as deserving more assistance than other small businesses to resolve debt disputes. Like other small businesses, farmers enter into finance contracts freely, and have the opportunity to seek professional advice – as they often do in preparing business plans (for finance applications and government assistance applications) and managing tax obligations.

The review was also unconvincing in arguing that mandatory mediation improves the efficiency of the farm finance market. It argued that farmers in financial difficulty are often reluctant to initiate negotiations with lenders, and that without mandatory mediation this leads to missed opportunities to avoid mortgagee sales, more court proceedings and hence higher costs for both farmers and lenders. However, the review did not show better outcomes from mandatory mediation by, for example, comparing:

- rates of foreclosure of farm loans in New South Wales with other states; or
- farm finance interest rates in New South Wales with other states (other things being equal lenders will recover higher costs through higher interest rates – farm finance interest rates in New South Wales should be lower if mandatory mediation lowers lenders' costs).
- Table 1.17 summarises New South Wales progress in review and reform of legislation regulating mediation of farm debt disputes.

Table 1.17: Review and reform of legislation regulating mediation of farm debt disputes

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Farm Debt Mediation Act 1994*	Mediation is mandatory before lenders may enforce security on farm debt in default.	Review by officials and industry representatives completed December 2000, recommending retention of mandatory mediation, and a variety of procedural and other amendments.	Act amended accordingly in October 2002.	Does not meet CPA clause 5 (June 2003).

Bulk Handling

The supply of off-farm bulk handling and storage services to grain growers has traditionally been restricted to statutory monopolies in most States. New South Wales repealed its regulation in 1992. Victoria replaced its regulation with the *Grain Handling and Storage Act 1995* which regulates pricing and third party access to port and related infrastructure. Queensland does not directly regulate the supply of bulk handling and storage services.

At the time the CPA commenced only Western Australia and South Australia restricted competition in the supply of bulk handling and storage services.

Legislative restrictions on competition

Western Australia and South Australia restricted competition via the *Bulk Handling Act 1967* and *Bulk Handling of Grain Act 1955* respectively. These Acts:

- prohibited anyone other than the statutory monopoly handler from receiving or delivering grain in bulk, and requiring it to accept all grain tendered;
- required the statutory monopoly handler to charge uniform prices for its services irrespective of cost, and to provide facilities at points specified by the Minister;
- prohibited the statutory monopoly handler from trading in grain; and
- allowed the Government to guarantee the liabilities of the statutory monopoly handler.

Table 1.18 summarises Western Australia's and South Australia's progress in the review and reform of legislation regulating bulk grain handling and storage.

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 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.

Western Australia

Review and reform activity

The Bulk Handling Act's prohibition on anyone other than Cooperative Bulk Handling Limited (CBH) receiving and delivering grain expired on 31 December 2000.

The remainder of the Act was reviewed by the Department of Agriculture in 2002. The review recommended that the State Government repeal all remaining restrictions on competition except the requirement that it accept all grain tendered to it. It also recommended that the State Government retain the provision requiring CBH to allow anyone to use its port facilities on payment of prescribed charges and that it continue to monitor the need to establish an access regime for these facilities.

The Act was amended accordingly by the *Bulk Handling Repeal Act 2002.*

Assessment

The Council assesses that Western Australia has met its CPA clause 5 obligations arising from the Bulk Handling Act. The continued requirement that CBH accept all grain tendered to it is most unlikely to restrict competition as it does not prevent new entry into the bulk handling and storage services market and, as CBH is free to determine its charges and the location and standard of facilities, it does not in practice prevent CBH from responding to new entry, actual or threatened, through, for example, changes to its service prices or its receival site network.

In relation to port facilities it is open to anyone not satisfied with CBH's voluntary terms of access to invest in alternative facilities or to seek to have CBH's facilities declared under Part IIIA of the TPA.

South Australia

Review and reform activity

South Australia reviewed and repealed its Bulk Handling of Grain Act in 1998.

Assessment

The Council assessed in 2002 that, with the repeal of the Act, South Australia had met its related CPA clause 5 obligations.

Table 1.18: Review and reform of legislation regulating bulk grain handling and storage

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
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 in 2002 by Department of Agriculture recommended removal of uniform pricing obligation but retention of obligations in relation to grain receival and port facility third party access.	Act amended accordingly in 2002.	Meets CPA obligations (June 2003).
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).

Food

The food industry is a core activity in the Australian economy, involving primary producers and their suppliers, and processing, transport, export, import and retailing activities. Food production from the farming and fisheries sector was worth an estimated A$29 billion in 2000-01, total sales by the food processing industry were worth an estimated A$55 billion and food imports were worth A$4.8 billion (AFFA 2002).

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 Government 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 that imported food:

- comply with Australian public health and food standards; and
- 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 damage 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 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. The major initiatives are outlined below.

In 1994 the Australia New Zealand Food Standards Council, comprising health Ministers from the Commonwealth Government, 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, with effect 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:[9]

- the registration of food businesses;
- the licensing of certain high risk food premises;
- the licensing of laboratories and analysts to test food samples; and
- the 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 Government commissioned the Blair Review, which examined all aspects of food regulation (including competitive restrictions

[9] The model food Bill uses 'notification' to mean registration and 'registration' or 'approval' to mean licensing.

contained in the Australia New Zealand Food Authority Act) with the object of improving the efficiency of food regulation while protecting public health. The Blair Report in August 1998 recommended that:

- the Commonwealth, States and Territory governments develop a national uniform food safety regulatory framework that meets identified principles of effective and efficient regulation;
- the Commonwealth Government amend the Australia New Zealand Food Authority Act to clarify its objective; and require ANZFA to consider whether the regulation's 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 services such as end-product inspection, auditing and laboratory analysis; and
- regulators and industry develop an integrated food safety auditor accreditation framework.

In 1999, the Commonwealth Government amended the Australia New Zealand Food Authority Act as recommended.

The model food Bill

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 the 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 and the ACT modified their food legislation in 2001. Where these jurisdictions adopted noncore provisions they considered that these were necessary to ensure adequate food safety standards.

New South Wales re-introduced the Food Bill 2002 to Parliament in 2003. The Bill contains all core provisions of the model food Bill, which relate primarily to food handling offences and the application in New South Wales of the Food Standards Code. The Food Bill requires laboratories, analysts and food safety auditors to be approved for the purposes of carrying out analyses. (A nonapproved person is not prohibited from carrying out those activities, but their analysis results will not be recognised for the purposes of the proposed Act.) The Government considers that there is a public benefit in

maintaining high standards of food safety by ensuring the competence and integrity of persons carrying out analyses.

Western Australia is preparing a food Bill that will adopt the Food Standards Code and incorporate all its food hygiene regulations. Tasmania repealed its *Public Health Act 1962* and replaced it with the *Food Act 1998*. Following developments at the national level, Tasmania will replace the Food Act with the yet to be proclaimed *Food Act 2003*, which is based on the model food legislation.

The Northern Territory is yet to introduce the necessary legislation to adopt the model Bill. Western Australia is intending to introduce a food Act to replace the relevant sections of its Health Act. The new Act will give effect to the model food Bill.

Food safety in the dairy and meat industries

Most States and Territories undertook the review and, where appropriate, reform of their legislation relating to food safety in the dairy and meat industries. Developments since the 2002 NCP assessment are outlined below.

New South Wales placed the licensing and inspection provisions from its dairy and meat legislation into Regulations developed under the *Food Production Safety Act 1998*. A review of the Act in 2002 found the dairy and meat food safety schemes to be effective. The review was not a specific NCP review, but made a number of recommendations that would result in significant cost savings for both the government and industry. The report was provided to Parliament for tabling and public release on 30 December 2002.

Victoria accepted all but one of the recommendations of the review of its *Meat Industry Act 1993*. The Government did not accept that the Minister should be unable to direct the Victorian Meat Authority on the circumstances of particular businesses. It agreed, however, to the disclosure of such directions and amended the Act accordingly.

Queensland developed new food safety schemes under its *Food Production (Safety) Act 2000*. These schemes contain no restrictions on competition because they implement food safety standards in a manner consistent with the CoAG Agreement.

Western Australia intends to repeal all its food hygiene Regulations and include these in its foreshadowed Food Act. Drafting instructions have been prepared for the Bill.

South Australia is preparing a draft Bill for dairy food safety legislation that it intends to release for public consultation in August 2003. The framework established by the Bill is similar to that developed by Victoria for the Victorian *Dairy Act 2000* which was assessed as meeting CPA criteria. Amendments to the *Meat Hygiene Act 1994* to implement review recommendations are likely to be introduced in the second half of 2003,

following the development of a memorandum of understanding among agencies involved in inspections.

Tasmania has completed the review and reform of its legislation relating to food safety in the dairy and meat industries. It retained the licensing of producers, processors and manufacturers under the *Dairy Industry Act 1994* to ensure quality standards. Amendments to the *Meat Hygiene Act 1985* were passed in 2001 following a review of the Act. The amendments provide for a simplified licensing system, acknowledge the Australian Meat Standards and remove overlap with building regulations.

Imported food

The Commonwealth Government reviewed the *Imported Food Control Act 1992* 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 then implemented eight of the 23 recommendations. The outstanding recommendations involve legislative change and major changes to information technology systems. Work on changing the IT systems has commenced and amendments to the Act were introduced to Parliament in 2002.

Assessment

Commonwealth

In its 2002 NCP assessment, the Council assessed the Commonwealth Government as having met its CPA obligations to review and reform the Food Standards Australia New Zealand Act, but not its CPA clause 5(5) obligation in relation to the new joint Food Standards Code, because the Government presented no evidence of a public interest case for the proposed code. The

Commonwealth Office of Regulation Review found the cost–benefit analysis in the accompanying regulation impact statements to be inadequate and, therefore, not substantively compliant with CoAG's principles and guidelines for national standard setting and regulatory action. The Australia New Zealand Food Authority has addressed this noncompliance by a revised approach to measuring regulatory impacts that more fully considers business concerns including implementation costs.

The Council assesses the Commonwealth Government as not having met its CPA clause 5 obligations in relation to the Imported Food Control Act because the recommended reforms are still to be implemented. The Council assesses the Government as having met its CPA clause 5 obligations in relation to the Food Standards Code.

States and Territories

Implementation of the model food Bill

The Council assesses Victoria, Queensland, South Australia and the ACT as having met their CPA clause 5 obligations in relation to model food legislation. New South Wales, Western Australia, Tasmania and the Northern Territory have yet to pass the relevant legislation so they are assessed as not having met their CPA obligations in this area.

Legislation specific to the dairy and meat industries

In its 2002 NCP assessment, the Council assessed the following jurisdictions as having met their CPA obligations in relation to the listed legislation:

- Victoria — the *Dairy Industry Act 1992*;
- The ACT — the *Meat Act 1932*; and
- Northern Territory — the *Meat Industries Act 1996*.

Since 2002, New South Wales has completed a non-NCP review of its food safety legislation in the dairy and meat industries. 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 obligations in this area.

Victoria, Queensland and Tasmania have completed the review and reform of food safety legislation in their dairy and meat industries, and the Council thus assesses these jurisdictions as having met their CPA obligations in this area. The Council assesses Western Australia as having not complied with its CPA obligations because it did not complete review and reform activity in this area. The Council assesses South Australia too as not having met its CPA obligations, although the passage of the State's foreshadowed legislation would satisfy obligations in relation to dairy and meat safety legislation.

Table 1.19 details governments' progress in reviewing and reforming food regulation.

Table 1.19: Review and reform of 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 1991*)	Establishment of FSANZ (now 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	Standards for preparation, composition and labelling of food	ANZFA developed a new joint code including new standards on ingredient and nutritional labelling which underwent regulatory impact analysis.	The new joint Australia-New Zealand Food Standards Code was implemented on 20 December 2000. It was introduced under transition arrangements that allowed the old food standards codes of Australia and New Zealand to remain in force for two years. These codes were subsequently repealed on 20 December 2002	Meets CPA obligations (June 2003)

(*continued*)

Table 1.19 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
Commonwealth (continued)	*Imported Food Control Act 1992*	Requirement that imported food meet Australian standards; subjection of imported food to risk-based inspection and testing; provision 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.	The Government accepted all recommendations in June 2000. Some were implemented administratively while others await legislative change. Amendments have been drafted.	Review and reform incomplete
New South Wales	*Food Act 1989*	Provision for various food safety offences; provision of wide powers to make orders prohibiting or requiring conduct	National review was 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 offences. Its noncore provisions include: • the registration of all food businesses; • the approval of food premises; and • the 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 has introduced amendments in 2003.	Review and reform incomplete
	Dairy Industry Act 1979	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.	Meets CPA obligations (June 2003)

(*continued*)

Table 1.19 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales (continued)	*Meat Industry Act 1987*	Licensing of farmers and processors	Review was completed in 1998.	Licensing and inspection provisions were placed in the Food Production (Meat Food Safety Scheme) Regulation 2000.	Meets CPA obligations (June 2003)
Victoria	*Food Act 1984*	Provision for various food safety offences; prescribes food safety standards; registration of food premises and vehicles; requirement of food safety programs 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. Victoria amended its 1984 Act via the *Food (Amendment) Act 2001* to adopt provisions of the model food Bill.	Meets CPA obligations (June 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. The Act was repealed by the *Dairy Act 2000*, which establishes Dairy Food Safety Victoria.	Meets CPA obligations (June 2002)

(*continued*)

Table 1.19 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Meat Industry Act 1993*	Licensing of processing facilities and vehicles; requirement of quality assurance programs for certain premises; minimum qualifications for inspectors and minimum experience levels 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 the discriminatory exercise of Ministerial powers.	The Government accepted all but the recommendation to circumscribe the Minister's power to direct the Victorian Meat Authority. Instead, the Government agreed to the disclosure of such directions. The Act was amended accordingly in 2001.	Meets CPA obligations (June 2003)
Queensland	*Food Act 1981*	Provision for various food safety offences; requirement that food to meet prescribed food standards; requirement for 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 its Act accordingly in 2001.	Meets CPA obligations (June 2003).
	Dairy Industry Act 1993	Provision for licensing of farmers and processors	Government/industry panel review was completed in 1998.	Licensing and inspection provisions were replaced from 1 July 2002 by the Dairy Food Safety Scheme under the *Food Production (Safety) Act 2000.*	Meets CPA obligations (June 2003)

(*continued*)

Table 1.19 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Meat Industry Act 1993*	Provision for food safety offences; minimum qualifications for meat safety officers; accreditation of processing facilities; provision of wide powers to make standards	Review was completed in 1999, recommending the development of new food safety standards (especially for high risk foods).	The Act was repealed and provisions for meat safety standards were included in the *Food Production (Safety) Act 2000*.	Meets CPA obligations (June 2003)
Western Australia	*Health Act 1911*	Provision for food safety offences; requirement that food meet prescribed 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 is preparing a food Bill that will adopt the Food Standards Code.	Review and reform incomplete
	Health (Food Hygiene) Regulations 1993	Licensing of food processors and registration of premises; specification of safe food practices	Regulations are under way.	Western Australia intends to repeal all its food hygiene Regulations and include these in its foreshadowed Food Act.	Review and reform incomplete
	Health (Game Meat) Regulations 1992	Minimum qualifications for slaughterers; registration of field depots and processing facilities	Regulations are under way.	Western Australia intends to repeal all its food hygiene Regulations and include these in its foreshadowed Food Act.	Review and reform incomplete

(*continued*)

Table 1.19 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Food Act 1985*	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. South Australia passed a new Food Act in July 2001.	Meets CPA obligations (June 2003)
	Dairy Industry Act 1992	Licensing of farmers, processors and vendors	Food safety provisions remain under review. Officials developed a discussion paper for new primary industry 'food safety' legislation that would incorporate provisions for the dairy industry.	New legislation is likely in the March 2004 session of Parliament.	Review and reform incomplete
	Meat Hygiene Act 1994	Requirement for accreditation of meat processors; requirement that meat inspectors and auditors enter agreement with Minister	Review was completed in 2000. It recommended extending the Act to cover rabbit meat and retail.	A Bill incorporating amendments based on the review recommendations will be introduced in the second half of 2003.	Review and reform incomplete

(*continued*)

Table 1.19 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Public Health Act 1962*	Provision for food safety offences; requirement that food meet prescribed food standards; registration of premises and vehicles; licensing of food manufacturers and sellers	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. A new Food Act 2003, based on the model food Bill will replace the Food Act 1998.	Review and reform incomplete
	Dairy Industry Act 1994	Licensing of farmers, processors, manufacturers and vendors	Review by a joint government–industry panel was completed in 1999. It recommended that the Tasmanian Dairy Industry Authority continue to maintain milk quality standards until such time as a national system for food safety is implemented.		Meets CPA obligations (June 2003)
	Meat Hygiene Act 1985	Licensing of meat processing facilities	Review was completed.	Amendments were introduced in 2001. They provide for a simplified licensing system, among other reforms.	Meets CPA obligations (June 2003)

(*continued*)

Table 1.19 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Food Act 1992*	Provision for food safety offences; licensing of food businesses; requirement that food 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. The ACT amended its Act accordingly in August 2001.	Meets CPA obligations (June 2003)
	Meat Act 1931	Requirement for 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*	Provision for 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. The Northern territory intends to amend its Act accordingly in 2003.	Review and reform incomplete
	Meat Industries Act 1996	Provision for various food safety offences; licensing of processing facilities	Review by an independent reviewer was completed 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

The Australian Quarantine Inspection Service informed the Council that in 2002-02 it supervised about 11 400 ship arrivals; processed nine million passengers and aircrew, about one million cargo containers, 4.1 million airfreight consignments and more than 180 million mail articles; and managed the discharge of more than 200 million tonnes of ballast water.

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 people 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 NCP legislation review schedule in 1996, but that review (the Nairn Review) did not specifically consider whether the Act restricts competition. Consequently, the Commonwealth Government 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 a two-stage response to the review:

- stage 1: minor and technical amendments to update the legislation, remove current inconsistencies and to better align existing provisions with current policy and practice regarding human quarantine control measures;

- stage 2: a strategic examination of the department's role in quarantine in the context of current and future communicable disease management.

In response to stage 2 recommendations, the department is addressing issues of contemporary disease preparedness, governance and response, including options for administrative review and cost recovery where appropriate.

The Australian Quarantine Inspection Service proposes to commence a comprehensive re-examination of those parts of the Quarantine Act that relate to animal and plant health. Any amendments arising from this review will be subject to analysis via a regulation impact statement. This re-examination of the Act will also review those elements of the Act that were unchanged following the Nairn Review to assess their compliance with the CPA clause 5 obligations.

Assessment

The NCP review of the human quarantine provisions of the Quarantine Act 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 met its CPA clause 5 obligations relating to these provisions.

In relation to the animal and plant health provisions of the Act the Commonwealth did not completed its review and reform activity. The Council thus assesses the Commonwealth as not having met its CPA obligations in this area.

Food exports

Food exports make an important contribution to Australia's international trade, accounting for A$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 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 in 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 A$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 Government decided in April 2002 to accept all recommendations, and is consulting with industry on timeframes for implementation of the reforms. While considerable progress has been made, several complex issues are yet to be resolved.

Assessment

Because the Commonwealth Government is still to implement the review recommendations, the Council assesses it as not having met its CPA obligations in this area. Table 1.20 details the Commonwealth's progress in reviewing and reforming quarantine and export control legislation.

Table 1.20: Review and reform of 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 the importation of certain goods, animals and plants unless with a permit	The Department of Health and Aged Care reviewed provisions relating to human quarantine in 1998. Review found a minimal impact on competition, along with public health benefits in excess of costs. The Department of Agriculture, Fisheries and Forestry will review the provisions relating to animal and plant quarantine.		Human quarantine — meets CPA obligations (June 2001) Plant and animal quarantine — review and reform incomplete
	Export Control Act 1982 (food provisions)	Registration of processing premises; provision for inspection of premises and goods; product standards	Review of provisions relating to fish, grains, 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 accepted all recommendations. An implementation timetable is being developed with industry.	Review and reform incomplete

Veterinary services

About 7000 professional veterinarians are practising in Australia (DEST 2002). Some 60 per cent are in private practice, caring for the companion animals of city people, farm animals 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, some work in laboratories with diagnostic or research duties, some are in higher education and others conduct 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 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 limit innovation by veterinarians, thereby raising the cost of veterinarians' services and limiting choice for consumers, particularly for those in regional and remote areas with a shortage of veterinarians.

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 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, the 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;
- 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 the reservation reduces harms than cannot be addressed in less costly ways, and allow less qualified practitioners to perform less risky areas of practice; and
- not restrict business conduct in ways that are only weakly linked to avoiding harm, such as the reservation of practice ownership to veterinarians and advertising prohibitions beyond those in the TPA.

Review and reform activity

All States and Territories completed the review of their veterinary legislation. The main reforms implemented or foreshadowed were the removal of business conduct restrictions such as the reservation of practice ownership to veterinarians and the advertising prohibitions (to the extent that advertising is restricted beyond general fair trading regulation). Less common was the removal of general reservations of practice (although Victoria's legislation does not reserve practice and the ACT intends to remove its statutory reservation).

New South Wales completed the review of its *Veterinary Surgeons Act 1986* in 1998. The review found that licensing is in the public interest because it ensures that only trained persons are able to undertake surgical and other high risk health care procedures on animals and that consumers are well informed about the competencies of animal health service providers. New South Wales considers its requirements are consistent in this respect with animal welfare and public health obligations imposed by other legislation. The review also concluded that a licensing system is necessary to meet overseas trade certification quality requirements. It recommended loosening restrictions on entry to the profession and ownership of veterinary hospitals, and opening up less serious animal treatment procedures to nonveterinarians.

The New South Wales Cabinet responded to the review, and a draft Bill is being prepared to give effect to the reforms.

Victoria's *Veterinary Practice Act 1998* followed a pre-NCP review of earlier legislation. The Act removed restrictions on ownership of veterinary practices and strengthened nonveterinarian representation on the Registration Board. Registration provisions were retained, as was reservation of title. The Act does not contain a general reservation of practice, but specific reservations occur in other legislation. Advertising restrictions are equivalent to those in the TPA.

Queensland completed the review of its *Veterinary Surgeons Act 1936* in 2000 and passed amendments in 2001. The amendments removed restrictions on ownership and advertising but retained registration provisions, the reservation of title, a general reservation of practice (subject to the exclusion of not-for-fee practice and certain minor acts), and a provision requiring board approval of premises.

The Western Australian Government endorsed a review of its *Veterinary Surgeons Act 1960* in December 2001. The major review recommendations included:

- introducing a competency based licensing category known as 'veterinary service provider' to reduce the extent of barriers to entry for nonveterinarians wishing to provide veterinary services. Under these new arrangements, a person will be able to perform certain acts of veterinary surgery if that person has passed a relevant course offered by a training organisation;

- repealing the advertising provisions and replacing them with voluntary guidelines or a code of conduct;

- repealing the restrictive aspects of the premises registration provisions, and replacing them with a voluntary code of practice. The Act currently prescribes minimum standards to which veterinary premises must be built and maintained. The review found that these standards create barriers to entry via the higher compliance costs incurred by those wishing to establish a veterinary practice. Further, the review considered that the Act specifies overly restrictive criteria for the registration of premises, to the extent of discouraging innovative means of delivering veterinary services (such as mobile clinics) and limiting the provision of services in rural areas (where innovation is necessary); and

- repealing the restrictions on ownership of veterinary practices by nonveterinarians.

The recommendations, along with other changes that are not NCP related, will be implemented through a specific amendment Bill.

South Australia's review of its *Veterinary Surgeons Act 1985* was completed in May 2000 and approved by Cabinet in September 2000 A Veterinary Practices Bill is before Parliament and expected to be passed in the first half of 2003. Subordinate legislation is to be developed in consultation with the

key industry and public stakeholders. Proclamation of the new Act, and the repeal of the existing Act, are planned for before 31 December 2003.

Tasmania completed a minor review of its *Veterinary Surgeons Act 1987* in February 2000. The review recommended that the Veterinary Board of Tasmania continue to approve educational qualifications and training courses, and regulate practice. The Government retained mandatory registration for veterinary surgeons and specialists, and a requirement to keep records. It removed, however, a number of restrictions on bodies corporate providing veterinary services, via the *Veterinary Surgeons Amendment Act 2002* that came into effect on 1 September 2002.

The review of the ACT *Veterinary Surgeons Registration Act 1965* took place in conjunction with the review of the Territory's health professional legislation because the Health Minister has responsibility for the Act's operation. The Government prepared a draft Bill that would require veterinary surgeons to be registered. The Bill would also:

- retain restricted entry provisions based on the public benefit derived from their contribution to public and animal safety, enhanced productivity and reduced costs from misadventure. The importance of the entry standards to national mutual recognition procedures, taxation arrangements and other public and animal protection legislation were also reasons for retaining the restrictions;

- revise existing professional standards to, increase their specificity and include community evaluation and independent assessment of any breach;

- repeal and replace existing prohibitions against advertising. It recommends, however, enforcing a generic conduct standard breach whereby a registered veterinary professional must not advertise a service in a way that is misleading;

- retain board administration of the legislation. Boards would, however, be required to include community membership and consult with the community on conduct standards. Inquiries conducted by the boards would also require community member participation. The boards would also be responsible to the relevant Minister for their performance. An independent tribunal would replace board hearings on matters involving the potential suspension or cancellation of registration.

Finalisation of a draft revised Bill is awaiting comment on the health professionals bill. Once the structural elements of the health Bill are confirmed, a revised Veterinary Surgeons Bill will be issued for consultation.

The Northern Territory completed the review of its *Veterinarians Act* in 2000. The review recommended:

- retaining licensing, the reservation of title and the reservation of practices;

- increasing the number of nonveterinarian representatives on the Veterinary Board from one to at least two of the board's five members; and

- removing restrictions on the advertising of fees and discounts.

The Northern Territory subsequently advised that

- the legislative approach to restrictions on practice is sufficiently flexible to allow a high reliance on nonveterinarians in outlying pastoral areas to provide related services;

- a legislative proposal will be developed to amend the Act to provide for a Veterinary Board comprised of an independent chair, two elected veterinarians and two appointed consumer representatives; and

- the Regulation restricting advertising was repealed in June 2003

Assessment

The 2002 NCP assessment focused on several aspects of Victoria's and Queensland's legislation following their completion of review and reform in this area. A concern of the Council was the potential domination by veterinarians of registration boards in both jurisdictions.

In its 2003 annual report, Victoria responded to the Council's concerns about the composition of its registration board. It noted that its Veterinary Practices Act introduces significant nonveterinary membership of the registration board: the nine-member board has three members who are not veterinary practitioners. Of the veterinary members, one must be employed by the University of Melbourne (in recognition of the board's role in approving qualifications and accrediting courses of training for registration), and one must be employed by the Crown (in recognition of State veterinarians' role in protecting animal health and welfare, public health, food safety and trade.) Only four of the nine members are registered veterinary practitioners engaged in clinical practice. Victoria considers that clinical practitioner representation ensures the board has sufficient expertise across the many fields of veterinary practice to fulfil its prescribed functions, including setting appropriate standards of veterinary practice and veterinary facilities. Further, Victoria's Act requires that any panel appointed by the board for a hearing into the professional conduct of a veterinary practitioner must include at least one person who is not a veterinary practitioner. The Council considers that these arrangements should ensure the board is not dominated by professional interests. It thus assesses Victoria as having met its CPA obligations in relation to the regulation of veterinary surgeons.

Queensland considers that the composition of its Veterinary Surgeons Board (which contains only one nonveterinarian among its six members) does not restrict competition in terms of imposing meaningful restrictions on entry or business conduct. The board is composed of veterinarians from government,

education and private practice, in addition to consumer representation. In defending professional misconduct action, veterinarians may choose to be heard by the board (which has limited punitive powers not extending to suspension or removal from the register), or by the Veterinary Tribunal (whose decision is appealable to the District Court). Further, the legislation provides for specific entry requirements that preclude the board's arbitrary exclusion of new applicants. In the unlikely event of an arbitrary exclusion, the decision would be subject to judicial review.

The Council was also concerned that Queensland's registration criteria could set a higher than necessary barrier to entry. It was unclear as to how the criterion of 'good fame and character' — would be applied. The Council suggested to Queensland that this question could be addressed by identifying specific character disqualifications (such as prior offences) in the Act, in regulations or in guidelines made available to the public.

Queensland has informed the Council that the absence of specific offences demonstrates the applicant's "good fame and character". For first-time registrants after graduation, two references from course lecturers fulfil the criterion. For applicants registered elsewhere 'good fame and character' is demonstrated by a letter from that registering authority stating that no punitive measures are imposed on the veterinarian. These processes provide the capability to identify specific character disqualifications. This information is conveyed to any person enquiring about registration, and it will be on the board's web site when established.

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 previously indicated a preference for specific reservations over the general ones found in the Queensland and the Northern Territory legislation. Specific reservations allow competition from lesser qualified providers except where 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 controlling animal disease or protecting animal welfare. This is the approach of the Victorian legislation and the intended approach of reforms in the ACT.

Queensland considers that the reservation of practice restriction in its legislation is justified in the public interest. The restriction refers to the prescribed 'acts of veterinary science that require specific veterinary education to perform', — most notably, diagnosis, surgery and the use of scheduled drugs. Queensland considers that it is in the public interest and the interests of animal welfare to restrict the practice of veterinary science to persons who have undertaken appropriate tertiary training and gained professional expertise in the science. Queensland does not restrict nonregistered veterinary surgeons from providing veterinary treatments that are not prescribed as 'acts of veterinary science' and that do not require specific veterinary education to be performed. In support of its position Queensland cited the results of extensive public and industry consultation during the review, which revealed wide community support for maintaining a restriction on who may perform acts of veterinary science. Queensland

accepts the protection of animal welfare as a prime responsibility of Government, and believes the restrictions on veterinary practice reflect community expectations.

Queensland also requires the approval of premises from which veterinarians deliver services. The Victorian and the Northern Territory legislation do not include such a provision. Western Australia intends to replace a similar provision with a code of practice. In 2002, the Council expressed concern 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.

In response, Queensland referred to community and industry consultation during the review, which supported board approval (as distinct from registration) of veterinary premises to protect the interests of the consumer and to promote animal welfare. Arbitrary exclusion of new premises is not possible because the legislation provides criteria for the approval decision, requires the issue of an information notice if an application is refused, and specifies the right of appeal to the independent Veterinary Tribunal. Any person may apply, the application fees are minimal, and all applications are determined by a demonstration of compliance with uniform minimum standards that are applied equally to all applications. The standards are freely available to any person on request and will be accessible on the proposed board web site.

The Council is satisfied that the restrictions remaining in Queensland's veterinary surgeon legislation are in the public interest and thus assesses Queensland as having met its CPA obligations in this area.

Tasmania completed review and reform of its veterinary surgeon legislation. Although the review recommended the removal of a number of restrictions on business practices, its terms of reference did not require it to consider the composition of the Veterinary Board of Tasmania. The board consists of five members as follows:

- three members who must be registered veterinary surgeons nominated by the Australian Veterinary Association (Tasmanian Division);
- one member who is an officer of the relevant department and a registered veterinary surgeon, and who is nominated by the Secretary of the department; and
- one member who is nominated by the Minister.

The Council considers that the composition of the board may allow the profession to determine important regulatory decisions on entry and conduct. Because Tasmania did not provide a public benefit case to support its veterinary board structure, the Council assesses it as not having met its CPA obligations in this area. The Council notes a subsequent commitment by Tasmania to review the composition of the board.

New South Wales, Western Australia, South Australia, the ACT and the Northern Territory completed reviews but have yet to implement reform of their veterinary practice legislation. The Council thus assesses these jurisdictions as not having met their CPA obligations in this area. However, implementation by the Northern Territory of its review recommendations to increase nonveterinarian representation on the Veterinary Surgeons Board and to allow a nonveterinarian president would satisfy CPA obligations in this area.

Table 1.21 details governments' progress in reviewing and reforming legislation regulating veterinary surgeons.

Table 1.21: Review and reform of 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 conducted by a panel of officials, comprising veterinarians, consumers and animal welfare interests. The review was completed in 1998.	The Government is developing its intended reforms with public consultation. The Government intends to make amendments in 2003.	Review and reform incomplete
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.		Meets CPA obligations (June 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 the approval of premises; and • removing restrictions on ownership, advertising and business names.	Act was amended accordingly in October 2001.	Meets CPA obligations (June 2003)

(*continued*)

Table 1.21 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
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. • repealing the restrictive aspects of the premises registration provisions, and replacing them with a voluntary code of practice; and • repealing the restrictions on ownership of veterinary practices by nonveterinarians.	The Government endorsed the review recommendations and intends to amend the Act in 2003.	Review and reform incomplete
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.	New legislation is before Parliament.	Review and reform incomplete
Tasmania	*Veterinary Surgeons Act 1987*	Licensing of veterinary surgeons and hospitals; reservation of practices; reservation of title	Minor review was completed in 2000. The review removed some restrictions on business practice but did not consider the composition of the Veterinary Board of Tasmania. Tasmania has undertaken to review this aspect of the Act.	Reforms were implemented by the *Veterinary Surgeons Amendment Act 2002*.	Does not meet CPA obligations (June 2003)

(*continued*)

Table 1.21 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
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 2003.	Review and reform incomplete
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, the reservation of title and the reservation of practices; • having additional consumer representation on the Veterinary Board; and • removing some advertising restrictions.	Advertising restrictions were removed in June 2003 and legislation to increase consumer representation on the Veterinary Board is being developed.	Review and reform incomplete

Mining

Coal mining and mining for metallic and non-metallic commodities generated a gross value of A$35.3 billion in 2000-01 (ABARE 2003, p. 32). 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. The mining industry in Australia is privately owned. Governments intervene principally through regulation (some of which is specific to the industry) that restricts competition in mineral and related markets. Governments also assist in matters such as research and the provision of information. Governments' CPA obligations relating to mining, therefore, are 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 apply for an extraction right (or mining lease or licence).

Extraction rights are also exclusive and generally nontradeable. Their term is 16 – 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 (a requirement that includes 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, thus, reducing uncertainty for miners and mine investors. As well as allocating ownership of resources, these Acts may cover the provision of transport, water and energy infrastructure. Agreement Acts are most common in Western Australia where there are 64 resource development agreement Acts in operation. Few Agreement Acts in Australia have been listed for NCP 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, (but without exploration rights being 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, so 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 these agreements are better addressed by means other than the CPA clause 5 obligations. Consequently, the Council does not consider that agreement Acts are a priority for NCP assessment.

Review and reform activity

Commonwealth

The Commonwealth Government 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 retaining this right and removing other restrictions on consent negotiations. The Government is considering its response to this and other reviews of the legislation. It is continuing to consult stakeholders in an effort to reach agreement on reforms, and it is awaiting responses from the Northern Territory Government and the Northern and Central land councils.

The Commonwealth Government reviewed its *Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act 1993* and Regulations in 1997. This legislation imposes a fee on uranium producers to recover the 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 the historical costs of these activities. It also recommended removal of the cap on fees paid by individual producers. In December 1997, the Government announced that it accepted all recommendations except the fee cap removal. It implemented the change to the fee via a Regulation.

Assessment

In its 2002 NCP assessment, the Council accepted that the Commonwealth Government has substantively met its CPA clause 5 obligations relating to the Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act and Regulations. The Council acknowledged that retaining the fee cap is unlikely to have a significant effect on competition.

The Council assesses the Government as not having met its CPA obligations relating to the Aboriginal Land Rights (Northern Territory) Act (and Regulations), however, because the Government did not respond to the review.

New South Wales

In its 1997 NCP assessment, the Council assessed New South Wales as having met its CPA obligations in relation to the *Coal Ownership (Restitution) Act 1990* and the *Coal Acquisition Act 1981*. New South Wales 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. It developed the *Coal Mine Health and Safety Act 2002* in response to findings concerning mine safety. The Act, passed by Parliament in December 2002, repealed the Coal Mines Regulation Act and complements the *Occupational Health and Safety Act 2000*. The reforms were developed in conjunction with extensive consultation among the Government, the Mine Safety Council and the industry. They considered competition policy principles, including those raised in a 2000 NCP issues paper on the Coal Mines Regulation Act.

The Government released a position paper in October 2002 on reform of legislation governing safety in metalliferous mines and quarries. Reforms proposed in the position paper accounted for competition issues raised in the 2001 NCP review of the Mines Inspection Act. The proposed reforms are similar to those for coal mines, aiming to ensure the particular hazards of metalliferous mine and quarry operation of are appropriately managed at each site. In 2003, the Government plans to introduce a draft Mine Health and Safety Bill (based on the position paper) which would repeal and replace the Mines Inspection Act.

New South Wales reviewed the licensing provisions of the *Mining Act 1992* as part of its licence reduction program. The review found that licensing had benefits and no adverse effects on competition. The Government amended the other provisions of the Mining Act after enacting the Coal Mine Health and Safety Act

Assessment

The Council assesses New South Wales as having met its CPA obligations in relation to the Coal Mines Regulation Act and the Mining Act, but not

meeting its CPA obligations in relation to the Mines Inspection Act, because the State has yet to conclude the reform of this Act.

Victoria

The Council found in its 2001 NCP assessment that Victoria had met its CPA obligations relating to the *Mineral Resources Development Act 1990*. In October 2001, Victoria released the report of an independent review of its *Extractive Industries Development Act 1995*. The review recommended removing the requirement for quarry operators to obtain a work authority from the Minister. Victoria accepted the majority of the review recommendations. Where it did not accept a recommendation (including the recommendation in relation to the work authority), it provided a public interest case for its position. Victoria will introduce draft legislation to implement the Government's response to the review in the Spring 2003 session of Parliament

Assessment

Because Victoria has not implemented reforms arising from the review of the Extractive Industries Development Act, the Council assesses it as not having met its CPA clause 5 obligations in relation to this Act.

Queensland

The Council found in its 1999 NCP assessment that Queensland's repeal of the *Coal Industry (Control) Act 1948* and Orders met the State's CPA obligations. In the 2001 NCP assessment, the Council assessed Queensland as having met its CPA obligations relating to the *Coal Mining Act* 1925 and the *Mineral Resources Act 1989*.

Western Australia

The Council found in its 2001 NCP assessment that Western Australia had met its CPA obligations relating to the *Mining Act 1978* and Regulations 1981.

South Australia

South Australia completed the review of its major mining legislation (namely the *Mining Act 1971,* the *Mines and Works Inspection Act 1920* and the *Opal Mining Act 1995*) in December 2002. The report recommended repealing s.13 of the Opal Mining Act which established the Major Working Area — an area of known opal diggings within the Coober Pedy precious stones field. Under

s.13, corporations are not permitted to enter the Major Working Area for the purposes of prospecting and mining. The review process did not identify any net public benefits from this restriction. South Australia intends to introduce an amending Bill to Parliament in the second half of 2003.

In addition, the review report recommended repealing the health and safety provisions in the Mines and Works Inspection Act because occupational health and safety legislation now deals with these matters. It recommended incorporating the remaining provisions of the Mines and Works Inspection Act in other appropriate legislation (such as the Mining Act).

Assessment

The Council assesses South Australia as not having met its CPA obligations in relation to mining legislation because the Government is still to complete its reform of legislation.

Tasmania

In its 2002 NCP assessment, the Council assessed Tasmania as having met its CPA clause 5 obligations in relation to the *Mineral Resources Development Act 1995*.

The Northern Territory

In its 2001 NCP assessment, the Council found that the Northern Territory had met its CPA clause 5 obligations relating to the *Mine Management Act 1990* and the *Uranium Mining Environmental Control) Act* by repealing the Acts and subjecting the replacement legislation to its gatekeeper process (see chapter 13, volume 2).

The Northern Territory's principal mining legislation is the *Mining Act 1980* which prohibits exploration and extraction activity without a licence or similar authority. The Government completed a review of this Act and announced its response to the review recommendations. Five recommendations require amendments to the Act, four require discussion with the industry before any further action and four require development of the supporting public interest arguments.

Assessment

The Council assesses the Northern Territory as not having met its CPA obligations in relation to the Mining Act because the Government is still to complete its reform of legislation in this area.

Table 1.22 details governments' progress in reviewing and reforming legislation regulating mining.

Table 1.22: 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	Provision for the granting of land to traditional Aboriginal owners; certain rights over granted land, including a veto over mineral exploration.	Review report was released publicly in August 1999.	The Government is considering a response to this and other reviews relating to the Act.	Review and reform incomplete
	Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act 1993 and Regulations	Imposition of a charge on uranium producers to recover cost of nuclear safeguards and protection activities	Review by officials was completed in 1997, recommending principally that the flat fee be replaced with an output-based fee. It also recommended removing the 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)
New South Wales	(1) *Coal Ownership (Restitution) Act 1990* and (2) *Coal Acquisition Act 1981*	(1) Provision for the restitution of certain coal acquired by the Crown as a result of the *Coal Acquisition Act 1981*; (2) vesting of all coal in the Crown	Review was unnecessary because the Acts were considered not to restrict competition.	Acts were superseded by the *Coal Acquisition Amendment Act 1997* and are 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) Regulation and inspection of mines, and regulation of the treatment of the products of such mines; (2) regulation of coal mines oil shale mines and kerosene shale mines	Review is under way as part of a general review of mine safety regulation. It is expected to be completed shortly.		Coal Mining Regulation Act — meets CPA obligations (June 2003) Mines Inspection Act — review and reform incomplete

(*continued*)

Table 1.22 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
New South Wales (continued)	*Mining Act 1992*	Licensing of mineral exploration and extraction	Licensing requirements were dealt with under the Licence Reduction Program which found that licensing had benefits and no adverse effects on competition.	The Government amended the other provisions of the Mining Act after enacting the Coal Mine Health and Safety Act	Meets CPA obligations (June 2003)
Victoria	*Extractive Industries Development Act 1995*	Prohibition on searching for quarry stone without a permit; prohibition on quarrying without a work authority from the Minister	Review was completed and released in October 2001. It recommended a number of reforms.	The Government accepted most of the review recommendations and intends to pass amending legislation in 2003.	Review and reform incomplete
	Mineral Resources Development Act 1990	Requirement that licensees must be 'fit and proper' and intend to work; licence conditions, including employment levels; maximum term for licences and restrictions on licence renewal; prohibition on work without an approved work plan; certification of mine managers	Review by independent consultant was completed in 1997, recommending the removal of subjective licence criteria, employment conditions and mine manager certification. The Government accepted most recommendations, at least in part.	Act was amended in 2000. Guidelines were prepared on the interpretation of licence criteria.	Meets CPA obligations (June 2001)

(*continued*)

Table 1.22 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Coal Industry (Control) Act 1948* and Orders	Provision for compulsory acquisition of coal; price regulation; requirement for approval for opening, closing and abandonment of coal mines		Act was repealed.	Meets CPA obligations (June 1999)
	Coal Mining Act 1925	Regulation of the operation of coal mines, particularly health and safety issues	Not listed for review.	Act was 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	Requirement for various permits, licences and leases	Act was not listed for review because not considered unnecessarily restrictive.		Meets CPA obligations (June 2001)
Western Australia	*Mining Act 1978* and Regulations 1981	Prohibition of mineral exploration or extraction without a licence; five-year term for exploration licences and 21 year renewable term for extraction (mining) licences; minimum expenditure conditions	Review by the Department of Minerals and Energy recommended the retention of all restrictions. The Government endorsed the review recommendations in December 2000.	No reform was required.	Meets CPA obligations (June 2001)

(*continued*)

Table 1.22 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Mining Act 1971*	Licensing; five-year exploration licence term and 21-year renewable term for extraction (mining) licences	Review was completed in December 2002.	Amendments are being drafted.	Review and reform incomplete
	Mines and Works Inspection Act 1920	Provision for mine inspector to order the cessation of mining	Review was completed in December 2002.	The Act will be repealed following amendments to the Mining Act.	Review and reform incomplete
	Opal Mining Act 1995	Prohibition on mining for precious stones without authority; sets one-year exploration licence term and 3-month (renewable for 12 months) extraction permit term	Review was completed in December 2002. It did not support the ban on corporate mining in the nominated area of Coober Pedy.	Amendments are being drafted.	Review and reform incomplete
Tasmania	*Mineral Resources Development Act 1995*	Licensing; sets five-year exploration licence term and 21-year renewable term for extraction licences	Review by government/industry panel was completed, recommending no change.	No reform necessary.	Meets CPA obligations (June 2002)
Northern Territory	*Mining Act 1980*	Licensing; six-year exploration licence term (renewable for two plus two years) and a 25-year renewable term for extraction licences	Review was completed.	The Government has announced its response to the review recommendations.	Review and reform incomplete

(*continued*)

Table 1.22 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory (continued)	*Mine Management Act 1990*	Regulation of occupational health and safety in mining	Act was not reviewed.	Act was 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	Control of uranium mining in the Alligator Rivers Region	Act was not reviewed.	See *Mine Management Act 1990*.	Meets CPA obligations (June 2001)

2 Transport

Transport services are central to Australia's economic performance. In its own right, the transport and storage sector accounted for 5 per cent of Australia's gross domestic product (ABS 2003b, table 47) and employment (ABS 2002b, table 19) in 2000-01. It is a significant input into nearly all other industries.

The National Competition Policy (NCP) covers all modes of transport. This chapter analyses the major elements of the Competition Principles Agreement (CPA) as it applies to the transport sector.

- Clause 5 of the CPA obliges governments to review and, where appropriate, reform legislation that regulates transport (for example, legislated licensing requirements that limit the number of taxis and hire cars).

- Clause 3 of the CPA obliges governments to ensure government-owned rail and port businesses apply competitive neutrality principles.

- Clause 4 of the CPA 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.

The Council of Australian Governments' (CoAG) reform of the road transport sector — which is aimed at improving the national consistency of regulation in areas such as vehicle registration, vehicle operations, and driver licensing — is discussed in chapter 10, volume 1. (Road transport is one of CoAG's four sector-specific reforms.)

Taxis and hire cars

Chauffeured passenger vehicles, which include taxis, hire cars and minibuses, provide flexible 24-hour, door-to-door transportation services to businesses and individuals. Passengers rely on these services for time-critical and location-specific commuting, particularly where alternative transport modes are infeasible or inconvenient. Taxi services are especially important for the less mobile in the community, including people who are elderly, have a disability or are infirm.

All States and Territories regulate the taxi and hire car industries. It is widely accepted that governments have a role in prescribing safety and quality standards. Accordingly, drivers need to meet minimum standards and

vehicles must be roadworthy. Some governments also subsidise taxi journeys for people with a disability to ensure they have reasonable access to affordable services. Generally, these types of interventions do not have significant impacts on competition.

Conversely, restrictions on the supply of taxi licences, regulated fares and limits on the capacity of hire cars to compete with taxis — such as a prohibition on their ability to respond to street hails — constitute restrictions on competition. Under the CPA, these areas of regulation should be subject to a public interest test. The taxi and hire car industry is almost unique among consumer service industries in having absolute restrictions on entry.

Nature and significance of restrictions[1]

Supply restrictions

State and Territory legislation generally provides for new taxi licences to be issued only on a discretionary basis. This has meant that new licences have been issued infrequently, often leading to a continuing decline in the number of taxis per head of population — a point emphasised in a number of NCP reviews. In Brisbane, for example, taxis per 10 000 population fell from around 20 in 1960 to less than 10 by 1999 (IPART 1999a, p. 75).

Over the post-war period, the rate of household car ownership has steadily increased and mass transit systems have improved, leading some to argue that fewer taxis per head of population is appropriate. There are, however, countervailing influences that have encouraged the use of taxis and hire cars: higher real incomes have given individuals greater capacity to use taxis; congestion and parking problems in major cities have escalated; air travel and tourism have increased substantially; and social trends such as dining out, coupled with increasingly stringent drink driving laws, discourage own driving in some circumstances.

The supply shortfall in Australian capital cities contrasts the supply in New Zealand cities, where taxi markets are deregulated. The number of taxis per 10 000 population in Australian capital cities ranges between around 8 and 11, compared with 29 in Auckland and 37 in Wellington (IPART 1999a, p. 75).

Also indicating the regulation-induced scarcity of taxis in Australia are the artificially high and escalating values attached to taxi licences — often in the range of A$200 000 to A$300 000. The Victorian NCP review found that the real value of a Melbourne taxi licence increased almost fourfold between 1975 and 1998 (KPMG Consulting 1999, p. 55). Subsequent Victorian Government

[1] The Council's 2002 Assessment provided a comprehensive commentary on the nature of taxi and hire car markets including the services provided, network effects and international experiences. This section draws, in part, from that detailed treatment.

estimates indicated further increases, with Melbourne licences achieving values of A$330 000 (Department of Infrastructure 2002).

Fare regulation

All State and Territory governments regulate maximum taxi fares. NCP reviews indicate that fares have risen approximately in line with the consumer price index. Such outcomes are consistent with pricing policies that seek stability and predictability in taxi fares.

In setting maximum fares, the relevant cost-based factors usually include operating costs, administration fees, booking/despatch membership fees, driver income and a return to the taxi owner to cover capital costs. Returns for lessees need to be sufficient to cover the cost of leasing the plate or, in the case of owners, sufficient to yield a return commensurate with the cost of the plate. Thus, there is a direct relationship between plate values and the price of taxi services. Findlay and Round (1995, p. 64) contend that the high cost of plates 'leads owners to press, through the regulatory system, for higher fares in order to provide a higher return on their investment in the plate'. High regulated fares increase taxi revenues, thus further increasing the amount that owners are willing to pay for taxi plates. If the price of plates increases, then the rise could again flow through to higher regulated prices for taxi services.

With the quantity of taxis being controlled, it is difficult for the price regulator to obtain the market information needed to set fares at the level that would reflect a competitive market.

Impacts of restrictions on competition

Impacts on consumers

The cost to the community of restricting licence numbers is considerable, as evidenced by nearly all NCP reviews. The combined restrictions of price regulation and controls on the number of taxis mean that passengers experience either higher prices or lower service quality or both. If prices are regulated down to a competitive level, then the demand for taxi services will be greater than supply and there will be longer waiting times and too few taxis in peak periods. If prices are allowed to rise to reflect fewer taxis and high plate values, then passengers will pay for taxi regulation through higher fares.

Supporters of regulation argue that the current restrictions on the taxi industry improve service quality and productivity. They also argue that fewer taxis avoids rampant price cutting so fares are set at a reasonable level and there is higher use of taxis, which improves their efficiency. Further, the

supporters of the current regulation argue that maintaining a realistic level of profitability in the industry means there is less pressure for cost cutting, so taxi owners and operators are less likely to compromise maintenance and service quality.

In practice, most analysts agree that entry barriers lead to both congestion/availability costs and higher fares. The Victorian NCP review estimated that the average price of a taxi journey was around A$3 higher than it would have been if the market were unrestricted; the review concluded that while the cost of longer waiting times for consumers cannot be estimated, such costs do exist (KPMG Consulting 1999, p. 86).

Both the Western Australian and ACT reviews indicated that the current restriction could be removed without compromising service quality. In Western Australia, customer representatives 'responded most positively to suggestions of increasing the number of taxis as the most effective means of improving customer service' (Market Equity 2003, p. 49).

Restricting the number of taxi licences does increase the use of vehicles but, as noted by KPMG Consulting (1999 pp. 83–4), this reduction in waiting time for drivers must be weighed against an increase in waiting time for passengers. Measures of taxi efficiency need to include an assessment of service quality and not rest on the level of vehicle use.

In late May 2003, the New South Wales Taxi Council applied to the Independent Pricing and Regulatory Tribunal (IPART) for approval of a 20 per cent surcharge on Sunday fares in response to a perception that 'a shortage of drivers is limiting the availability of taxis for unpopular and quiet shifts' (Morris 2003, p. 3). The cost of licences may be contributing to the lack of interest in providing taxi services during periods of low demand.

Overall, the Victorian NCP review estimated that the annual cost to the community (based on then taxi plate values of A$250 000) of taxi supply restrictions was A$72 million, comprising transfers from passengers to plate owners of A$66 million and deadweight losses of A$6 million[2] (KPMG Consulting 1999, p. 93). In a similar vein, the ACT review estimated the annual transfer from passengers to plate owners to be A$5.6 million, and the deadweight loss to be approximately A$408 000 (Freehills Regulatory Group 2000, pp. 149–51). For the Sydney market, the Productivity Commission estimated prevailing lease rates in 1999 led to an annual impost of A$75 million on Sydney taxi users (PC 1999c).

[2] The deadweight loss arises because fewer taxi journeys are taken than would be the case in a market with unregulated supply, because higher prices are charged in the restricted market.

Impacts on industry participants

High plate values have put taxi licence ownership out of the reach of most taxi drivers. The key beneficiaries of the barriers to entry are licence plate owners, many of whom (the majority in some jurisdictions) are investors that have no further involvement in the industry. Many of those who obtained taxi licences in the past and/or previously disposed of plates have appropriated substantial windfall gains from the scarcity value arising from licence restrictions. Others who recently purchased licences at full market value are probably achieving only a market rate of return.

Fares have tended to move with the consumer price index whereas plate values have risen sharply in some jurisdictions, contributing to a squeeze on driver incomes. Most NCP reviews indicated that high values of taxi licences coincide with poor driver remuneration. Many industry participants are concerned that removing the controls on the number of taxis would further reduce driver incomes — a problem that would be exacerbated if fares were deregulated and subsequently fell. This view does not take account for lease costs falling or demand increasing due to the greater availability of taxis and improved service responsiveness.

Lease costs currently range around A$300 to A$400 per week (reaching A$500 per week in the ACT in 1998). The 1999 NCP review conducted by IPART in New South Wales found that the 1998 average cost of a plate lease was around A$18 700 per annum or A$360 per week. This amount was equivalent to around 27 per cent of total operating expenses, including the plate lease cost (IPART 1999b, pp. 60–1). A fall in lease costs can have a significant impact on the cost of operating a taxi business.

Unrestricted entry would also provide more opportunities for drivers to own taxis and be self-employed, rather than working for licence owners. These opportunities, along with the reduction in lease costs and the need for taxi operators in a more competitive environment to attract good drivers, could improve the low driver incomes.

The outcome from this array of sometimes conflicting forces is uncertain. What is clear, however, is that current regulatory arrangements are delivering poor outcomes for drivers and high returns for long standing investors.

Regulatory constraints on taxi alternatives

The hire car sector focused initially on special purposes such as weddings, but over time has broadened its services so it now competes with taxis in some market segments. The key competitive restriction on hire cars is the limit on their numbers. Some jurisdictions, however, have allowed relatively unrestricted entry to the hire car sector, possibly as an indirect means of addressing taxi shortages.

A further restriction on hire cars is the prohibition on rank and hail services (apart from limited opportunities to rank at airports, such as in the ACT and Tasmania). Accordingly, hire cars generally compete with taxis only for pre-booked and phone despatch services. Other restrictions, which vary across jurisdictions, include regulated minimum fares for hire cars (which are set higher than taxi detention rates) and minimum hiring periods (typically one hour). Most jurisdictions also require hire cars to be of higher quality than taxis.

Victoria and the ACT do not regulate hire car fares, and the NCP reviews in these jurisdictions suggested that hire car rates are at a small premium to taxi fares. Hire cars' share of the small chauffeured passenger vehicle fleet is higher in Victoria and the ACT than in jurisdictions that regulate hire car fares. The regulated fare restrictions appear to have a direct impact on the ability of hire cars to compete with taxis, especially in the price-sensitive segments of the market.

NCP review and reform activity

All jurisdictions have completed NCP reviews of the competition restrictions in their taxi and hire car legislation against the CPA clause 5 principles. The Victorian, Western Australian, ACT and Northern Territory reviews recommended removing restrictions on taxi licence numbers and paying compensation to existing plate holders through licence buybacks. The New South Wales and Tasmanian reviews recommended transitional approaches involving annual increases in licence numbers. The Queensland review recommended retaining restrictions on taxi licence numbers. The South Australian review noted that the legislation in that State gives the Government the option of increasing the number of taxi licences by up to 5 per cent per year.

Nevertheless, at the time of the Council's completion of the 2002 NCP assessment report in August 2002, all States and Territories still had licence restrictions that affected competition in the market for chauffeured private vehicles. None of the jurisdictions was considered in the 2002 NCP assessment to have satisfied its CPA clause 5 obligations. No government had demonstrated that the benefits of the remaining restrictions exceeded the costs, nor that the objectives of taxi and hire car legislation could be achieved only by restricting competition.

The slowness (or absence) of reform in several States and Territories may reflect concerns about the impact of rapid change on the financial position of licence holders and about the potential effects for government finances if compensation to plate owners is funded under the Budget.

To encourage State and Territory commitment to reform, the Council wrote to governments on 10 October 2002, stating that while the public interest evidence from governments' NCP reviews supports the immediate removal of supply restrictions, a more gradual transition to open competition could be

consistent with CPA clause 5. The Council outlined the following four broad principles for reform that would be consistent with governments' clause 5 obligations.

1. There should be regular (at least annual) releases of new licences, with sufficient new licences being released to improve the relative supply of taxis in the short term and medium term, given historical demand trends.

2. There should be a commitment to independent and regular monitoring and review of reform outcomes (at least every two to three years), and to additional action if the demand/supply imbalance is not improving.

3. There should be immediate reform of the other chauffeured passenger transport providers (such as hire cars and minibuses) to increase competition.

4. There must be strong commitment that the program of staged licence increases will proceed.

The principles reflect the Council's broad objectives of ensuring reforms deliver real benefits to consumers and enabling governments to follow a staged program of reform through to conclusion.

An 'off balance sheet' compensation model

Some governments indicated that they are considering an approach to taxi reform that involves compensation for licence holders in a manner that does not have an impact on their Budgets. The proposal involves devolving to financial institutions the responsibility for a compensation payout and the subsequent recouping of its cost. The financial institution funds the licence buyout and the government issues new taxi licences for an annual fee, which flows to the financial institution's 'taxi pool'. Over time, the financial institution recoups its initial outlay plus an appropriate return.

Such an arrangement would overcome the fiscal restraint on reform by those governments that consider that licence owners should be compensated for the liberalisation of entry restrictions. The community benefit from such an approach depends on the design features of the proposal.

Price benefits

Setting the annual licence fee below prevailing lease rates for taxi licences would reduce the pressure on regulated maximum fares and possibly induce some price competition in the absence of entry restrictions. Conversely, setting the licence fee above prevailing lease rates would create upward pressure on taxi fares. Irrespective of the magnitude of the licence fees imposed, the full consumer price benefit could not be realised until the financial institution had recouped its investment and the compensation 'surcharge' in licence fees was removed. This would probably take many years

— the higher the licence fee, the shorter the program's duration and vice versa.

Service quality

The deferral of consumer price benefits would be offset by a rapid improvement in the availability of taxis flowing from the removal of entry barriers. This improvement would address the service quality and congestion costs associated with scarcity (particularly during peak periods). In principle, the taxi pool proposal involves deferring price benefits and improving service quality because the compensation of licence owners for the market value of their licence plates would be accompanied by a complete deregulation of entry restrictions. For the taxi fund model to provide a return to the community, governments would need at a minimum to ensure compensation was accompanied by genuine liberalisation of entry restrictions. Retaining residual entry restrictions — possibly premised on a perceived need to bring about an 'orderly' transition — would dissipate the benefits of reform. If the principles or benchmarks underlying such a transition were restrictive, then taxi passengers might not realise any real benefits from the reforms. Moreover, the commercial viability of the taxi fund proposal would be at risk if potential entrants were denied access to a licence.

Problems can also arise if a government directly funds a buyback of licence plates without significantly increasing the number of taxis. The potential price and service benefits will result only if taxi numbers are allowed to increase to redress the taxi shortage and then continue to increase in response to future changes in the demand for taxis. If government regulation restricts such increases, then despite the government incurring significant costs from undertaking the buyback and compensating existing plate holders for the proposed reform, no ongoing benefits would emerge for consumers and plate values would again rise.

The States and Territories made varying degrees of progress in taxi and hire car reforms between the 2002 and 2003 NCP assessments. Some jurisdictions have made significant reforms, reflecting their recognition that reforms would be finally assessed in 2003. Other jurisdictions continued to find it difficult to embrace taxi reforms consistent with the four principles, notwithstanding the benefits that would accrue to consumers.

New South Wales

New South Wales limits the number of taxi and hire car licences through the *Passenger Transport Act 1990*. The NCP review of the Act by IPART was completed in November 1999. The review report concluded that 'restricting the number of taxi and hire car licences does not appear to generate any significant benefits for passengers, drivers, or anyone working in the industries other than the licence owners' (IPART 1999b, Foreword). It recommended immediately freeing licence restrictions in the hire car sector,

annually increasing the number of taxi licences by 5 per cent between 2000 and 2005 (that is, approximately 300 new taxis per year), and conducting a further review in 2003. The review concluded that taxi and hire car restrictions are not in the public interest.

By mid-2002, the Government had only partially responded to these recommendations, releasing 60 six-year taxi licences and 120 wheelchair-accessible taxi licences (a small increase on the almost 6000 taxis in New South Wales). The Government also reduced the annual fee for hire cars from A$16 100 to A$8235 in September 2001. This reduction encouraged a shift from perpetual plate holdings to annual licences because the cost of perpetual plates was becoming prohibitive at A$150 000. New South Wales had the smallest ratio of hire cars to population, indicating scope for further relaxing the limits on, and reducing the cost of, hire car operations. As at mid-2002, the Government was negotiating with the industry on the staged release of taxi licences. Taxi plates were trading at the time at around A$250 000, suggesting that there was a shortage.

A late 2002 survey of taxi users in five States indicated that metropolitan Sydney had the highest proportion (38 per cent) of customers who had been unable to obtain a taxi at some point during the previous six months. The corresponding proportion in Victoria was 30 per cent and, in the other three States surveyed, it was around 20 per cent (Colmar Brunton 2003, pp. 7–8).

The State's 2003 NCP annual report noted that the uptake of new taxi licences over the preceding year had remained slow. It noted industry advice that the downturn in the tourist market had led to a flattening in demand in the taxi market. The New South Wales Government did not implement any reforms involving the regular release of new taxi licences. Perpetual licences are issued on demand at market value, but the high price of plates contributed to no applications being received in recent years. Over the next year, up to 319 new unrestricted taxi licences are expected to be issued as a result of the adjustment package being offered to the holders of perpetual hire car licences (who will be able to surrender these licences for an equity component in a taxi licence).

New South Wales reported in June 2003 that the value of taxi plates was approximately A$290 000. It stated in its 2003 NCP annual report that it may bring forward a review of market conditions and regulation (originally scheduled for 2005). New South Wales subsequently advised the Council that IPART would be asked in June 2003 to model options for taxi and hire car reform.

The Council understands that the only remaining restriction on the issue of annual hire car licences is the willingness of operators to pay the A$8235 annual fee. While New South Wales substantially reduced this fee from A$16 100 — and thus reduced the barriers for new entry — the remaining charge is still a significant deterrent to new businesses.

Assessment

The New South Wales review concluded that the restrictions on competition in the Passenger Transport Act are not in the public interest and thus recommended 5 per cent annual increases in taxi licence numbers between 2000 and 2005. The New South Wales Government did not introduce the reforms as recommended by the NCP review. Next year, however, it expects to increase the number of taxi licences by up to 319 as a result of the hire car adjustment package, although it made no firm commitment to ongoing reform. The IPART is expected to conduct a review of reform options, but the Council has no details of that review. Finally, there has been a significant reduction in the competition restriction in the hire car sector, but the remaining restrictions are still a barrier to entry. While the New South Wales Government stated that it 'remains committed to advancing reform in the taxi sector', the Council concludes that it has not met its CPA clause 5 obligations to review and reform taxi and hire car legislation.

Victoria

Victoria's *Transport Act 1983* and associated Regulations provided for licensing controls on entry into the taxi and hire car industries and for the regulation of driver qualifications, taxi fares, vehicle standards and safety devices. Victoria completed its NCP review of restrictions on taxi licensing in July 1999. The review, by KPMG Consulting, calculated that existing taxi supply restrictions cost consumers A$66.1 million per year and lead to A$6 million per year in deadweight losses to the economy. It recommended removing all restrictions on the number of taxi and hire car licences, and buying back 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 a 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 annual release of 100 new peak period taxi licences, of six year duration, for the next 12 years;
- the annual conversion of 50 peak period licences into full licences, for 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;
- the release of new hire car licences at a fee of A$60 000 (about 10 per cent greater than the market price in 2001), reviewed two-yearly by the Essential Services Commission (to consider whether the licence fee is a barrier to entry);

- a 20 per cent surcharge on taxi fares between 1 am and 6 am (with 100 per cent of the surcharge to be 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 3273 in 2002 to 4773 in 2014.

The Victorian Government introduced the Transport (Further Miscellaneous Amendments) Bill to Parliament on the same day. This Bill was enacted on 12 June 2002. It delivers some elements of the reform package, including some with implications for the supply of taxis and hire cars — namely, the imposition of a late night tariff on taxi fares (to encourage the provision of services at this peak time), the removal of the public interest test for hire cars and the introduction of an entry fee for new hire car licences (with the amount of the fee to be gazetted, but initially A$60 000). As at mid-2002, Victoria had started implementing the measures announced in May, but not made the first release of additional plates.

In the second half of 2002, the Victorian Government accepted applications for the first release of 25 new peak period licences. It released these licences in January 2003. Over the following six months, applications were invited for two more batches of 25 plates each, and by late July 2003 there were 66 new peak period taxis on the road. The Government is committed to releasing 100 new licences by spring 2003.

Legislative amendments relating to driver probity were introduced to Parliament and passed during May 2003.

Assessment

The Victorian Government implemented measures that are consistent with the four broad principles for staged reform in the taxi and hire car industry. It began a process of annually introducing new licences over 12 years and publicly indicated its commitment to these annual increases. It also committed to review the impact of these increases and to adjust the rate of annual increase if the supply/demand imbalance does not improve. It is making new hire car licences available on demand (although the licence fee is still significant) and brought forward the timing of the Essential Services Commission's independent review of the hire car licence fee. In the June 2002 enactment of the Transport (Further Miscellaneous Amendments) Bill, the Government removed the public interest test requirement for the release of a hire car licence. The Council thus assesses that Victoria has complied with its CPA clause 5 obligations in relation to taxis and hire cars, and that the current phasing arrangements are in the public interest.

Queensland

Queensland's *Transport Operations (Passenger Transport) Act 1994* limits the number of taxi and hire car licences, enabling Queensland Transport to determine the number that it believes are necessary. Queensland released its NCP review of the Act in September 2000. The review report recommended retaining the existing arrangements for issuing taxi and hire licences, arguing that easing supply constraints would increase travel costs (particularly in outlying areas and for services to airports) and reduce the supply of wheelchair-accessible taxis.

The Council considered Queensland's review of taxi legislation in its 2002 NCP 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 conclusions 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.* (NCC 2002, p. 5.30)

The proposed taxi reforms focus on improving the quality of services offered by taxi companies. The report recommended that the hire car licences be made available at a price that reflects the value of licences (Government of Queensland 2000, pp. xviii–xxviii). Such a price would be likely to ensure few new hire car licences would be issued.

By mid-2002, the Queensland Government had not made any substantial announcements since the completion of the NCP review in 2000. The Government had requested a report by Queensland Transport, but the report was expected to address service quality issues rather than supply constraints. Queensland's 2003 NCP annual report stated that the department's report would focus on 'measures to enable booking companies more flexibility and responsibility in controlling the resources they need to provide taxi services', and indicated that the department would recommend policy proposals to the Government in April 2003. This focus indicated that the Government accepts the general recommendation to retain supply restrictions.

Queensland informed the Council in early July 2003 that Queensland Transport is developing a submission outlining options for taxis and limousines, including options based on the four broad principles for reform.

Assessment

Queensland's 2000 NCP review did not demonstrate a public interest case for retaining the restrictions on taxi and hire car licence numbers, but the Government did not introduce any significant taxi and hire car reforms after the review. Its approach to taxi reform, therefore, is not consistent with the four broad principles of reform that the Council circulated to States and Territories in October 2002. The Council concludes that Queensland has not complied with its CPA clause 5 obligations in relation to taxi and hire car legislation.

Western Australia

Western Australia's *Taxi Act 1994* allows the Director-General of Transport to prescribe the number of taxi licences that will be issued per head of population in different 'control areas', set fare schedules, establish driver qualifications and vehicle standards, and impose conditions on the transfer of taxi plates. Western Australia does not restrict the number of hire car licences, and hire car licence fees are nominal. As at mid-2002, however, several restrictions impeded the capacity of hire cars to compete with taxis. Not only were hire cars required to accept only jobs that had been booked by phone, but the bookings had to be for at least an hour and the hire cars had to charge a detention fee that was 30 per cent higher than that charged by taxis (a difference that increased to more than 64 per cent in September 2002).

The NCP review of the Western Australian taxi industry was completed in August 1999. It recommended removing restrictions on taxi licence numbers, retaining maximum fares for a transitional period following which they should be reviewed, and retaining safety and vehicle standards. Western Australia established a steering committee of officials to respond to the NCP review. The committee recommended more gradual reform, involving the issue of 100 new peak period licences and 50 new wheelchair-accessible taxi licences. The Government put 25 wheelchair-accessible taxi licences and 100 peak period licences to tender in early 2000. The peak period licences were only for Friday and Saturday nights and for vehicles that could carry six passengers or more. These restrictions discouraged the uptake of the licences, with only 35 being issued following the tender.

As at mid-2002, the Western Australian Government had not conducted any further tenders or other taxi licence issues. Data collected by the Department of Planning and Infrastructure from taxi companies suggest that the lack of new licence issues exacerbated the shortage of taxis. In the second quarter of 2002, the proportion of 'as soon as possible' bookings that were not covered in the peak period of the day was 5.3 per cent, up from 4.6 per cent a year earlier. The proportion of taxis not arriving to pick up wheelchair passengers who had made phone bookings was similar. There was a significant proportion of jobs with long waiting periods, especially in peak times and especially for wheelchair customers. A market value of more than A$200 000 for an existing taxi plate also indicated an ongoing shortage of taxis in mid-

2002. Over the following year, there was no major release of new licences and service performance remained much the same.

On 26 February 2003, the Western Australian Government convened a forum with industry and consumer representatives to discuss the implications of the NCP and the four principles for gradual, staged reform. Following this forum, the Government established a review group comprised of a Parliamentary Secretary and representatives of the Department of Planning and Infrastructure and the Department of Treasury and Finance.

The Government announced reforms on 9 July 2003 that involve leasing 50 new nontransferable taxi plates in Perth (around 4 per cent of the taxi population) during 2003 and consideration of buying back existing taxi plates from those plate owners who wish to sell them, with the redeemed plates being made available for lease as nontransferable plates. The Government proposed that the lease rates will be A$235–285 per week, which compares with the market lease rate of A$345 per week. The buyback proposal would involve:

- the purchase of plates at market price[3] or the price that the owner paid for them, whichever is higher; and
- establishment of a fund by a financial institution to cover the cost of the voluntary buyback. The fund would be repaid over time from the cashflow generated by the issue of new licences. The payback period is estimated at 17–21 years (Giffard 2003, pp. 39–40).

The buyback offer would end after three years.

A 12 August 2003 statement to Parliament by the Minister for Planning and Infrastructure indicates that the Government will not proceed with a buyback unless industry representations force a reconsideration.

The Government intends to release a smaller number of new plates in following years, 'depending on consumer demand'. It believes that the increased taxi numbers will improve consumer service and 'give more drivers a chance to acquire their own plates' (MacTiernan 2003). In announcing the Government's proposed taxi reforms, the Minister for Planning and Infrastructure stated that Western Australia's taxi legislation will require substantial amendment to implement the reforms. The Taxi Amendment Bill 2003 was introduced on 19 August, providing for the Government to issue licences through leases in addition to the current arrangements of selling licences by tender.

The Western Australian Government has not announced any reforms to the hire car sector. While there are no restrictions on hire car numbers, the minimum booking time and price regulation do restrict competition.

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[3] The review report that accompanied the Government's statement indicated that the market price will be the average price paid for plates in 2002.

Assessment

Western Australia intends to release some new plates in 2003 and has committed to further increases in later years. These further releases will be based on the monitoring of performance indicators (as currently occurs). The Council suggests that Western Australia consider further reform to hire car regulation too.

The Council considers that Western Australia has made some progress towards taxi reform. The Council assesses that Western Australia has not completed its review and reform activity in relation to taxis and hire cars.

South Australia

South Australia's *Passenger Transport Act 1994* allows the Government to restrict the number of taxi licences on issue; it can issue up to 50 new licences per year. The Act also allows the Government to set maximum taxi fares. South Australia has allowed unlimited entry of hire cars since 1991, subject to the payment of fees for operator accreditation (around A$250) and the vehicle (around A$1110). Hire cars account for a significant proportion of prebooked services in Adelaide.

Halliday–Burgan conducted an NCP review of the Act in 1999. The review concluded that there is no need to change the Act because the Government has the discretion to increase the number of taxi licences. Between the 1999 review and mid-2002, however, the South Australian Government had not used this discretion. The Council's 2002 NCP assessment stated that 'the mere existence of the legislative discretion is not sufficient for compliance with CPA clause 5 obligations'. Factors that indicate a shortage of taxis in Adelaide include the results of a survey of passengers conducted by the Consumers Association of South Australia in early 2003. Almost half of the respondents gave a low rating to the punctuality of Adelaide taxis. A large proportion of respondents were concerned about drivers' reluctance to accept short trips and to provide noncore service such as assisting people who are elderly or have a disability to enter or alight from taxis.

The South Australian Government promised in the 2002 election that there would be no new taxi licences in its first term of office. In information provided to the Council in mid-June 2003, the Government indicated that it is still considering its response to the NCP review. This information showed that the number of general taxi licences in Adelaide has remained unchanged at 920 since 2001. The number of wheelchair-accessible taxi licences had increased from 68 in 2001 to 73 in 2003. The average value of taxi plates sold in the first half of 2003 was A$140 000.

Assessment

South Australia's hire car arrangements have been consistent with the Council's third broad principle (relating to other chauffeured passenger transport) for some years. The Government has not announced, however, that it will change its arrangements that provide for the ad hoc release of new taxi plates by the Minister. Further, plate numbers have stagnated. Despite the contribution of hire car deregulation, the value of taxi plates and the response of passengers to the survey on service quality indicate that significant restrictions on competition remain. South Australia has not met its CPA clause 5 obligations in relation to taxis.

Tasmania

Tasmania did not introduce any reforms between the end of its NCP review in April 2000 and the Council's NCP assessment in mid-2002. As at that time, the *Taxi and Luxury Hire Car Industries Act 1995* allowed the Tasmanian Transport Commission to issue new taxi licences whenever the value of a licence exceeded a 'capped value' set by regulation. A concern with this arrangement is that it is difficult to estimate which plate values indicate that supply shortfalls are becoming significant.

The 2000 NCP review noted that no new licences had been issued since 1995. It recommended the annual issue of new licences (at a level of 5 per cent of existing licences) via a tender. While licence issues under such a tender would have been subject to reserve prices, they would have been more responsive to tightening supply conditions. By mid-2002, the Tasmanian Government had not changed the restrictive arrangements for the issue of new taxi licences.

Tasmania removed some restrictions on the entry of hire cars in 2000, especially the requirement that they charge a minimum fare of A$40. It allowed unlimited entry of new hire cars, subject to a A$5000 one-off fee.

In correspondence with the Council in August 2002, Tasmania acknowledged that it was yet to consider the recommendations of the regulatory impact statement following the 2000 NCP review. Tasmania asked the Council whether implementation of the NCP review recommendations — particularly the proposal for an annual tender of a 5 per cent increment in the number of licences — would meet the State's NCP obligations. The Council replied in October 2002 that action in line with the review recommendations would meet the CPA obligations, provided Tasmania committed to a further review of the effects of the reform two years after its implementation. Tasmania advised in August 2003 that the Government is expected to consider its response to the 2000 NCP review in September 2003.

Assessment

Tasmania's review identified taxi market reforms that are consistent with the broad principles outlined by the Council in October 2002. If the Government committed to annual increase taxi numbers and to review the market situation in two years, then the reforms would be consistent with its CPA clause 5 commitments. For the moment, however, the Council assesses the Tasmanian taxi reforms as incomplete.

The ACT

The ACT's *Motor Traffic Act 1936* provides for the issuing of taxi licences, enabling the Minister to determine the maximum number of taxi and hire car licences and to set maximum taxi fares. The ACT conducted two reviews of the taxi and hire car industry. The first review report was prepared by the Freehills Regulatory Group and completed in March 2000, recommending that taxi and hire car supply restrictions be removed. The second review was undertaken by the Independent Competition and Regulatory Commission (ICRC) and released on 12 June 2002, also recommending that restrictions on entry to the ACT taxi and hire car industries be removed. The completion of this report in June 2002 gave the ACT Government insufficient time to announce reforms before the Council completed its 2002 NCP assessment.

The ICRC review found that no new taxi licences had been issued since 1995, although 20 wheelchair accessible taxis were issued in the April 2000–June 2001 period, and 16 Queanbeyan taxis have been able to operate freely in the ACT since July 2001. This slow growth in supply was likely to have contributed to the high value of taxi plates in the ACT, which had been in the range of A$250 000 to A$270 000 over the previous 12 months. By mid-2002, the ACT had not issued any new hire car plates for 20 years.

The introduction of the Public Passenger Service legislation in 2001 removed the reserve price for a taxi licence and the limit on the number of licences that may be held by one person. The legislation also introduced operator and taxi network accreditation to set minimum service standards, increase safety and accountability of taxi services.

On 10 December 2002, the ACT Minister for Urban Services announced reforms for the taxi and hire car industry. An additional 5 per cent of taxi licences will be issued each year, subject to a reserve price that will be based on the ACT Valuer-General's valuation of market prices in November 2001. The reserve price will be set at 90 per cent of the market value. If the average price at auction is more than 95 per cent of the market value, then a further 5 per cent of licences will be released. In the following years, market value will be the average sale price from the previous year's auction. The maximum number of licences released in any year will be 10 per cent of the current fleet. New hire car licences will be released according to a similar formula, but at a rate of 10 per cent for the first two years. The ICRC will review the reforms after two years and, thereafter, every three years.

Legislation was introduced to the ACT Legislative Assembly in April 2003 to establish the regulatory power to allow the annual increases in licence numbers through auction arrangements. The Road Transport (Public Passenger Services) Amendment Bill 2003 would remove existing legislative provisions that empower the Minister to determine the maximum numbers of taxi and hire car licences. Draft regulations were circulated to industry representatives in May and June 2003. The ACT Legislative Assembly debated the Bill in mid-June 2003 and directed it for consideration by an Assembly Standing Committee.

The Valuer-General determined a valuation for taxi and hire car licences and the Government scheduled the first auction of licences for August 2003. This auction has been deferred by the Assembly's referral of the legislation to a standing committee, which has been given until December 2003 to make its report.

Assessment

The ACT's intended taxi and hire car changes are broadly consistent with the principles for reform that the Council circulated to jurisdictions in October 2002. The Council is concerned, however, that the numbers of new taxi and hire car licences that will be issued at the first auction may be less than the 5 per cent and 10 per cent respectively provided for in the reforms. The reserve price has been set at 90 per cent of the value of the plates before the proposed reforms were announced. Given that the industry is aware that reform is proceeding, the market value of taxi plates is likely to have already fallen. The reserve price may be close to or even above the current market value. If there is limited take-up at auction due to the level of the reserve price, then the Council believes that the ACT should reconsider the design of the auction conditions to attract new participants to enter the industry. The ACT did not complete its taxi and hire reforms and it is not clear whether (and in what form) the amending legislation will be passed and when the proposed auctions will result in increased taxi and hire car numbers. The Council thus assesses the review and reform activity in this area as incomplete. In future NCP assessments, the Council may revise its assessment of the adequacy of the reform program if an increase in taxi and hire car numbers does not result.

The Northern Territory

In its 2001 NCP assessment, the Council assessed that the Northern Territory — which removed its restrictions on taxi and hire car numbers in January 1999 and introduced a buyback program — had complied with its NCP obligations. In November 2001, the Northern Territory imposed a temporary (six-month) cap on the numbers of taxi, hire car and minibus licences. The Government released a discussion paper in May 2002, proposing the establishment of a board (with industry membership) that would advise the Government on certain regulatory issues, including the size and composition of the industry.

The temporary cap was still in place in mid-2002 and the Council concluded in its 2002 NCP assessment that the Territory would no longer comply with its CPA clause 5 commitments if it introduced new restrictions on competition without an adequate public interest justification. The Council indicated that it would reassess the Territory's performance in 2003, by which time the end of the cap and the role of the board were expected to be clarified.

The Minister for Transport and Infrastructure announced on 16 October 2002 that the temporary cap on licence issues would be extended to the end of December 2002, after which there would be no number controls on taxi, minibus and hire car licences. (The temporary cap was subsequently extended to the end of February 2003.) The Minister announced that minibuses would be allowed to operate like taxis, responding to street hails. The private hire car category would be phased out by July 2003 and replaced by 'executive taxis' (higher standard vehicles that can ply for trade like a taxi but charge higher fares) and 'limousines' (higher standard vehicles for pre-booked travel only). The Minister also announced that a Commercial Passenger Vehicle Board, with industry and consumer representation, would be established to advise the Minister.

The first stage of the reforms was implemented when the Commercial Passenger (Road) Transport Amendment Act came into effect on 1 March 2003. This Act established the Commercial Passenger Vehicle Board, set standards for driver training and introduced the executive taxi category. The Government introduced the second stage of reforms in the Commercial Passenger (Road) Transport (Consequential Amendments) Bill, which the Minister presented to Parliament on 25 February 2003. This legislation established the limousine category and allowed taxis and minibuses to stand at bus stops outside bus service hours.

On 3 June 2003, the Minister announced further changes to taxi and hire car arrangements, which he said the Government would introduce to Parliament in the June sittings. He said that the changes are 'designed to accommodate industry concerns articulated in the final round of public consultation on the issues' (Vatskalis 2003). The Minister announced that the number of taxi licences would be capped in the Darwin and Alice Springs regions — where the number would fit within a ratio of one licence for every 900 people (implying small falls from current taxi numbers in those regions) — and that cap would be reviewed after 12 months.

Despite the recent increase in the availability of taxis, the cap results in a significant restriction on taxi numbers. In 1999, IPART (1999a, p. 75) provided data on taxis per person in some Australian and New Zealand cities. At that time, both Sydney and Hobart had fewer people per taxi (approximately 880 and 890 respectively) than the current level regulated in the Northern Territory. Taxi availability in Auckland and Wellington was considerably higher, where one taxi served 340 and 290 people respectively. Given that the Northern Territory taxis also serve a significant number of tourists, who are not included in the population estimates, this restriction on taxi numbers is significant.

The Minister also announced that the private hire category would be reintroduced (with licences costing A$6000 per year) and that executive taxis would not be introduced (Vatskalis 2003). Private hire cars and limousines would be able to use mobile phones to communicate with their clients and their bases. (Earlier in 2003, the Minister had foreshadowed possible restrictions on such mobile phone use.) The changes announced by the Minister were implemented by amendment to the Commercial Passenger (Road) Transport Amendment Act and the Commercial Passenger (Road) Transport (Consequential Amendments) Bill.

Assessment

By restoring unlimited entry to the taxi and other chauffeured passenger transport markets in March 2003, the Northern Territory removed a key restriction on competition. As part of this process, the Government compensated existing licence holders for the fall in licence value as a result of the reforms. The Council is concerned, however, about the reintroduction of caps on taxi numbers in the Darwin and Alice Springs regions. While the Government undertook to review the cap in 12 months, the restriction represents a significant constraint on competition. The annual cost of hire car licences also represents a significant restriction on competition. The Council assesses that the Northern Territory has not complied with its CPA clause 5 obligations for taxi and hire cars.

Table 2.1: 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: • an annual increase (5 per cent) in licences (limited term, non-transferable) during 2000–05; • no restrictions on hire car licences to increase competition; • further review in 2003; and • continuing fare regulation.	The Government supported but did not implement the recommended 5 per cent annual increase in licences. It released 60 restricted taxi licences and 120 wheelchair-accessible taxi licences in 2000. The take-up of the new licences was low. There has been a partial deregulation of hire cars via a substantial reduction in the annual hire car licence fee and relaxation of vehicle standards. There is no firm commitment to ongoing reform.	Does not meet CPA obligations (June 2003)
Victoria	*Transport Act 1983*	Limitation on numbers of taxis and hire car licences	Review was released in October 2000. It recommended: • the removal of entry restrictions for taxis and hire cars; • the buyback of existing licences, to be funded by annual fees on operators; • continuing fare regulation, pending the development of a competitive market; and • improvement in the quality of fare regulation via the transfer of responsibility to an independent economic regulator.	The Government announced reforms in May 2002, including the annual issue of 100 new peak period licences for 12 years, additional licences in years seven to 12 via the conversion of peak licences to full licences, and a reduction in restrictions on hire car numbers, subject to an entry fee of A$60 000.	Meets CPA obligations (June 2003)

(*continued*)

Table 2.1 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.	Queensland Transport is developing policy options that the Government expects to consider in the second half of 2003. Queensland has not introduced any significant reforms or made a commitment to future reform.	Does not meet CPA obligations (June 2003)
Western Australia	*Taxi Act 1994*	Limitation on numbers of taxi licences	Review was completed in August 1999. It recommended: • the removal of licence supply restrictions; • the use of substantial training requirements to regulate entry; • similar requirements for the hire car industry; • the payment of full compensation to existing plate owners; and • the issue of new licences at a maximum rate of 20 per cent per year on a 'first come, first served' basis.	Peak period licences were tendered in 2000, but the take-up was low due to restrictive conditions. A February 2003 taxi forum was followed by a review, with its findings released in July 2003 together with the Government's decision to lease 50 new taxi plates in 2003 and smaller numbers in following years. Legislative amendment to allow leases introduced in August 2003.	Review and reform incomplete

(*continued*)

Table 2.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Passenger Transport Act 1994*	Limitation on numbers of taxi licences (no restrictions on hire car numbers)	Report was completed in November 1999. It recommended: • retaining existing restrictions (for example, 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 • relying on competition from hire cars, once some restrictions are removed.	The Government did not respond to the 1999 review.	Does not meet CPA obligations (June 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: • an annual tender of new licences up to 5 per cent, subject to the reserve price, or 10 per cent if the tender price exceeds valuations by 10 per cent; • the retention of maximum fare for rank/hail market only; and • free entry to the hire car industry subject to A$5000 licence fee.	The Government is expected to consider its response to the review in September 2003. Tasmania has implemented hire car reforms.	Review and reform incomplete

(*continued*)

Table 2.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Motor Traffic Act 1936* *Road Transport (General) Act 1999* *Road Transport (Passenger Services) Act 2001*	Limitation on numbers of taxis and hire car licences	The NCP review was completed in March 2000. On licence quotas, it recommended: • the immediate removal of restrictions on the supply of taxi and hire car licences; • full compensation to licence holders via a licence buyback, with compensation to be funded via consolidated revenue or a long-term licence fee regime. The ICRC released its report in June 2002. It endorsed the removal of supply restrictions and proposed three options for compensation (not recommending any particular option).	In December 2002, the Government announced that an additional 5 per cent of taxi licences would be issued each year, subject to a reserve price (90 per cent of market value). New hire car licences are to be released according to a similar formula, at a rate of 10 per cent for the first two years. The first auction was scheduled for August 2003, but has been delayed).	Review and reform incomplete
Northern Territory	*Commercial Passenger (Road) Transport Act*	Limitation on numbers of taxis and hire car licences	Review was completed in 1998. It recommended: • the 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 and implemented a buyback in January 1999. It imposed a six-month moratorium on new licences in November 2001 (which was later extended). The reforms announced in October 2002 did not restrict taxi and hire car numbers. In June 2003, however, the Minister announced a cap on the number of taxis in Darwin and Alice Springs at one per 900 people. These reforms were passed on 17 June 2003.	Does not meet CPA obligations (June 2003)

Road transport-related legislation

Tow truck legislation

Legislative restrictions on competition

Most jurisdictions have legislation governing the operations of tow truck owners.[4] 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 legislation uses 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 entrants, thus raising costs by decreasing competition, reducing the need for efficient delivery of services and placing artificially high values on licences. Further costs arise if the regulator does not accurately predict need. The main benefit of the regulation is greater certainty.

An issue that has been raised with the Council on several occasions is the impact of regulation on businesses that operate in more than one state. Some regulatory arrangements involve prohibitions (including the failure to recognise licences from another jurisdiction); others have the unintended effect of constraining the operation of interstate businesses.

Regulating in the public interest

Many restrictions on tow truck operators have arisen in response to concerns about probity, consumer protection and safety. While licensing and enforcement provide community benefits from the assurance of probity and consumer protection, they also impose costs. Entry requirements that are too onerous or conduct rules that are too restrictive can reduce competition and significantly raise the price of towing services. There are also compliance and enforcement costs for operators and governments respectively.

[4] The CoAG road transport reforms affect tow truck operators, but do not specifically cover the tow truck industry.

Review and reform activity

In its 2002 NCP assessment, the Council found that Queensland and the Northern Territory had both met their CPA clause 5 obligations. Western Australia, Tasmania and the ACT did not list for NCP review any legislation restricting tow truck operations. The Council considers that these five governments met their CPA clause 5 obligations. For this 2003 assessment, the Council assessed outstanding issues in New South Wales, Victoria and South Australia. Table 2.2 details the progress of governments' review and reform activity relating to the tow truck industry.

New South Wales

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 introduced a (possibly unintended) restriction on competition. Clause 69(2) of the Tow Truck Industry Regulation 1999 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, restricts competition.

The New South Wales Government commenced a six-month trial of the job allocation scheme on 20 January 2003 and committed to review the Tow Truck Industry Act six months after the job allocation scheme begins. Its 2003 NCP annual report stated that the terms of reference will include an examination of the impact of clause 69(2) of the tow truck Regulations on interstate operators. New South Wales has not completed its review and reform activity.

Victoria

Victoria completed the review of its tow truck legislation in 1999. The legislation restricts market entry and conduct by limiting the number of licences available and defining licence categories and conditions. In particular, new accident towing licences (including heavy vehicle accident towing licences) can be issued only with Ministerial approval and then only after the licensing authority has assessed the need for the new licence. A need criterion is applied for the authorisation of a certain number of licences for each region. 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;

- remove the need criterion for location decisions;

- clarify the zone boundaries and review the Melbourne metropolitan boundaries;

- continue the regulation of accident towing fees (although this will not be necessary if the Government adopts the franchise bidding scheme), but allow greater transparency and independence in their establishment; and

- extend the cooling-off period for repairs.

The Victorian Government rejected several of the key recommendations. It did not accept that the need restrictions on accident and heavy accident licences should be removed, arguing that an oversupply of tow trucks would lead to 'law of the jungle' conditions at accidents, which would stress accident victims and have an adverse impact on the State's accident attendance allocation system. The Government also did not accept that the need criterion should be removed for location restrictions, arguing that such a change could result in certain regions not having adequate truck numbers to attend accidents. The Government accepted recommendations relating to accrediting tow truck licence holders, exempting motor cycle carriers from basic licence requirements, ensuring consumers have access to information pamphlets and insurance company advice at towing destinations, making the Essential Services Commission responsible for the regulation of fees, and extending the cooling-off period. The necessary legislative changes were made in 2002 and autumn 2003.

Victoria's approach to tow truck licences has meant that licences have acquired a value as a result of their scarcity. In this regard, tow truck licensing is similar to taxi licensing, although the licence values are somewhat lower for tow trucks. In 1999, Victoria's 378 metropolitan accident towing licences were worth around A$22.7 million (approximately A$60 000 per licence). The review report estimated that about half the accident towing fee could be attributed to servicing the capital cost of the licence.

The Council is concerned that the restrictions increase accident towing fees by adding to the capital cost of tow truck licences. This cost may outweigh any service quality benefits that consumers gain from the restrictions. Further, Victoria did not demonstrate that the need and location restrictions are the only means of achieving orderly conduct at accident scenes and ensuring adequate tow truck availability in all regions. The Council asked Victoria for the public interest evidence for the entry restrictions. The Government asserted that the current arrangements work well and that job allocation arrangements (as practised in other jurisdictions) would be unworkable as a

result of 'the sheer number of operators'. The Council considers that Victoria did not fully consider alternative mechanisms of dealing with public interest concerns in the tow truck industry. Further, Victoria did not show that job allocation arrangements would not effectively moderate tow truck operators' behaviour. Victoria has not met its CPA clause 5 obligations in relation to tow trucks.

South Australia

South Australia completed the review of the accident towing provisions in the *Motor Vehicle Act 1959* in 2001. It informed the Council that it intended to release the report for consultation with industry and key stakeholder groups in mid-2003, and complete a draft Bill by August 2003. South Australia did not, however, commence this post-review consultation process or provide the Council with a copy of the review report.

The Council cannot gauge (1) the extent of reform proposed by the South Australian review of tow trucks, or (2) the public interest justification for any remaining restrictions on competition. South Australia has not completed the review and reform of tow truck legislation.

Table 2.2: 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	This legislation was introduced in 1998 following a review of the industry. A review is to begin six months after the job allocation scheme was established (20 January 2003).	Six-month trial of job allocation scheme is being undertaken.	Review and reform incomplete
Victoria	*Transport Act 1983* (provisions relating to tow trucks) 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 rejected several recommendations, arguing that need restrictions on licences and location are necessary to prevent distress to accident victims, facilitate the allocation system and ensure regions are adequately serviced.	Does not meet CPA obligations (June 2003)
Queensland	*Tow Truck Act 1973* and Tow Truck Regulation 1988		Review was completed in 1999, finding a public benefit justification for the consumer protection and industry regulation provisions in the Act.	Act was amended in 1999 to strengthen the consumer protection provisions.	Meets CPA obligations (June 2002)
South Australia	*Motor Vehicles Act 1959*	Market conduct	Review was completed in 2001.	The Government is proposing to consult publicly and introduce legislation in the second half of 2003.	Review and reform incomplete
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 supplier of their choice.	The Government approved the review recommendations in November 2000.	Meets CPA obligations (June 2001)

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 this aspect of the national road transport reforms and clause 5 of the CPA.

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. They can be inflexible, technical requirements that are inconsistent between jurisdictions. Some legislation stipulates conditions for displaying items such as fireworks. Inconsistencies hamper competition because more than one standard applies if an activity crosses State boundaries.

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 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 in a position to replace existing dangerous goods legislation 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.

Review and reform activity

In previous NCP assessments, the Council found that Queensland and Tasmania had met their CPA clause 5 obligations. Table 2.3 details governments' review and reform activity relating to the regulation of dangerous goods.

New South Wales released an issues paper on amending the *Dangerous Goods Act 1975* to apply the national standard. The Government consulted with interested parties and reviewed submissions, and introduced the amending Occupational Health and Safety Amendment (Dangerous Goods) Bill and the cognate Explosives Bill 2003 to Parliament on 17 June 2003. The Bills were passed in early July 2003. New South Wales thus met its clause 5 obligations in relation to dangerous goods legislation.

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. The measures in the current legislation and regulations reflect the national standard. Victoria thus met its clause 5 obligations in this area.

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 of achieving the Act's objectives. It recommended an alignment of licensing requirements for the manufacture of explosives with those for other hazardous chemicals, replacing the inspection and licensing arrangements for vehicles used to transport explosives with the system used to carry other dangerous goods, and industry responsibility for health and safety matters

relating to the storage of explosives and other dangerous goods. The Dangerous Goods Safety Bill 2002 was subsequently introduced to Parliament in December 2002. This Bill will repeal the Explosives and Dangerous Goods Act and the *Dangerous Goods (Transport) Act 1998*. The Government stated that the Bill will reduce restrictions on competition while retaining the necessary public interest restrictions on the use of dangerous goods. It noted that the transport, storage and handling provisions of the Bill are based on national regulations and standards. Passed by the Lower House of Parliament, the Bill is scheduled for debate in the Upper House after September 2003. Reform activity is thus incomplete, but Western Australia will meet its clause 5 obligations if the Bill is passed unchanged in spring 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 stated that the legislation is currently consistent with national standards covering the transportation of dangerous goods, and proposed to introduce legislation that will be consistent with the national standards covering storage, the handling of dangerous goods and the transportation of explosives. South Australia has not completed its reform activity in this area.

The transport of dangerous goods (with the exception of explosives, and class 6.2 and class 7 dangerous goods) is regulated in the ACT under the *Road Transport reform (Dangerous Goods) Act 1995* (Cth) and is fully consistent with the national road transport reform program. The ACT repealed its *Dangerous Goods Act 1984* and incorporated provisions in the *Dangerous Goods Act 1975*. This Act was reviewed in 2000, along with associated provisions in the *Occupational Health and Safety Act 1989* and other Acts. The Government is preparing a new dangerous goods regulatory package which will be consistent with the national standard for the storage and handling of dangerous goods. The package will be submitted to the Legislative Assembly during the spring 2003 session. The ACT did not complete its reform activity in this area.

The Northern Territory reviewed its *Dangerous Goods Act* and replaced it with a new Act in 1998. The Northern Territory presented the Dangerous Goods (Road and Rail Transport) Bill and an amendment Bill to the 1998 Dangerous Goods Act (which had still not commenced) to Parliament in February 2003. Parliament passed the two Bills in late May 2003. The legislation ensures consistency with national agreements on the road and rail transport of dangerous goods, with the Northern Territory drawing heavily on the Commonwealth Act and Regulations. The Northern Territory thus complied with its CPA clause 5 obligations.

Table 2.3: 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 (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) was completed.	The Government finalised the implementation of the *Occupational Health and Safety Act 2000* and the Occupational Health and Safety Regulation 2001. Amending legislation to apply the national standard was passed in early July 2003.	Meets CPA obligations (June 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. These measures are consistent with the national standard.	Meets CPA obligations (June 2003)
Queensland	*State Transport Act 1960*	Regulation of the transport of dangerous goods		The 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 2.3 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 more efficient and effective ways of achieving the objectives of the legislation. It recommended: aligning licensing requirements for manufacture of explosives with those of other hazardous chemicals and for transportation of explosives with existing controls for other dangerous goods; shifting responsibility for safety and accreditation in storing explosives and other dangerous goods to industry; and having less onerous restrictions on sale, display and use of fireworks.	The Dangerous Goods Safety Bill was introduced to Parliament in December 2002 and will repeal the Explosives and Dangerous Goods Act and the *Dangerous Goods (Transport) Act 1998*. This Bill is expected to be debated in the Legislative Council after September 2003 and will introduce reforms that are consistent with national standards.	Review and reform incomplete
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 Act is consistent with national standards for transportation of dangerous goods. South Australia intends to introduce legislation that will widen the application of national standards under the Act to include the storage and handling of dangerous goods and the transport of explosives.	Review and reform incomplete

(*continued*)

Table 2.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Dangerous Goods Act 1976*			The Act was repealed and replaced by new dangerous goods legislation that is based on the National Road Transport Commission's model for the transport of dangerous goods by road, which was expanded to include the use, storage and handling of dangerous goods.	Meets CPA obligations (June 2001)
	Dangerous Goods Act 1998	Code of conduct	Replacement legislation was assessed under the gatekeeper requirements.	Restrictions such as licences were replaced with a code of conduct based on national road transport reforms.	Meets CPA obligations (June 2001)
ACT	*Dangerous Goods Act 1975*	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 an overall review of the ACT's occupational health and safety legislation. A regulatory impact statement was prepared and released for public comment. The ACT is considering how the national standards can be incorporated into a new legislative framework, accounting for the regulatory impact statement and public consultation.	The ACT is preparing new dangerous goods legislation for submission to the Legislative Assembly in spring 2003.	Review and reform incomplete
Northern Territory	*Dangerous Goods Act* and Regulations	Requirements for the transport, storage and handling of dangerous goods; licensing for businesses, operators of dangerous goods vehicles, shotfirers, gasfitters and autogasfitters	Review completed.	Act was repealed and the new Dangerous Goods Act received assent on 30 March 1998. New legislation, consistent with national agreements, was passed in the Legislative Assembly in late May 2003.	Meets CPA obligations (June 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 standards help improve the safety of other road users, protect the environment and deter crime.

Legislative restrictions on competition

The Motor Vehicle Standards 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. In particular, such vehicles were exempt from paying the A$12 000 specific tariff applying to used vehicle imports.

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 tightened the eligibility criteria for concessional imports of used vehicles. The changes to the Motor Vehicle Standards Act:

- limited imports of used vehicles (under the low volume scheme) to 'specialist' and 'enthusiast' vehicles, and prevented the importation of 'standard' vehicles (for example, vehicles with diesel instead of petrol engines) under this scheme;
- introduced a scheme to regulate registered automotive workshops; and
- required that all imported used vehicles be inspected and approved by registered automotive workshops to ensure each vehicle's compliance with the appropriate national standards.

Used vehicles not defined as specialist or enthusiast vehicles can still be imported subject to the specific rate tariff.

Assessment

For compliance with CPA clause 5, the Commonwealth Government needed to demonstrate that the new restrictions provide a net community benefit and are necessary to achieving the Government's safety, environmental and vehicle security objectives.

The review report provided a public benefit argument for requiring vehicles to be inspected by registered automotive workshops. 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 clause 5 of the CPA.

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).

To understand the Commonwealth's public interest reasoning, the Council examined the regulatory impact statement 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 regulatory impact statement sought to make a case that the number of used vehicles being imported far exceeded the level that had been originally intended and that it had the capacity to threaten Australia's motor vehicle industry, thus warranting the controls introduced by the specialist and enthusiast vehicles scheme.

The Commonwealth Office of Regulation Review, which provides the gatekeeper process for legislative amendments by the Commonwealth Government, considered that the regulatory impact statement 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 without quantifying the costs and benefits.

The Commonwealth approach subsequently received tacit endorsement by the Productivity Commission in its review of post-2005 assistance to the automotive industry. The Commission acknowledged that the A$12 000 specific tariff on used vehicles imposed substantial costs on the community, but considered that unconstrained imports of second-hand vehicles would jeopardise the achievement of a viable domestic automotive production sector capable of operating in the long term without special treatment.

The Council considers that the Commonwealth's legislative approach is not in keeping with the recommendations of the review or the Office of Regulation Review's subsequent regulatory impact statement. However, because the

previous arrangements under the Motor Vehicle Standards Act ran counter to industry policy objectives, and given the subsequent recommendations of the Productivity Commission (see chapter 12, volume 2), the Council considers that the Commonwealth Government's breach of its CPA clause 5 obligations is not significant enough to raise compliance issues.

Rail

The NCP agreements do not specifically cover the rail sector, nevertheless, rail is subject to the CPA's general provisions on 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 some States — but private sector involvement is increasing as governments move to privatise their rail businesses. Western Australia and Victoria privatised their rail line and rail transport businesses, although in early 2003 one private franchisee withdrew from the Victorian industry and the Victorian Government decided that country passenger rail services will operate under Government management as a standalone business until the regional rail projects are completed in 2005-06 (Batchelor 2003b). New South Wales maintained 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 or introduce competition through third party access regimes. Access regimes establish the terms and conditions under which third parties can negotiate to use the services provided by the rail infrastructure.

Government legislation in relation to rail services typically establishes operating arrangements for government rail businesses (including establishing government-owned monopolies) and imposes requirements aimed at ensuring the safety of rail users. Legislation in these areas has generally restricted competition.

Competitive neutrality

In the 2002 NCP assessment, the Council considered competitive neutrality issues relating to the Commonwealth, New South Wales and Queensland Governments. Capricorn Capital lodged complaints against the National Rail Corporation Limited, a rail freight business then owned jointly by the Commonwealth Government (majority owner), New South Wales and Victoria, and against FreightCorp, a bulk freight transport operator then owned by New South Wales. 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 IPART because privatisation was pending, but it addressed one focus of the Capricorn Capital complaint via a review of FreightCorp's community service obligations. After the owner governments sold these rail businesses in February 2002, the remaining competitive neutrality issues lapsed, because private companies are not subject to the CPA competitive neutrality obligations.

The Council found in 2002 that the Queensland Government had satisfactorily addressed the competitive neutrality complaint against Queensland Rail's livestock transportation service, Cattletrain.

Structural reform

In the 2001 NCP assessment, the Council concluded that Victoria had met its CPA obligations in relation to the privatisation of V/Line Freight. It considered structural reform issues for New South Wales and Western Australia in 2002, assessing that these States had also met their structural reform obligations. There are no outstanding structural reform issues.

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 clause 5 of the CPA. Table 2.4 details governments' review and reform of rail sector legislation.

The Council previously reported that New South Wales, Victoria and Western Australia had met their CPA clause 5 obligations. Queensland undertook a public benefit test of the rail safety provisions of the *Transport Infrastructure Act 1994* and the related Regulation. Queensland Transport's review report was completed in March 2003 following consultation with the rail industry and relevant Government agencies. The report accounted for the recommendations of the New South Wales inquiry into the Glenbrook rail accident. The report concluded that net benefits for the community arise from the safety accreditation system that applies to railway managers and operators. The Queensland Government introduced amendments relating to safety provisions to Parliament in the Transport Infrastructure and Another Act Amendment Bill 2003 on 3 June 2003.

Tasmania repealed a number of rail Acts that contained restrictions on competition. The Government retained three rail Acts unamended because the Solicitor-General advised that third party access is guaranteed and the Acts do not contain any restrictions on competition. The Council considers that Tasmania has met its CPA clause 5 obligations in relation to rail legislation.

Table 2.4: 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 the 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)
Queensland	Transport Infrastructure (Rail) Regulation 1996 under the *Transport Infrastructure Act 1994* Legislation was not initially scheduled for review	Includes rail safety regulations that could restrict competition	Queensland Transport's review report was completed in March 2003 following consultation with the rail industry and relevant Government agencies. The report accounted for the recommendations of New South Wales' inquiry into the Glenbrook rail accident. The report concluded that net benefits for the community arise from the safety accreditation system that applies to railway managers and operators.	Amendments relating to safety provisions were introduced to Parliament in June 2003.	Review and reform incomplete

(*continued*)

Table 2.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
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	Review completed in 1998. Recommendations related primarily to the removal of competitive advantages conferred on the Western Australian Railways Commission.	The *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 its safety and access provisions would negate the need for the 1939 Act. The Rail Safety Act was proclaimed. The Tasmanian Solicitor-General advised the Government that there is no need to repeal the 1939 Act because it guarantees third party access and does not contain any restrictions on competition.	Following the Solicitor-General's advice, the Government retained this Act unamended.	Meets CPA obligations (June 2003)
	Don River Tramway Act 1974	Provides a particular company with a competitive advantage by conferring the authority to construct and operate a railway	The 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)
	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.	Act was repealed.	Meets CPA obligations (June 2002)

(*continued*)

Table 2.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Railways Clauses Consolidation Act 1901*	Authorises the construction of railways or tramways; sets fares, construction standards, rates and charges		Act was repealed by the *Legislation Repeal Act 2000*.	Meets CPA obligations (June 2001)
	Van Diemen's Land Company's Waratah and Zeehan Railway Act 1895 *Van Diemen's Land Company's Waratah and Zeehan Railway Act 1896* *Van Diemen's Land Company's Waratah and Zeehan Railway Act 1948*	Provides a particular company with a competitive advantage by conferring the capacity to construct and operate a railway; prescribes the construction standards that must be met	Review was deferred pending proclamation of the *Rail Safety Act 1997,* because its safety and access provisions would negate the need for these three Acts. The Rail Safety Act was proclaimed, but the Tasmanian Solicitor-General advised the Government that there is no need to repeal these three Acts because they guarantee third party access and do not contain any restrictions on competition.	Following the Solicitor-General's advice, Tasmania retained these Acts unamended.	Meets CPA obligations (June 2003)
	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; prescribes the construction standards that must be met	Review was deferred pending proclamation of the *Rail Safety Act 1997*, because its safety and access provisions would negate the need for the 1977 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 heavily 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 involves the transport of nonbulk cargo, usually in shipping containers. Bulk shipping usually involves the transport of a single product such as grain. The industry also covers the management of ports and shipping channels, and the regulation of the vessels coming in and out of port.

Competitive neutrality

Port authorities are often owned and operated by State governments. 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). For the 2002 NCP assessment, the Council considered residual implementation questions and determined that Western Australia and the Northern Territory had met their CPA clause 3 obligations. This 2003 assessment discusses some ongoing issues in Victoria and South Australia.

Victoria

The Council previously considered that Victoria had fulfilled its CPA clause 3 obligations for the Melbourne Port Authority and the Victorian Channels Authority. Following the review of port reforms (the Russell Review), the Victorian Government embarked on a further reform program. Central to this program is a broader role for the Government-owned Port of Melbourne. Acting on the recommendations of the Russell Review, the Government is expanding the role of the Port of Melbourne to include more landside activities and the operation of the shipping channels. This role expansion will entail changes to both the Melbourne Port Authority and the Victorian Channels Authority.

The Government introduced legislation in April 2003 that vests (from 1 July 2003) in the new Port of Melbourne Corporation the management responsibility for the waters and channels that serve the port. The corporation will have operational control over the channels at the entrance to Port Philip Bay (which all shipping entering or leaving the bay must use), as well as the channels for shipping travelling to and from the north of the bay. The management of the channels serving the port of Geelong (which is privately owned) will remain separate from the Port of Melbourne Corporation. The legislation received royal assent on 13 May 2003. The Government's second Bill will introduce further port reforms in spring 2003. The Minister for Transport foreshadowed that this Bill will address other issues arising from the Russell Review, including arrangements for the establishment of commercial and local ports, port safety, security and environmental obligations, governance arrangements for the port of Hastings, the management of channels serving the port of Geelong and the holding and licensing of channels (Batchelor 2003a).

The Essential Services Commission reviewed the effectiveness of existing access regulation. The commission's report, released in May 2003, concluded that access regulation is appropriate for shipping channel services in Port Phillip Bay and the ports of Melbourne and Geelong. It recommended that the Government make some improvements to the existing access regime and apply to the National Competition Council to have the regime certified as effective.

While the Council reported in 2002 that Victoria had met its CPA clause 3 obligations for ports, any subsequent changes to port governance arrangements must be consistent with competitive neutrality policy. Victoria's approach to date appears to address potential competitive neutrality issues.

South Australia

The SA Ports Corporation managed and owned 10 ports in South Australia. The Government corporatised the port entity with a view to improving its performance. Subsequently, the Government privatised operations at the seven main ports in 2001 and enacted legislation to repeal the *South Australia Ports Corporation Act 1994* in September 2002. Responsibility for the remaining three ports — Cape Jervis, Penneshaw and Kingscote — was transferred to Transport SA. Kingscote jetty is used mainly for recreational purposes, while Cape Jervis and Penneshaw are used mainly by ferries. South Australia reported that these ports seek to recover costs but are not profitable. Competitive neutrality principles are not applied to these ports because the Government considers that they are not significant enterprises and that they do not compete with other ports or significantly with other modes of transport. The Council suggests that the Government consider any competitive neutrality complaints about these ports, because a complaint may indicate that the ports have a competitive impact.

Structural reform of port authorities

Over recent years, several jurisdictions privatised or considered privatising their port authorities. Some governments 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.[5] Both privatisation and the introduction of competition via third party access trigger obligations under the CPA clause 4 (see chapter 3, volume 1).

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. The Council extended this finding to South Australia in the 2002 NCP assessment.

However, as noted above, the Victorian Government is in the process of further port reform, including the revision of its channels access regime to account for the changed structure of the port authorities. The Essential Services Commission considered access regulation for shipping channels in some detail and recommended an appropriate form of such regulation. The Victorian Government has not yet responded to the commission's report.

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:

- provision on access to shipping berths, channels and port infrastructure;
- pilotage requirements;
- marine safety and navigation requirements;
- vessel operating requirements, including crewing;
- provisions that enable organisations governing ports and shipping to determine market products and to set prices and regulations;
- the exemption of organisations governing ports and shipping from paying taxes and government charges; and
- provisions to issue licences for vessels and vessel operations.

5 A natural monopoly exists where it is more cost-effective for one facility, rather than two or more competing facilities, to provide the service.

Review and reform activity

All governments except the ACT listed legislation regulating ports, shipping and marine activity for review under the NCP. Table 2.5 details governments' review and reform activity in this area. The Council previously assessed Tasmania and the Northern Territory as meeting their CPA clause 5 obligations. All other jurisdictions had matters outstanding following the 2002 NCP assessment.

Commonwealth

The Commonwealth Government reviewed several laws relating to ports and shipping. Its Shipping Reform Group reviewed the coastal trade provisions of part VI of the *Navigation Act 1912* in 1997. In response to the group's report, the Commonwealth Government streamlined the processes for engaging in coastal trade that are specified in part VI. It 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 Government did not expand on this matter or clarify whether any further review would consider the NCP issues associated with cabotage's inherent restrictions on competition. The Commonwealth Government has met its CPA clause 5 obligations for those aspects of Part VI not related to cabotage. The Council did not receive a response from the Department of Transport and Regional Services on how it intends to address the cabotage issue. On the review and reform of that part of the legislation related to cabotage, therefore, the Commonwealth did not meet its CPA clause 5 obligations.

The Commonwealth Government reviewed the remainder of the Navigation Act in two stages. 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. The House of Representatives passed this Bill in March 1999, but the Senate rejected a significant number of items in the Bill. The Minister decided that further action on the Bill should be deferred until the Government responds to the second stage of the review.

The second stage of the review, completed in June 2000, was tasked with identifying the nature and magnitude of safety, environmental, economic and social issues that the Navigation Act seeks to address. The terms of reference asked the review's steering committee to identify restrictions on competition, along with the benefits and costs. The second stage considered all parts of the Act except part VI, which had been previously reviewed. The review found that the Act imposes restrictions on competition by:

- requiring all persons wishing to be a ship's master, crew or pilot to be properly qualified;

- requiring all ships to meet minimum standards of construction, equipment, manning and maintenance;
- prescribing employment-related matters; and
- providing for ship inspection and accreditation.

The review sought to estimate the costs to the shipping industry of compliance with these regulations, and compared the costs with the benefits of reduced injuries, ship losses and environmental damage. The review considered alternative approaches to meeting shipping safety and environmental objectives, but concluded that they were impractical. It 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 of the review also considered seafarers' employment arrangements, which had been deferred from the first stage 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 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 re-focusing the regulation towards the adoption of performance-based standards, but considered that this approach would need to be consistent with international regulations, of which many are prescriptive in nature.

The Commonwealth Government advised that new shipping legislation, rather than amendments to the Navigation Act, would be an efficient means of introducing 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 Government has not provided the Council with any information on the outcomes of this consultation, how the new legislation will respond to the recommendations of the review, or the timing of this process. The Government informed the Council in July 2003, however, that the Minister for Transport and Regional Services met with industry representatives in June 2003 as part of the process of a review of shipping issues that is currently under way and that will report to the Government in spring 2003. This review will influence the Government's consideration of the Navigation Act and other shipping matters. The Commonwealth Government thus has not completed its review and reform of the Navigation Act.

The Commonwealth's 1997 review of the *Shipping Registration Act 1981*, which provides for an Australian system of registering ships and mortgages on ships, recommended that Australia continue to legislate to fix conditions

for granting nationality to its ships in accordance with international conventions. The review made recommendations to improve the workings of this legislation and reduce compliance costs, including the removal of the obligation to register certain ships, a restructure of the Australian Register of Ships into four parts, and the simplification of the requirements for the marking of a ship. The Government approved amendments to the Act in 1998 to implement the review recommendations, but the shipping industry raised concerns that proposed legislative amendments could have an impact on finance for shipping, particularly mortgage arrangements. The amendments did not proceed. The Commonwealth Government reported to the Council that it is considering the review recommendations in the context of its broader shipping policy issues. The Government advised in July 2003 that a review of significant shipping issues is under way. The review is expected to present a final report in spring 2003, and the Government will factor the review conclusions into its shipping policy deliberations. The Commonwealth thus has not completed its review and reform of the Shipping Registration Act.

The Australian Transport Safety Bureau, formed in 1999, is a multimodal investigation unit, bringing together the rail, air and maritime investigation functions and the nonregulatory functions of the Office of Road Safety. The *Transport Safety Investigation Act 2003* and the *Transport Safety Investigation (Consequential Amendments) Act 2003* were assented on 11 April 2003 and commenced operation on 1 July 2003. These Acts create a single legislative framework for the Commonwealth's investigation and reporting of rail, shipping and aviation accidents. The Council concluded that the Commonwealth met its review and reform obligations in relation to the Australian Transport Safety Bureau.

The Commonwealth completed reviews of the *Australian Maritime Safety Authority Act 1990* and part X of the *Trade Practices Act 1974* (TPA), and implemented reforms. The Council concluded in the 2001 NCP assessment that the Commonwealth had met its CPA obligations in relation to this legislation.

In February 2002, the Commonwealth asked the Productivity Commission to conduct an inquiry into harbour towage. The Government released the inquiry report on 27 March 2003. The Government supported the report recommendation that jurisdictions should (subject to maintaining safety) modify regulations relating to tug use, size or type, to promote the provision of required levels of service at minimum cost, and that they should harmonise minimum crew qualifications and standards to minimise impediments to movements of crews and tugs across Australian ports. The Commonwealth Government accepted, with qualifications, a recommendation relating to ports' tendering for towage services, and agreed that price monitoring of towage charges where declarations apply should (after a transitional period of three years) be light-handed.

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 fully operational for 12 months. In its 2003 NCP annual report, New South Wales stated that much of the Marine Safety Act has not commenced, however, because the Government has not finalised the related Regulation on marine safety. New South Wales is awaiting advice from the Commonwealth Government on a review of the Uniform Shipping Laws Code, which provides for common national safety standards for commercial vessels. The Government intends to commence a statutory review of the Act in late November 2003; the review will consider NCP issues. The Act requires the review to be tabled in Parliament by 28 November 2004. Awaiting the finalisation of the national safety standards, New South Wales did not complete its review and reform of the Marine Safety Act.

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. The Centre for International Economics completed an NCP review of the Act in December 2001. The review concluded that net benefits for the community arise from the provisions that allow service providers' control of market power, and the Minister's delegation of port safety functions to the port authorities. The review report also noted that each of the port corporations provides for competitive tendering of its more contestable waterfront services. The Council considers that New South Wales met its CPA clause 5 obligations in relation to this Act.

Victoria

Victoria completed a review of the *Marine Act 1988* in December 1999. The review recommended that all rules, standards and determinations issued by the Marine Board should be consistent with NCP principles. Victoria made the changes necessary to give effect to this recommendation. The review also resulted in the Victorian Government amending legislative arrangements and licensing standards for harbour masters, amending licensing standards for pilots, and deciding not to renew the monopoly agreement for the provision of pilotage services. Victoria met its CPA clause 5 obligations in relation to the Marine Act.

The Victorian Government conducted a review of port reform since the mid-1990s. The review focused on the *Port Services Act 1995*, which established

new corporatised entities as successors to the old port authorities. The review examined the structure and operation of Victorian ports. The Government released the review report (the Russell Report) and its response in July 2002, then began to implement 22 actions. One of the Russell Report's key recommendations was to reintegrate the land and water management of commercial trading ports to enable them to better compete with interstate ports.

Major legislative amendments resulting from the Russell Report recommendations were scheduled for the sessions of Parliament in autumn and spring 2003. The Port Services (Port of Melbourne Reform) Bill, passed on 13 May 2003, establishes a new, integrated corporation to manage the port of Melbourne from 1 July 2003. It will replace the Melbourne Port Corporation with the Port of Melbourne Corporation. The Minister's second reading speech stated that the new corporation will be vested with broader functions and powers than those of the Melbourne Port Corporation to 'enable the port to be integrated seamlessly with the wider freight and logistics system and to contribute effectively to the state's overall trade development effort' (Batchelor 2003a). The legislation 'will clearly vest in the new Port of Melbourne Corporation management responsibility for the waters which serve the port, including the shipping channels in those waters' (Batchelor 2003a). The Minister foreshadowed that a second bill to be introduced in the 2003 spring session of Parliament 'will address remaining issues arising from the review, including arrangements for the establishment of commercial and local ports, port safety, security and environmental obligations, governance arrangements for the port of Hastings, the management of channels serving the port of Geelong and the holding and licensing of channels generally' (Batchelor 2003a). The Government did not complete its reform of the Port Services Act, but appears committed to doing so in the second half of 2003.

Queensland

In previous NCP assessments, the Council indicated that Queensland's review and reform of the Harbours (Reclamation of Land) Regulation 1979, the *Transport Operations (Marine Safety) Act 1994* and the *Sea Carriage of Goods (State) Act 1930* were consistent with CPA obligations. Reform of the Transport Infrastructure (Ports) Regulation 1994 under the *Transport Infrastructure Act 1994* was assessed in 2002 as not meeting CPA obligations. The 2002 NCP assessment indicated that the impact on competition may be negligible.

The most significant outstanding matter in the Transport Infrastructure (Ports) Regulation 1994 was the restriction on harbour towage. Queensland Transport commissioned a review of the Regulation. Completed in January 2002, the review recommended allowing individual ports flexibility and discretion for exclusive licensing of towage operators as warranted. The review recommended that any exclusive licences that are issued should be subject to a competitive tender. It recommended also that port authorities should be required, when determining licensing arrangements, to consider

the impacts on port users and other stakeholders, demonstrate the net benefits and make publicly available the conditions of such licences. The Queensland Government accepted the recommendations and amended the legislation in November 2002. Queensland thus met its CPA clause 5 obligations in relation to this matter.

Western Australia

Western Australia's proposed Maritime Bill will introduce new legislation governing maritime activity. The Maritime and Transport Legislation Amendment and Repeal 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 *Western Australian Marine Act 1982*; and
- the *Shipping and Pilotage Act 1967* and Regulations.

These two Bills were introduced to the previous Parliament in 1999 but lapsed when the Parliament was prorogued before the 2001 State election. The Government intends to redraft the Maritime Bill, partly in response to machinery-of-government changes. The earliest time for the redrafting is the second half of 2003. Given its slow progress in redrafting the Maritime Bill, Western Australia did not complete its review and reform activity in this area.

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, was repealed in September 2002.

The *Harbours and Navigation Act 1993* governs the operations of South Australian harbours and facilities. It provides for harbour management, charges, vessel crewing, the registration of vessels and the licensing of pilot services, and specifies other vessel safety requirements in South Australian

ports. South Australia completed a review of this Act in 1999, but is part of an intergovernmental agreement to develop nationally consistent legislation over the period to 2005. The South Australian Government intends to amend the legislation as changes are agreed at the national level. Pending finalisation of this national process, the Government did not complete its review and reform of this Act.

Table 2.5: 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 a 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 if a conference breached an undertaking.	The *Trades Practices Amendment (International Liner Cargo Shipping) Act 2000* was enacted on 5 October 2000. It effects, 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. The Act changes the arrangements for the 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. The Act also repealed the section that prohibited price discrimination.	Meets CPA obligations (June 2001)
	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.	Recommendations were implemented.	Meets CPA obligations (June 2001)

(*continued*)

Table 2.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth (continued)	*Shipping Registration Act 1912*	Provides for registration of ships and ship mortgages in Australia	Review was completed in 1997, recommending amendments to improve the efficiency of the legislation and reduce compliance costs.	The Government accepted the recommendations and drafted legislative amendments in 1998. The shipping industry, however, raised concerns about the financing implications. The Government informed the Council that it is considering the review recommendations in the context of broader shipping policy issues.	Review and reform incomplete
	Navigation Act 1912	Regulates maritime matters (including ship safety, coastal trade, the employment of seafarers and shipboard aspects of the protection of the maritime environment), wreck and salvage operations, passengers, tonnage measurement of ships, administrative measures relating to ships and seafarers, and processes (part VI) for engaging in coastal trade	The Shipping Reform Group reviewed the coastal trade provisions of part VI of the Act in 1997. The rest of the Act was reviewed in two stages. The first stage was concerned with employment regulation in shipping. The second stage was a comprehensive review of the Act (excluding part VI) that was completed in June 2000. The review found that the benefits of regulating ship safety and environmental protection outweigh the costs of restrictions on competition, and that alternative approaches to meeting shipping safety and environmental objectives would be impractical.	Following the 1997 review, the Government introduced measures to streamline processes and reduce compliance costs in coastal trade. The first stage of the review led to the Navigation Amendment (Employment of Seafarers) Bill 1998. The Bill would have removed the employment-related provisions that are inconsistent with the *Workplace Relations Act 1996*. The Bill was introduced to Parliament on 25 June 1998. The Senate rejected a significant number of items. The Minister deferred the Bill. The second stage of the review covered maritime and safety issues and seafarers' employment arrangements that had been deferred from the first stage process. The Government is still considering the recommendations of the second-stage review. It will take into account a new review of shipping issues that is expected to be completed in spring 2003.	Review and reform incomplete

(*continued*)

Table 2.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Marine Safety Act 1998*	Provides for licensing of pilots and navigation requirements	A statutory review, taking NCP issues into account, is to commence on 28 November 2003 and finish a year later.	The Government awaits advice from the Commonwealth Government on the national review of the Uniform Shipping Laws Code.	Review and reform incomplete
	Ports Corporation and Waterways Management Act 1995	Provides for marine administration, safety, port charges and pilotage	Statutory and NCP reviews were completed in December 2001. Reviews found public benefits from the Act.	The Government does not propose any changes to the legislation.	Meets CPA obligations (June 2003)
	Commercial Vessels Act 1979	Provides for the use of certain vessels	Review was not required.	The Act was repealed and replaced by the Marine Safety Act.	Meets CPA obligations (June 2001)
	Maritime Services Act 1935	Provides for harbour operations	Review was not required.	The Act was repealed and replaced by the Marine Safety Act.	Meets CPA obligations (June 2001)
	Marine Pilotage Licensing Act 1971	Provides for pilotage	Review was not required.	The Act was repealed and replaced by the Marine Safety Act.	Meets CPA obligations (June 2001)
	Navigation Act 1901	Restricts market conduct and entry	Review was not required.	The Act was repealed and replaced by the Marine Safety Act.	Meets CPA obligations (June 2001)
	Marine (Boating Safety — Alcohol and Drugs) Act 1991		Review was not required because the Act contained no restrictions on competition.	The Act was repealed and replaced by the Marine Safety Act.	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.	The recommendations were accepted and significant amendments completed.	Meets CPA obligations (June 2003)

(*continued*)

Table 2.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Port Services Act 1995*	Provides port arrangements (relating to structures, objectives, functions and powers), channels access, charges, regulation and governance	Review (the Russell Report) was completed in 2001.	The Government commenced 22 key reforms in 2003, including reintegrating the land and water management at commercial ports.	Review and reform incomplete
	Transport Act 1983 (passenger ferry services)	Provides for ferry operation	Review was completed.	The Act was repealed.	Meets CPA obligations (June 2001)
Queensland	Harbours (Reclamation of Land) Regulation 1979	Provides approval procedures for activities in tidal waters (for example, land reclamation and harbour works)	Act was not for review.	The Act was repealed, with certain approval provisions incorporated in other existing legislation.	Meets CPA obligations (June 2002)
	Transport Infrastructure (Ports) Regulation 1994 under the *Transport Infrastructure Act 1994*	Provides for harbour towage restrictions	Review was completed in January 2002.	The Government accepted all recommendations. Amending legislation was passed in November 2002.	Meets CPA obligations (June 2003)
	Transport Infrastructure (Ports) Regulation 1994 under the *Transport Infrastructure Act 1994*	Provides for port activities outside port limits	Review was completed in 2001.	No reforms were proposed.	Does not comply with CPA obligations (June 2002)

(*continued*)

Table 2.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Transport Operations (Marine Safety) Act 1994* and Transport Operations (Marine Safety) Regulation 1994	Provide for marine safety and pilotage services	Review was completed in 1999.	Legislative amendments took effect from 1 July 2001.	Meets CPA obligations (June 2002)
	Sea Carriage of Goods (State) Act 1930	Provides for operating requirements for the carriage of sea goods	Act was not for review.	The Act was repealed.	Meets CPA obligations (June 2001)
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. The Act repealed individual port Acts.	No reform is planned.	Meets CPA obligations (June 2001)
	Jetties Act 1926 and Regulations	Provide for licensing and competitive neutrality	No review was undertaken.	The Act is to be repealed by the Maritime Bill and the Maritime and Transport Legislation Amendment and Repeal Bill — due to be redrafted in the second half of 2003.	Review and reform incomplete
	Lights (Navigation) Protection Act 1938	Provides for licensing	No review was undertaken.	The Act is to be repealed by the Maritime Bill and the Maritime and Transport Legislation Amendment and Repeal Bill.	Review and reform incomplete
	Marine and Harbours Act 1981 and Regulations	Provides for competitive neutrality	No review was undertaken.	The Act is to be repealed by the Maritime Bill and the Maritime and Transport Legislation Amendment and Repeal Bill.	Review and reform incomplete
	Ports (Model Pilotage) Regulations 1994		No review was undertaken.	The Act was repealed.	Meets CPA obligations (June 2001)

(*continued*)

Table 2.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Ports Function Act 1993*	Restricts market conduct	No review was undertaken.	The Act was repealed.	Meets CPA obligations (June 2001)
	Shipping and Pilotage Act 1967 and Regulations	Govern pilotage services (licensing and competitive neutrality)	No review was undertaken.	The Act is to be repealed by the Maritime and Transport Legislation Amendment and Repeal Bill.	Review and reform incomplete
	Albany Port Authority Act 1926 and Regulations *Bunbury Port Authority Act 1909* and Regulations *Dampier Port Authority Act 1985* and Regulations *Fremantle Port Authority Act 1902* and Regulations *Geraldton Port Authority Act 1968* and Regulations *Port Hedland Port Authority Act 1970* and Regulations *Esperance Port Authority Act 1968*	Restrict market conduct and market entry	No review was undertaken.	The Act was repealed.	Meets CPA obligations (June 2001)

(*continued*)

Table 2.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Western Australian Marine Act 1982*	Provides for licensing	No review was undertaken.	The Act is to be repealed by the Maritime Bill and the Maritime and Transport Legislation Amendment and Repeal Bill.	Review and reform incomplete
South Australia	*South Australian Ports Corporation Act 1994*	Restricts market conduct and market entry		The Ports Corporation was sold in November 2001. The Act was repealed on 5 September 2002.	Meets CPA obligations (June 2003)
	Harbours and Navigation Act 1993	Provides for harbour operations	Review was completed in 1999.	The Government intends to make amendments progressively until 2005, as national standards are agreed.	Review and reform incomplete
Tasmania	*Marine Act 1976*	Restricts market conduct and market entry	Review was completed.	Act was repealed in 1997 and replaced by the *Marine and Safety Authority Act 1997,* the *Marine and Safety Authority Act 1997* and the *Marine (Consequential Amendments) Act 1997.* These Acts were assessed under gatekeeper requirements as not restricting competition.	Meets CPA obligations (June 2001)
	Roads and Jetties Act 1935	Provides for access restrictions	A minor review was conducted. It recommended retaining access restrictions in the public interest.	Recommendations were accepted.	Meets CPA obligations (June 2001)
	Hobart Bridge Act 1958		Review was completed.	Act was repealed in 1996.	Meets CPA obligations (June 2001)
	Port Huon Wharf Act 1955	Provides for access restrictions	Review was completed.	Act was repealed in 1997.	Meets CPA obligations (June 2001)

(*continued*)

Table 2.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Darwin Port Corporation Act*	Establishes the Darwin Port Authority; prescribes monopoly powers, licensing arrangements and fees, stevedoring licensing, the control of shipping movements in port, exemptions from local government charges, exemptions from pilotage requirements, and partial exemption from the corporations law	Review was completed in 2001.	The Government accepted most of the recommendations, but not the recommendation to remove the licensing of stevedores. The Government considered licensing to be the most cost-efficient way of monitoring environmental health and safety at Darwin Port.	Meets CPA obligations (June 2001)
	Darwin Port Authority Act and By-laws			Legislation was replaced by the Darwin Port Corporation Act in 1999. Repeal of the legislation was completed in mid-2002.	Meets CPA obligations (June 2001)

(*continued*)

Table 2.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory (continued)	*Marine Pollution Act*	Protects marine and coastal environments by minimising intentional and negligent discharges of ship-sourced pollutants; exempts the Australian Defence Force and foreign ships used only for government noncommercial services	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.	Meets CPA obligations (June 2002)
	Marine Act and Regulations	Applies national uniform shipping law codes; provides for licensing of certain commercial operations, permits for the operation of hire-and-drive vessels and certificates of competency	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)

(*continued*)

Air transport

Structural reform

Sydney Basin airports (Commonwealth)

In its 2001 NCP assessment, the Council noted the Clause 4 review of the Sydney Basin airports and raised the issue of the structure of the Sydney airports. In 2002, the Council accepted the Commonwealth Government's arguments for the structure of the airports and considered that the Government had met its CPA clause 4 obligations. On 9 April 2003, the Commonwealth Government announced the strategy for the sale of Bankstown, Camden and Hoxton Park airports. The sale process is currently under way and is expected to be completed at the end of October 2003. In announcing the sale, the Commonwealth Government also noted that, given the changes to the aviation environment since 11 September 2001, the collapse of Ansett and the trend to using larger aircraft, particularly on regional routes, there is no longer a need for Bankstown Airport to develop an overflow capacity to supplement Sydney Airport.

Airservices Australia (Commonwealth)

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 its 2001 NCP assessment, the Council noted the Government's moves to introduce contestability in Airservices Australia's provision of services. This introduction depended on the Civil Aviation Safety Authority (CASA) developing a regulatory framework to govern the provision of aviation safety services delivered by Airservices, such as air traffic control services and aerodrome rescue and fire-fighting services. CASA subsequently developed the aviation safety Regulations, which would have resulted in aerodrome operators becoming responsible for ensuring the provision of aerodrome rescue and fire-fighting services. The Governor-General made these Regulations on 26 June 2002, but the Opposition gave notice of a disallowance motion against the Regulations in September 2002.

In November 2002, the Government advised the Opposition that it would amend the regulatory package to address the Opposition's concerns. These

amendments were made on 1 May 2003 and Australia now has a legislated safety regime to govern the provision of aviation safety services. The regulatory amendments include the introduction of a list of 'approved providers'. Only CASA can approve persons on this list. New providers can still obtain approval, so long as amendments to the list of approved providers do not face opposition in Parliament.

The current aviation safety Regulations mean that Airservices Australia remains effectively the monopoly provider of air traffic services, air navigation support services and aerodrome rescue and fire-fighting services. The Government sought to introduce competition in these areas, and regulation of the industry (by CASA) is separated from the service provider. The Commonwealth Government has met its CPA clause 4 obligations in relation to air safety services.

Review and reform activity

Some regulation of intrastate air passenger transport routes remains in the two geographically large States that have a substantial requirement for domestic aviation services. The Regulations in Queensland and Western Australia restrict competition by granting rights to service particular regional or remote locations. Table 2.6 details governments' review and reform activity in this area.

Queensland

In 2000, Queensland completed an NCP review of the *Transport Operations (Passenger Transport) Act 1994*, which includes aviation. While air transport in Queensland is largely deregulated, services to some remote areas are restricted. The services are regulated through exclusive service contracts that specify minimum service levels, such as aircraft type, frequency of service and fares. Each contract is for five years, after which it is re-tendered.

The review found that these restrictions are in the public interest because the contracted operators provide services that otherwise would not be available, or would be available only at greater cost or with lower service levels. The review report argued that, because the exclusive service contract is open to tender every five years (that is, there is competition for the market), it is likely to provide a net community benefit. The review recommended that the Government retain the tendering arrangements. The Government considered the review recommendations and agreed that the regulation is justified on public interest grounds.

One of the regional service providers collapsed as a result of the airline industry difficulties in 2001, and Queensland Transport established air service contracts while it conducted a review of regional air services. In May 2002, the Government determined the routes and minimum service levels to

apply to future regional air service contracts and issued a new tender. Eight airlines tendered for contracts, which will continue to attract subsidies. Two airlines were selected in July 2002 to provide the services for five years.

The Council agrees with the public interest arguments for basing the provision of remote air services on competitive tendering processes. The regulation recognises the low scope for competition in the provision of air services to remote areas with small populations. Queensland met its CPA clause 5 obligations in relation to the regulation of the aviation transport sector.

Western Australia

Western Australia completed a review of the *Transport Co-ordination Act 1966* in 1999. 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 review report recommended that this general provision be circumscribed so licences are required only where there is a public benefit. The Government endorsed this recommendation and intends to repeal this section of the Act and replace it with provisions that relate to the requirement for a licence to be in the public interest.

Western Australia reported that the collapse of Ansett in September 2001 had a significant impact on the intrastate air transport market in Western Australia. It therefore further reviewed its intrastate aviation policy, including the application of the licensing provisions in the Transport Co-ordination Act. Conducted by consultants, this review was completed in November 2002. It did not explicitly seek to review NCP aspects of intrastate aviation policy, but one of its aims was to recommend which Western Australian airports and intrastate routes have the passenger throughput to sustain competition.

As a result of the review report, the Government is considering a number of steps. First, for the network that connects Perth with major coastal towns (including Exmouth, Carnarvon, Geraldton, Albany and Esperance), the airline Skywest was given an extension on its monopoly for the nine months to May 2003. (These are routes with passenger movements below 55 000 to 60 000 per year.) The Government now proposes to extend this licence for another two years, subject to a review being completed by May 2004, after which the Government would decide either to deregulate the network from May 2005 or go to competitive tender. Second, the Government is considering issuing competitive tenders for other routes that cannot sustain competition. This would probably involve the issue of exclusive licences (sole operating rights) for a period of up to three years. Third, the Government is undertaking consultation with some mining companies in the Northern Goldfields area, and with other companies in the wider resource sector, to ascertain whether there is scope for consolidating the charter services that they use with the regular passenger transport services to nearby towns.

It appears likely that Western Australia will take some time to finalise the legislative arrangements for intrastate aviation. The State thus did not complete its review and reform activity in the aviation transport sector. Given that the precise nature of the reform is unknown, the Council cannot assess whether any of the remaining restrictions are justified in the public interest.

Table 2.6: Review and reform of legislation regulating air transport

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Transport Operations (Passenger Transport) Act 1994*	Provides for exclusive service contracts to operate passenger transport services on particular routes for a five-year period	The 2000 NCP review found that deregulation of the provision of aviation services to the currently restricted routes could lead to a fall in services. Quality provision of air passenger services would not be economic without subsidisation or the provision of an exclusive right. The review found that submitting each contract to tender every five years is a source of competition. The review did not recommend any change to current arrangements.	The Government accepted the review recommendations and maintained the competitive tendering arrangements.	Meets CPA obligations (June 2003)
Western Australia	*Transport Co-ordination Act 1966*	Provides for licensing of vehicles used for commercial purposes; regulates transport services provided by those vehicles	The 1999 NCP review recommended the removal of the requirements that public vehicles be licensed, except where there is a public benefit. A review of interstate air services was conducted in 2001 following the collapse of Ansett.	The Government endorsed the recommendations of the first review in November 2000. Following the review of interstate air services, the Government extended the licence to operate on the network connecting Perth with major coastal towns. It will undertake a further review of the provision of services to these routes from 2005. The Government is also considering changes for other air routes.	Review and reform incomplete

Other transport

Queensland's *State Transport (People Movers) Act 1989* provides for licences and agreements for the installation of 'people movers'.[6] Queensland had considered repealing the Act but decided to retain provisions relating to the existing licence holders (of which there are two: the Cairns–Kuranda rainforest cableway and the Broadbeach monorail) to preserve their legal rights. Under legislation that the Government plans to introduce in the second half of 2003, all new people mover proposals will be regulated under the framework of the *Integrated Planning Act 1997*. This Act provides for planning and development proposals to be managed across local and State levels to ensure they are ecologically sustainable. The Act does not contain any provisions for licensing new people mover projects on private land. Proposals for projects over national parks are subject to the *Nature Conservation Act 1992* and the standard features of a competitive bidding process. Such a process would introduce the extent of competition practicable. The Council thus finds that Queensland met its CPA clause 5 obligations in this transport activity. Table 2.7 summarises Queensland's review and reform activity in this area.

[6] The Act refers to a 'people mover system' as 'a transport system designed and intended for use for the carriage of people by means of a fixed structure on a route that entails carriage over and above public land or water within Queensland other than carriage by (a) a railway …; (b) by any moving walkway, belt or escalator'.

Table 2.7: Review and reform of legislation regulating other transport

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*State Transport (People Movers) Act 1989*	Provides for licences for the provision of people mover services	Queensland Transport undertook a public benefit test in early 2003 that found that the two people mover licences in place do not restrict competition for the carriage of people because alternative means of transport are available.	The Government is retaining the Act to preserve the legal rights of the two existing licensees. Amendments are being introduced later in 2003 which relate to ensuring ecological compliance and will not entail any restrictions on competition.	Meets CPA obligations (June 2003)

3 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, at about 4.9 per cent a year from 1992-93 to 2000-01. In 2000-01, Australians spent A$60.8 billion on health and pharmaceutical services — around 9 per cent of gross domestic product. Governments contributed around 70 per cent of this amount, while private spending comprised the remainder (AIHW 2002).

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 — also affects competition among health professions and providers of related services such as pathology. Governments have a wide variety of population health legislation, such as licensing of facilities that provide health services and other activities, which aims to reduce risks of infection.

In its assessments, the National Competition Council considers Commonwealth, State and Territory governments' compliance with National Competition Policy (NCP) obligations under the Competition Principles Agreements (CPA) on 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 ensuring (by applying the principles of transparency, consistency and accountability) 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 the employment of health professionals by nonprofessionals, or the 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 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 of 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 for consideration 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 from 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, whereas restricting an entire discipline is likely to create anomalies because it can lead to some common low risk activities being 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 that practitioners should be required 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 of 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 6 of this volume 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 completed its review and reform activity, but is commencing another round of review of health practitioner registration legislation. The other three States have largely completed their legislation reviews but still have some legislation that they have not yet (where warranted) reformed.

Queensland, Western Australia, the ACT and the Northern Territory each conducted omnibus reviews of most or all of their practitioner legislation. Box 3.1 outlines the staged reform process that Queensland has adopted, which involves establishing common administrative and operational support arrangements for the health practitioner registration boards and complaints and disciplinary processes, and enacting new registration legislation for each profession, including reforms to practice restrictions.

Box 3.2 discusses Western Australia's key directions for reforms of its health practitioner legislation (except its medical practitioner legislation, which is subject to a separate review process) and its core practices review. Western Australia is preparing separate replacement legislation for each profession based on a common template. In April 2001, it undertook to replace the majority of State laws governing health professions as soon as it had finalised the template legislation (NCC 2002). The legislation will retain title protection. It will also retain broad practice restrictions and some business conduct and ownership restrictions for up to three years (from 1 July 2001) while a more focused review is undertaken to determine appropriate core practices for each profession and to assess the need to retain other restrictions over the longer term.

The ACT and the Northern Territory are preparing omnibus Acts to replace most of their existing health practitioner legislation. As outlined in box 3.3, the ACT Health Professionals Bill 2002 establishes a framework for the regulation of health professions, which does not restrict the use of specific titles but makes it an offence for unregistered practitioners to pretend to be registered professionals. The Northern Territory, like the States, proposes to continue to reserve the use of professional titles for registered practitioners, but intends to make entry requirements more flexible.

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. This 2003 assessment considers whether the other jurisdictions have met their CPA clause 5 obligations in this area.

Queensland

As noted above, Queensland is reforming its health practitioner legislation, which includes chiropractors, in stages. In the first stage, generic framework reforms were implemented. At the second stage the Government enacted the *Chiropractors Registration Act 2001* to replace the *Chiropractors and Osteopaths Act 1979*. The new Act continues to reserve the title of 'chiropractor' for registered practitioners in the public interest, but removes other anticompetitive restrictions on commercial and business conduct, including advertising restrictions. The Act also retains broad practice restrictions pending the outcome of a further core practices review (see box 3.1).

The Queensland Treasurer endorsed the recommendations of the PricewaterhouseCoopers review to reserve the core practice of thrust manipulation of the spine to chiropractors, medical practitioners, osteopaths, and physiotherapists. A Bill to implement these reforms was introduced into Parliament in June 2003. This legislation had not been passed, so Queensland has not met its CPA obligations regarding its chiropractic legislation.

Box 3.1: Queensland's review and reform of health practitioner legislation

Queensland commenced a general review of its health practitioner legislation in 1993 and completed its NCP review in 1998. The Government accepted the review findings and commenced a staged reform process to replace the existing health practitioner registration legislation with new and consistent legislation that meets the objectives of protecting the public and promoting accountability, fairness, peer and public involvement, efficiency and effectiveness.

Framework reforms

In February 2000, Queensland enacted new generic legislation — the *Health Practitioners Registration Boards (Administration) Act 1999* and the *Health Practitioners (Professional Standards) Act* — to govern the administrative and operational support for the health practitioner registration boards and to implement a fairer and more transparent complaints and disciplinary system.

(continued)

Box 3.1 continued

Specific registration reforms[a]

In May 2001, Queensland enacted 13 new Acts to govern the registration of the following professions: chiropractors; dental practitioners; dental technicians and dental prosthetists; medical practitioners; medical imaging technologists, nuclear medicine technologists and radiation therapists; occupational therapists; optometrists; osteopaths; pharmacists; physiotherapists; podiatrists; psychologists; and speech therapists. Other changes were also made via these Acts and the *Health Practitioners Legislation Amendment Act 2000*. Together the reforms:

- continued to provide title protection for registered practitioners, but simplified the registration eligibility criteria and provided alternative routes to registration;
- significantly scaled back restrictions on commercial and business conduct by:
  - replacing prescriptive advertising restrictions with provisions that reflect fair trading principles for consumer protection (that is, prohibiting, false misleading and deceptive advertising or advertising that promotes a harmful or potentially harmful service);
  - replacing business licences with negative licences, which permit nonregistrants to own health service businesses, but make it an offence to direct or induce registrants to do something that would constitute grounds for disciplinary action;
- prohibited conduct that compromises registrants' autonomy and the making or accepting of payments for recommendations or referrals; and
- preserved practice restrictions pending the outcome of the NCP core practices review.

Core practice reforms[a]

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 certain defined practices for registered members of particular health professions. The Queensland Treasurer endorsed the public benefit test report in January 2001, which 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 Government introduced the Health Legislation Amendment Bill 2003 into Parliament in June 2003 to implement these core practice reforms.

[a] Separate reviews were conducted to consider registration and core practices reforms in dentistry and other oral health services (see p. 3.16). Ownership restrictions in pharmacy were considered at the national level (see p. 3.53).

Western Australia

Western Australia completed its NCP review of health practitioner legislation (including the *Chiropractors Act 1964*) and, in April 2001, the Government approved the drafting of new template health practitioner Acts to replace the Chiropractors Act and other health professions legislation. It also agreed to replace the majority of the State's health practitioner legislation as soon as the new template legislation was finalised. The template legislation will establish broad chiropractic practice restrictions. This restriction is scheduled to be automatically repealed under the template legislation by 1 July 2004, but may be replaced sooner by specific core practice restrictions, depending on

the outcome of the core practices review under way. The Government's *Key directions* paper sets out the policy framework that is the basis for the new legislation. Box 3.2 provides details on the policy framework and core practices review.

In it 2002 NCP assessment, the Council undertook to monitor Western Australia's progress in completing its core practices review. The Department of Health released a discussion paper in March 2003 and expects the Government to be in a position to introduce any amending legislation to Parliament in late 2003. The Council considers these amendments to be a significant issue because they have the potential to deliver substantial benefits to the Western Australian community and the economy more generally. The Council is concerned, however, that the template health practitioner legislation, which the Government commenced drafting in 2001, is yet to be finalised.

The Council assesses Western Australia as not having met its CPA obligations in relation to chiropractic legislation because it has not completed its review and reform process.

Box 3.2: Western Australia's policy framework and core practices review

Western Australia's *Key directions* paper, released in July 2001, outlines the policy framework for the reform of its health practitioner legislation — namely, the *Chiropractors Act 1964*, *Dental Act 1939*, *Dental Prosthetists Act 1985*, *Nurses Act 1992*, *Occupational Therapists Registration Act 1980*, *Optometrists Act 1940*, *Osteopaths Act 1997* (amendment only)*, Physiotherapists Act 1950*, *Podiatrists Registration Act 1984* and *Psychologists Registration Act 1976.* The proposed template legislation retains title protection for health professions and will:

- replace prescriptive advertising restrictions with provisions that reflect consumer protection legislation;
- remove requirements for businesses to register with the board and for the board to approve business names;
- provide for codes of practice (relating to clinical matters only) to be approved by the Minister;
- require practitioners to hold professional indemnity insurance; and
- remove restrictions on business ownership.

In addition, the Government decided to retain broad practice restrictions (except for physiotherapy) in the template legislation for three years (from June 2001), while it undertook a review to identify core practices that warrant restriction (as identified by the NCP review). If the project could not be completed within the time allowed (that is, by 1 July 2004), then the practice protection would be automatically removed under a sunset clause in the template legislation.

In March 2003, the Department of Health released its *Core practices* discussion paper, which seeks views on whether it is appropriate to retain certain core practices for chiropractors, dentists and other oral health care practitioners, medical practitioners, nurses, occupational therapists, optometrists, osteopaths, pharmacists, physiotherapists, podiatrists and psychologists. It also seeks views on the supervisory arrangements for oral health care practitioners (except dentists) and title protection for occupational therapists.

(continued)

Box 3.2 continued

The Council's view of Western Australia's progress

In its 2002 NCP assessment, the Council stated that it:

… 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. (NCC 2002, p. 6.7)

This view reflected an undertaking from Western Australia, accepted by the Council, that Western Australia's core practices review would be completed and fully implemented by 30 June 2004. The Council is concerned that Western Australia has not yet finished drafting the replacement template legislation (except for nursing legislation, for which drafting instructions were approved in 2001). Western Australia's progress with the core practices review has also been slow. Nevertheless, in relation to the timetable for implementing a core practices model, Western Australia advised the Council (D Morrison (Department of Treasury and Finance) 2003, pers. comm. regarding advice from the Department of Health, 8 July) that a department steering committee has been established, a discussion paper has been released and extensive consultation has been undertaken with stakeholders. The steering committee is reviewing the submissions received, and a draft review report will soon be available for the Minister for Health's consideration. The Government considers that this report will enable legislative amendment to be implemented 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', removing business licensing and amending advertising restrictions to prohibit only false and misleading advertising.

South Australia advised that it has prepared the Bill to amend the Act and finalised consultation with the Chiropractors Board of South Australia. The Government intends to undertake public consultation on the Bill, then introduce it to Parliament in the second half of 2003 (Government of South Australia 2003). While the Council considers that the review recommendations satisfactorily address competition questions, South Australia has not completed its review and reform activity, so has not yet met its CPA clause 5 obligations in relation to this legislation.

The ACT

The ACT completed its NCP review of health practitioner legislation, which included the *Chiropractors and Osteopaths Act 1983* (box 3.3), in March 2001. The review recommended continuing to register chiropractors, subject to

meeting minimum entry standards. It also recommended maintaining protection of title, but not restricting practices to any specific professions and removing unnecessary business conduct restrictions. The Government accepted the review's recommendations and has completed consultation on an exposure draft of the Health Professionals Bill 2002. The Bill will repeal the existing health professionals Acts and replace them with a consolidated Act. The ACT anticipates considering the final package in the ACT Legislative Assembly spring 2003 session.

The proposed reforms are in line with CPA principles, but the ACT has not completed its review and reform process, so it has not met its CPA obligations in relation to chiropractic legislation.

Box 3.3: The ACT's review and reform of health practitioner legislation

In March 2001, the ACT completed a consolidated review of health profession Acts, comprising the *Medical Practitioners Act 1930*, *Nurse Act 1988*, *Dentists Act 1931*, *Chiropractors and Osteopaths Act 1983*, *Dental Technicians and Dental Prosthetists Registration Act 1988*, *Optometrists Act 1959*, *Pharmacy Act 1931*, *Physiotherapist Act 1977*, *Podiatrists Act 1994* and *Psychologists Act 1994*.

The ACT Government approved the drafting of legislation that incorporates the review recommendations. It released an exposure draft of the Health Professionals Bill 2002 in November 2002. Consultation on the draft was due to close in mid-December 2002, but was extended until the end of February 2003 in response to interest from the public. The Government anticipates considering the final package in the ACT Legislative Assembly spring 2003 session. The Bill will repeal the existing health professional Acts and replace them with a consolidated Act.

The Bill provides for registration of practitioners of regulated professions and for ongoing review of the standard of practice of registered practitioners. It does not restrict the use of any specific titles, instead making it an offence for unregistered practitioners to pretend to be registered professionals. Regulations under the Act set out registration requirements for the suitability to practise. The Regulations also provide for required standards of practice for health professions (including requirements that professionals are competent to practice and that advertising is not misleading).

In line with the review recommendation, the Act does not reserve specific practices for specific professions. Instead, it protects consumers by making it an offence for an unregistered person to provide a health service ordinarily provided only by practitioners of a regulated health profession (s. 73). There are no restrictions on the practices that individual regulated professions may perform, but the Regulations state that a registered practitioner who demonstrates a lack of competence or endangers public health and safety breaches the required standards of practice.

Source: Department of Health and Community Care 1999; Government of the ACT 2002 and 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 professional boards 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 a regulation impact assessment before introduction.

The former Northern Territory Government accepted the review recommendations and determined in April 2001 that the current legislation regulating health professionals would be repealed and that an omnibus Act would be created to replace the existing six Acts. The current Government endorsed this position and approved drafting of the new legislation on 18 March 2003. The Health Practitioners Bill incorporates the legislative changes recommended by the NCP reviews of the six Acts and the professional board's 1998 review. (Some recommendations from the 1998 review did not require legislative amendments and have been administratively implemented.)

The review recommendations regarding the regulation of chiropractors are consistent with the CPA clause 5 guiding principle, but the legislation is not expected to be introduced to the Legislative Assembly until the November 2003 sittings. Consequently, the Northern Territory Government has not met its NCP obligations because it has not completed the reform process. The costs imposed on the community from reform delays are low, however, because the new legislation will retain many of the core restrictions on competition (which the review found to be in the public interest).

Table 3.1: 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. Its NCP review of core practice restrictions was completed in 2001. Recommendations included retaining title protection and entry restrictions, but removing other unnecessary anticompetitive restrictions (see box 3.1, p. 3.6).	Queensland passed framework legislation in 1999 and enacted the *Chiropractors Registration Act 2001*. It also introduced a Bill to reform practice restrictions in June 2003. All implemented and proposed reforms are in line with NCP review recommendations.	Review and reform incomplete
Western Australia	*Chiropractors Act 1964*	Entry, registration, title, practice, discipline	*Key directions* paper was released in June 2001. It proposed removing prescriptive advertising restrictions; requiring practitioners to hold professional indemnity insurance; removing restrictions on business ownership; and retaining broad practice restrictions for three years pending the outcome of the core practices review (which is under way).	In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the health professions legislation.	Review and reform incomplete

(*continued*)

Table 3.1: continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Chiropractors Act 1991*	Entry, registration, title, practice, discipline, advertising, ownership	South Australia completed the review in 1999, which recommended removing ownership restrictions and amending practice reservation and advertising codes.	Following consultation, the Government intends to introduce an amending Bill to Parliament in the second half of 2003.	Review and reform incomplete
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)
The 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 recommended removing practice restrictions.	The Government released an exposure draft of the omnibus Health Professions Bill 2002 (incorporating the review recommendations) in July 2002 and anticipates tabling the final Bill in the Legislative Assembly in late 2003.	Review and reform incomplete
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 restriction and removing generic practice restrictions.	Omnibus Bill is being drafted, which incorporates the recommendations for legislative change. Other reforms will be implemented administratively.	Review and reform incomplete

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 2002 NCP assessment reported that Victoria and Tasmania had met their CPA obligations in relation to dental practitioner legislation in 2001. This 2003 NCP assessment considers other jurisdictions' compliance with their CPA clause 5 obligations in relation to this area.

New South Wales

The *Dentists Act 1989* reserved the title 'dentist' and the practice of dentistry to dentists registered under the Act. It also restricted the employment of dentists by nondentists (with 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, but replacing the current restriction on the practice of dentistry with five restricted core practices.

The review also recommended replacing the restrictions on the employment of dentists and the ownership of dental practices with 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 risk of commercial considerations overriding professional obligations, while having only marginal impacts on competition (NSW Health 2001).

The Government accepted the review recommendations, except that regarding the ownership restrictions, and 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 registered 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 (Government of New South Wales 2002, pp. 19–20).

To comply with the CPA clause 5 guiding principle, governments must demonstrate that any remaining legislative restrictions on competition are in the public interest and 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 are less restrictive ways of protecting patients.

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. Based on the approach adopted in New South Wales for medical practitioners, to exclude a person from the market requires a criminal conviction, which can be complex, time consuming and expensive, particularly if the matter goes to appeal (Government of New South Wales 2003).

The impact on competition of New South Wales' employment and ownership restrictions depends 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 does not intend to use the employment and ownership restrictions to protect incumbents. To finalise its assessment, the Council sought information on how the board will apply the public interest test. In response, the Government commented:

> …*at the time of completing the review of the Dentists Act 1989 (March 2001), the Dental Board had granted employment exemptions to enable seven separate organisations to employ dentists in sixteen dental clinics. It is noted that the restrictive effect of the provisions was substantially lessened following the 1996 Court of Appeal decision in NIB Health Services Ltd v Dental Board. Since this date the only applicants for new approvals have been private health insurance companies, which have all received decisions in their favour. This record would appear to indicate that there have been no adverse impacts on these or other potential employers.* (Government of New South Wales 2003, p. 17)

The Council notes that the Court of Appeal found that the Dental Board, in refusing NIB's application to operate a dental care clinic at Newcastle, had considered the interests of dentists, which contravenes the Act. The court upheld NIB's appeal and ordered that the board reconsider the application in accordance with the law.

Since the appeal decision, however, the objectives under which the board makes its decisions have changed. Under the Dentists Act, the board could not grant an exemption unless 'satisfied that the interests of the public generally or of *any section of the public* [emphasis added], other than dentists, warrant the granting of the approval'. Under the reforms contained in the Dental Practice Act, the board cannot grant an exemption 'unless it is satisfied that it is in the public interest (excluding the interest of registered dentists) to do so'. Private health funds are also granted an automatic exemption from the ownership restrictions.

Only private health insurance companies have applied for exemption since the Court of Appeal decision. There has been no opportunity, therefore, to assess the quality of the public benefit tests undertaken by the board and thus determine how well the exemption mechanism is operating.

The application/exemption process may create a barrier to entry. In contrast to New South Wales, the Victorian Branch of the Australian Dental Association claims that more than 100 non-dentist owned practices have established in Victoria since the deregulation of ownership restrictions in June 2000. This claim supports a finding that the exemption model is not the least restrictive approach to achieving the objectives of health practitioner legislation and, therefore, does not comply with CPA obligations.

The Council accepts that a negative licensing approach may not be as cost-effective as the approach that New South Wales has chosen to adopt. Nevertheless, this cost factor does not rule out the use of potentially less restrictive alternatives. A formal positive licensing approach, for example, would be less restrictive of competition than is the 'exemptions' model, because it would provide greater transparency and accountability in decision-making. Alternatively, rather than requiring applicants to satisfy the board that their exemption would be in the public interest, the Act could simply require applicants to show that exemption approval would not be contrary to the public interest. New South Wales has not properly considered such alternatives.

The Council considers that New South Wales has not made a convincing case that employment and ownership restrictions are necessary to achieve its regulatory objectives. It thus assesses New South Wales as not having met its CPA obligations in relation to the review and reform of its dental practitioner legislation.

Queensland

Queensland introduced legislation to reform all of its health practitioner legislation (see box 3.1, p. 3.6). A separate, but similar review of legislative restriction of dentistry was commenced in 1999 and endorsed by the Government in October 2000. The new dental legislation — the *Dental Practitioners Registration Act 2001* and the *Dental Technicians and Dental Prosthetists Registration Act 2001* — mirrors most elements of other health

practitioner legislation, but adds provision for registering specialist dentists (for example, oral maxilla-facial surgeons).

A separate core practices review for the dentistry profession was undertaken by PriceWaterhouseCoopers, which 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 to:

- remove the requirement that dental technicians work to the written prescription of a dentist, dental specialist or dental prosthetist;
- remove the requirement that dental therapists work in the public sector; and
- allow dental therapists to treat adults under the supervision of a dentist (PricewaterhouseCoopers 2000b).

After undertaking further consultations, Queensland introduced the Health Legislation Amendment Bill 2003 to Parliament in June 2003 to implement the recommended core practice reforms in dentistry and other health professions.

The changes already implemented in Queensland and the proposed core practices reforms are consistent with the CPA clause 5 guiding principle. That said, Queensland has not complied with its CPA obligations because it has not completed the core practices reforms.

Western Australia

Box 3.2 (p. 3.8) discusses the general health practitioner legislation reforms announced in Western Australia's *Key directions* policy framework paper. In this paper, the Government proposed reforms specific to dentistry and other oral health professions, including:

- removing the restriction on the number of dental therapists and dental hygienists that a dentist may employ;
- allowing dental prosthetists to construct and fit partial dentures, providing the practitioner meets specific training requirements set by the board;
- removing the restrictions on the ownership of dental practices; and
- removing the ban on the private sector employment of school dental therapists (Department of Health 2001, pp. 5–6).

The Government also decided to retain broad practice restrictions for three years (from June 2001) pending the outcome of the core practices review, which is under way.

As discussed in the section on chiropractors (p. 3.7), the Council considers health practitioner reforms to be a significant issue — one that has the potential to deliver substantial benefits to the Western Australian community and the economy more generally. The Council is concerned that the template health practitioner legislation drafted in 2001 is yet to be introduced in Parliament. Western Australia has not met its CPA obligations in relation to dentistry legislation because it has not completed its review and reform process.

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*, which commenced in June 2003. 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), whereas the new Act retains the restrictions on ownership and association.

The new Act 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).

South Australia released its application form for exemption to the ownership restrictions (s. 45(3) of the Dental Practice Act) on 23 May 2003. The s. 2 criteria for exemption states:

> *An exemption may be provided pursuant to Section 45(3) if the Governor determines that good reason exists for doing so in the particular circumstances of the case. In deciding whether good reason exists, the following will be considered:*
>
> - *Whether the provider is considered fit and proper to provide dental services;*
>
> - *That such an exemption provides a public benefit, consideration will be given to issues of access and quality.*

South Australia, New South Wales and Western Australia are the only jurisdictions with restrictions on the ownership of dental practices. Western Australia advised, however, 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 in the public interest and that a restrictive approach is 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 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, the government can 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 screen potential dental practice owners before they purchase a business, but still provide greater transparency and accountability than provided by South Australia's exemptions model.

The Council notes that an application/exemption process may create a barrier to entry and considers there to be potentially less restrictive means available for achieving outcomes consistent with the objectives of Dental Practice Act.

The Council raised it concerns about the ownership restrictions with South Australia in November 2000. It undertook to monitor the situation before finalising the assessment noting that the impacts on competition will depend on how the Government uses its power to grant exemptions from the restrictions. In particular, they 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.

South Australia advised in its 2002 NCP annual report that it there is already nondentist ownership of dental practices. It has also provided additional evidence that it is using the exemption power to promote competition in a way that is consistent with the objectives of the Act. It advised that no application for exemption has been refused. At the time of the commencement of the Act, all nine applications received for exemption were approved and a further batch of applications received are being processed (R Williams (Director of the National Competition Policy Unit of the Cabinet

Office) 2003, pers. comm., 28 August). This indicates that South Australia's exemption power, although broad and allowing for Ministerial discretion, does focus on safeguarding patient welfare. The mechanism has been in operation for such a short duration of time, however, that it is difficult to properly assess its true impact on competition.

On balance, the Council considers that South Australia, like New South Wales, has not made a convincing case that ownership restrictions are necessary to achieve its regulatory objectives. For this reason, South Australia has not met its CPA obligations in relation to the review and reform of its dental practitioner legislation. Nevertheless, the evidence to date suggests that, at least in South Australia's case, the restrictive effect is likely to be small because the application/exemption process has not significantly impeded market entry.

The ACT

The section on chiropractors (p. 3.9) 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 specific recommendations in relation to dental practitioners.

- The review recommended removing requirements for the registration of dental technicians. It considered that since dental technicians work to the order of registered dentists or dental prosthetists, it is these employers that should be 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). It 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 profession.

- The review recommended removing the restrictions on the scope of practice of dental hygienists and dental therapists. It 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 accepted the review's recommendations and has completed consultation on an exposure draft of the Health Professionals Bill 2002. The Bill will repeal the existing health professionals Acts and replace them with a consolidated Act. The ACT anticipates considering the final package in the ACT Legislative Assembly spring 2003 session.

While the proposed reforms are in line with the CPA guiding principle, the ACT has not completed its review and reform process and therefore has not met its CPA obligations in relation to dental practitioner legislation.

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 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* (TPA).

The Government accepted the review recommendations in May 2001 and commenced drafting a new omnibus Health Practitioners Registration Bill to replace the Dental Act and five other health practitioner registration Acts. The Bill is expected to be ready for introduction to the Legislative Assembly in November 2003. While the proposed reforms to the Northern Territory dental practitioner legislation are consistent with the CPA guiding principles, the Government has not complied with its CPA obligations in this area because it has not completed its review and reform process. If, however, the Northern Territory Government is able to meet its proposed timetable for passing the legislation, then the costs imposed on the community from the delay would be insignificant.

Table 3.2: Review and reform of 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.	Does not meet CPA obligations (June 2003)
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	Queensland completed its health professions review in 1999. Its NCP review of core practice restrictions was completed in 2001. Recommendations included retaining title protection and entry restrictions, but removing other unnecessary anticompetitive restrictions (see box 3.1, p. 3.6). The review of practice restrictions in dentistry recommended relaxing a number of the restrictions.	Queensland passed framework legislation in 1999 and enacted the new dental registration legislation in 2001. The Government is considering the recommendations of the core practices review, and expects to make legislative amendments implementing the final policy approach in 2003.	Review and reform incomplete
Western Australia	*Dental Act 1939* *Dental Prosthetists Act 1985*	Entry, registration, title, practice, discipline	Issues paper was released in October 1998 and *Key directions* paper was released in June 2001. The latter 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.	Review and reform incomplete

(*continued*)

Table 3.2 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. Criteria for exemption from the ownership restrictions have been developed.	Does not meet CPA obligations (June 2003)
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. 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 the review recommendations) in July 2002, and anticipates tabling the final Bill in the Legislative Assembly in late 2003.	Review and reform incomplete
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.	Review and reform incomplete

Medical practitioners

The 2002 NCP assessment reported that New South Wales and Victoria had met their CPA obligations in relation to medical practitioners. This 2003 NCP assessment considers whether the other jurisdictions have met their CPA obligations in this area and reports on new regulatory developments in Victoria.

Victoria

Victoria amended the *Medical Practice Act 1994* in 2002 to:

- create a negative licensing scheme to regulate corporate owners of medical practices who direct or incite medical practitioners to engage in unprofessional conduct; and
- give the Medical Practitioners Board powers to manage poorly performing medical practitioners.

These changes are consistent with the CPA guiding principle so Victoria remains in compliance with its CPA obligations in relation to the regulation of medical practice.

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 with the enactment of the *Medical Practitioners Registration Act 2001*. This Act provides for specialist registration, and special-purpose registration and the registration of interns.

Core practice reforms are in the process of being implemented (see box 3.1, p. 3.6) to retain the restriction on the practices of thrust manipulation of the spine and prescribing optical appliances for correction or relief of visual defects, but remove the practice restrictions that apply to surgery of the muscles, tendons, ligaments and bones of the foot and ankle. A Bill to implement these reforms was introduced into Parliament in June 2003. This legislation had not been passed, so Queensland has not met its CPA obligations in relation to medical practitioner legislation.

Western Australia

A Ministerial Working Party, chaired by Dr Bryant Stokes (Chief Medical Officer, Health Department of Western Australia), has reviewed the competition restrictions as part of a broader review of its *Medical Act 1894*.

The working party released a draft review report in October 1999. The final report was released in 2001 and contained the following recommendations:

- retaining registration requirements, including specialist registration;
- retaining title protection for 'registered medical practitioners' only, but prohibiting nonregistrants from using any title that may induce people to believe they are a registered practitioners (consistent with the approach adopted in Victoria);
- making major changes to the disciplinary system, including establishing a medical tribunal (independent of the Medical Board) to deal with more serious disciplinary matters;
- revising advertising restrictions to prohibit the advertising of medical services in a manner that offers a discount, gift or inducement to attract patients where the terms and conditions of such an offer are not outlined, but also to remove other prescriptive controls on the form and content of advertising by medical practitioners;
- undertaking further consultation to determine whether and how to regulate the activities of bodies corporate involved in the provision of medical services; and
- initiating a process to examine whether a link between registration and a requirement for ongoing professional development be established.

Western Australia's 2003 NCP annual report advised that Cabinet accepted the review's recommendations and approved drafting of a Medical Practitioners Registration Bill, which will replace the current Act. The Government intends to introduce the Bill to Parliament in the latter half of 2003, in parallel with reforms to establish a State Administrative Tribunal to deal with more serious disciplinary matters relating to medical practitioners.

Western Australia has not complied with its CPA obligation in relation to its medical practitioner legislation because it has not completed its review and reform activity.

South Australia

South Australia completed a review of the *Medical Practitioners Act 1983* in March 1999, which recommended removing ownership restrictions, registering medical students, requiring the declaration of commercial interests and requiring practitioners to have professional indemnity insurance. The former Government introduced a new Medical Practice Bill to the Parliament in May 2001, which implements the recommendations of the review. The Bill lapsed following the State elections. The current Government advised that it is further consulting on proposed medical practitioner legislation reforms and intends making some amendments, including

amendments relating to infection control, accountability and honesty. It aims to introduce a new Bill to Parliament in the second half of 2003.

The Council considers that the review recommendations satisfactorily address competition questions. South Australia has not completed its review and reform activity and, therefore, has not met its CPA clause 5 obligations in relation to this legislation.

Tasmania

Tasmania completed a review of the *Medical Practitioners Registration Act 1996*. The review found that the registration of medical practitioners is justified in the public interest, but that restrictions on the ownership of medical practices and controls on advertising were not (Government of Tasmania 2003). The Cabinet has accepted all the review recommendations and legislation is set for introduction into Parliament in October 2003 (P Mussared (Acting Secretary of the Department of Treasury and Finance) 2003, pers. comm., 25 August).

While the review recommendations are in line with CPA principles, Tasmania has not complied with it obligations in this area because it has not completed its reform activity.

The ACT

The ACT completed its NCP review of health practitioner legislation in March 2001, including the *Medical Practitioners Act 1930* (box 3.3, p. 3.10). The review recommended continuing to register practitioners (subject to them meeting minimum entry standards) and maintaining protection of title, but not restricting practices to specific professions and removing unnecessary business conduct restrictions. The Government accepted the review recommendations and anticipates considering the final package of reforms in the ACT Legislative Assembly spring 2003 session.

While proposed reforms in the ACT are in line with CPA principles, the ACT has not complied with its obligations in this area because it has not completed its reform activity.

The Northern Territory

The 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 practitioners, but repealing residency requirements, allowing greater flexibility for assessing entry qualifications and empowering the medical board to require registrants to demonstrate continuing competence in order to gain or renew a license. The review also recommended removing the reservation of practice, but empowering the board

to restrict treatments or procedures that have a high probability of causing serious damage. Further, the review recommended removing advertising and ownership restrictions.

The Northern Territory Government accepted the review recommendations in May 2001 and commenced drafting a new omnibus Health Practitioners Registration Bill to replace the Medical Act and five other health practitioner registration Acts. The draft omnibus Bill is expected to be ready for introduction to the Legislative Assembly during November 2003.

While the proposed reforms are consistent with the CPA guiding principle, the Northern Territory has not complied with its NCP obligations because it has not completed its review and reform.

Table 3.3: 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 recommended inserting an objectives clause, clarifying entry requirements, reforming the disciplinary system and removing of business and practice restrictions.	*Medical Practice Amendment Act 2000* was passed in July 2000, implementing 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 the advertising provisions, including the ability of the board to impose additional restrictions. Further amendments in 2002 required Ministerial endorsement of the board's advertising proposals.	Meets CPA obligations (June 2002)
Queensland	*Medical Act 1939*	Entry, registration, title, practice, discipline, advertising, business	Queensland completed its health professions review in 1999. Its NCP review of core practice restrictions was completed in 2001. Recommendations included retaining title protection and entry restrictions, but removing other unnecessary anticompetitive restrictions (see box 3.1, p. 3.6). The core practices review recommended removing practice restrictions on foot surgery.	Queensland passed framework legislation in 1999 and enacted the *Medical Practitioners Registration Act 2001.* It also introduced a Bill to reform practice restrictions in June 2003. All implemented and proposed reforms accord with review recommendations.	Review and reform incomplete
Western Australia	*Medical Act 1894*	Entry, registration, title, practice, discipline, advertising	Draft report (October 1999) recommended: retaining registration and title protection; changing the disciplinary system; removing of prescriptive controls on advertising; further considering of issues relating to the regulation of bodies corporate; and linking registration with a requirement for ongoing professional development.	Cabinet intends to introduce a package of reforms in the latter half of 2003 to implement the review's recommendations.	Review and reform incomplete

(*continued*)

Table 3.3 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 the declaration of commercial interests and requiring practitioners to have professional indemnity insurance.	New legislation was introduced in May 2001, but lapsed with the calling of the State elections. After further consultation, a new Bill will be introduced to Parliament in the second half of 2003.	Review and reform incomplete
Tasmania	*Medical Practitioners Registration Act 1996*	Entry, registration, title, practice, discipline, advertising	Review has been completed. The review found that the registration of medical practitioners is justified in the public interest, but that restrictions on the ownership of medical practices and controls on advertising were not.	The Government has accepted the recommendations and legislation is expected to be introduced to Parliament in October 2003.	Review and reform incomplete
ACT	*Medical Practitioners Act 1930*	Entry, registration, title, practice, discipline, advertising	The ACT completed its health practitioner legislation review in March 2001. The review recommended revisions to advertising and conduct provisions. It recommended removing practice restrictions.	The Government released an exposure draft of the omnibus Health Professions Bill 2002 (incorporating the review recommendations) in July 2002 and anticipates tabling the final Bill in the Legislative Assembly in late 2003.	Review and reform incomplete
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 and allied professionals registration legislation is being drafted to replace this and other Acts.	Review and reform incomplete

Nurses

The 2002 NCP assessment reported that Victoria, South Australia and Tasmania had met their CPA obligations in relation to the regulation of nurses. This 2003 NCP assessment considers whether other jurisdictions have met their CPA obligations in this area.

New South Wales

In 1998, New South Wales enacted legislation allowing advanced nurse practitioners to have limited prescribing and referring rights. NSW Health commenced a review of the *Nurses Act 1991* in 1999. 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.

The Government approved the review's recommendations in November 2001. The Nurses Amendment Bill 2003 was passed by the Legislative Assembly on 18 June 2003. It is currently before the Legislative Council.

While the review's recommendations are consistent with clause 5 of the CPA, New South Wales has not completed its reform activity. Given, however, that the review recommended retaining restrictions on the use of professional titles for nurse and midwives, which are the major restrictions on competition, some delay in New South Wales meeting its CPA obligations in this area is unlikely to impose a significant cost on the community.

Queensland

Queensland reviewed the *Nursing Act 1992* separately from its review of other health practitioner registration legislation. Queensland Health commenced the NCP review of the Nursing Act in October 1999. It released a discussion paper in November 2001 and the final public benefit test report in August 2003. The review recommended that separate title and practice restrictions be maintained for nurses and midwifes, but that practice restrictions be refined to:

- allow persons without nursing (midwifery) authorisation to practice under the supervision of a nurse (midwife);
- recognise the role of other health professionals that provide services, within their professional training and expertise, that may be regarded as nursing (midwifery) type services; and
- develop a Ministerial endorsed document that provides guidance with respect to the scope of nursing (midwifery) practice;

The review also recommended that penalties for contravening the restrictions be increased.

The review concluded that these restrictions provide a net benefit by overcoming information asymmetries and reducing the risks to people receiving care.

The proposed reforms are consistent with the CPA guiding principle. Nevertheless, Queensland has not met it CPA obligations in relation to legislation regulating the nursing and midwifery profession because it has not yet implemented the reforms. The Government is expected to implement amending legislation in 2003.

The 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.

These recommendations are consistent with the CPA clause 5 guiding principle. The former Northern Territory Government accepted the review recommendations in May 2001 and elected to prepare new omnibus legislation to replace the Nursing Act and five other health practitioner registration Acts. The current Northern Territory Government also endorsed the recommendations of the review. It advised the Council that it expects to introduce the omnibus Health Practitioners Registration Bill to the Legislative Assembly in November 2003.

The Council assesses the Northern Territory as not having met its CPA obligations in this area because it has not completed its review and reform activity.

Other jurisdictions

Western Australia completed an omnibus review of its health practitioner legislation and announced the policy framework for replacement legislation. It has commenced a review to determine whether broad practice restrictions should be replaced with the identification of core practices in nursing (see box 3.2, p. 3.8). One reform specific to nurses was implemented through amendment to the *Nurses Act 1992*: it deems nurses registered in other Australian jurisdictions or New Zealand responding to an emergency or retrieving organs in Western Australia to be registered in Western Australia (Government of Western Australia 2002).

The ACT included the *Nurses Act 1988* in its review of health practitioner legislation (see box 3.3, p. 3.10), but the review did not make any specific recommendations regarding the regulation of nurses. The ACT Government approved the drafting of legislation that incorporates the review recommendations and expects to introduce the final package of reforms — which will repeal the Nurses Act and replace it with a consolidated health practitioners Act — to the Legislative Assembly in spring 2003.

The proposed reforms to be implemented in Western Australia and the ACT are consistent with the CPA guiding principle. These jurisdictions have not completed their reform activity, however, so they have not met their CPA obligations in relation to legislation regulating the nursing profession.

Table 3.4: 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 has been passed in the Legislative Assembly and is before the Legislative Council.	Review and reform incomplete
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. The final public benefit test report was released in August 2003. It recommended retention of key competition restrictions in the public interest.	The Government is expected to implement amending legislation (if any) in 2003.	Review and reform incomplete
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 and the *Core practices* discussion paper was released in March 2003.	The Nurses Amendment Bill 2003, which deems Australian and New Zealand nurses to be registered in Western Australia in certain emergency situations, received the Governor's assent in April 2003.	Review and reform incomplete
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 review recommendations.	Meets CPA obligations (June 2001)

(continued)

Table 3.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
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)
ACT	*Nurses Act 1988*	Entry, registration, title, discipline	The ACT completed its health practitioner legislation review in March 2001. The review recommended revisions to advertising and conduct provisions. It recommended removing practice restrictions.	The Government released an exposure draft of the omnibus Health Professions Bill 2002 (incorporating the review recommendations) in July 2002 and anticipates tabling the final Bill in the Legislative Assembly in late 2003.	Review and reform incomplete
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 legislation is being drafted to replace this and other Acts. It is expected to be introduced into the Legislative Assembly in November 2003.	Review and reform incomplete

Optometrists and optical paraprofessionals

The 2002 NCP assessment reported that Victoria had met its CPA obligations in relation to the review and reform of its legislation governing optometry professions. This 2003 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 the reservation of practice and replacing restrictions on the ownership of optometry practices with a negative licensing system and restrictions on pressuring optometrists 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 that was passed, creating the *Optometrists Act 2002*. On commencement this Act will repeal the Optometrists Act 1930 and the *Optical Dispensers Act 1963*. The Optometrists Act 2002 implements most of the review recommendations, but 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. New South Wales also advised that on commencement of the Optometrists Act 2002, in early 2004, clear guidelines will be in place to implement the ownership exemption process.

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.

Despite the findings of the NCP review, New South Wales argued in 2002 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 gradually reduce competition in some areas and only marginally improve 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 case 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 Australian Competition and Consumer Commission has found evidence of effective entry in the past.
  - The TPA provides a mechanism for dealing with concerns about regional monopolies.
- New South Wales provided no 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 applied similar offence provisions to its health professions and New South Wales has applied this approach to regulate 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 would New South Wales' exemptions model, because it would provide greater transparency and accountability.

The Council assesses that New South Wales, in not having made a convincing case that the ownership restrictions provide a net public benefit and are necessary to achieve the objectives of the Act, has not met its CPA obligations in relation to the review and reform of its optometry legislation.

The competition impacts of the Government'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 its 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. The Government assured the Council that its intention is not to restrict competition unless there is a clear consumer need to do so. New South Wales did not, however, explain how the exemptions will operate. The Council therefore considers that New South Wales has not complied with its CPA obligations in relation to its review and reform of legislation governing the optometry profession.

Queensland

Optometry regulation is part of a wider Queensland reform program for health professions (see box 3.1, p. 3.6). Queensland replaced the *Optometrists Act 1974* with the *Optometrists Registration Act 2001*. The new Act removed restrictions on the ownership of optometry practices and the supply and fitting of optical appliances.

The Government is in the final stages of implementing core practice reforms, which will retain the practice restriction on prescribing optical appliances for correction or relief of visual defects, but will remove the restriction on the fitting of contact lenses. A Bill to implement these reforms was introduced into Parliament in June 2003. This legislation had not been passed, so Queensland has not met its CPA obligations in relation to optometry legislation.

Western Australia

In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the *Optometrists Act 1940* and other health professions legislation. The Government's *Key directions* paper sets out the policy framework that is the basis for this new legislation and provides details on the core practices review, which is under way (see box 3.2, p. 3.8).

In *Key directions* the Government announced that it had decided to retain the *Optical Dispensers Act 1966* for 12 months while further assessing the need for this restriction. In February 2002, the Department of Health released the *Review of the practices of optical dispensers*, seeking submissions on this issue. Based on the feedback received, the review's advisory committee is finalising its deliberations.

As discussed in the section on chiropractors (p. 3.7), the Council is concerned that that the template health practitioner legislation drafted in 2001 is yet to be introduced to Parliament. While restrictions on optical dispensing are unlikely to have a significant impact on competition, the overall package of reforms has the potential to deliver substantial economic benefits to Western Australia. The Council notes that Queensland has removed restrictions on the supply and fitting of optical appliances.

Western Australia has not met its CPA obligations in relation to optometrists legislation because it has not completed its review and reform process.

South Australia

South Australia completed its review of legislation regulating optometrists in April 1999. The review recommended extending legislative coverage to optical dispensers, removing the restriction on training providers and introducing a code of conduct. A Cabinet submission seeking approval for the recommendations and approval to draft amendments has been prepared. The Bill is expected to be drafted in the second half of 2003 and introduced to Parliament in 2004 (Government of South Australia 2003). While the review recommendations appear consistent with the CPA clause 5 guiding principle, South Australia has not met it CPA obligations in this area because it has not completed its review and reform activity.

Tasmania

Tasmania completed its review of its optometry legislation. The key issues for the review were the extent of restrictions on the ownership of practices and on the advertising of services (Government of Tasmania 2003). Tasmania advised that the Cabinet accepted all the review recommendations on 21 July 2003 (P Mussared (Acting Secretary of the Department of Treasury and Finance) 2003, pers. comm., 25 August). Tasmania has not met its CPA obligations in this area because it has not completed its review and reform activity.

The ACT

The ACT included the *Optometrists Act 1956* in its review of health practitioner legislation. The review recommendations are outlined in box 3.3 (p. 3.10). The one specific recommendation regarding optometrists was to continue restricting the sale of spectacles or contact lenses not prescribed by a medical practitioner or optometrist, but further review these restrictions. The review found a public protection case for keeping the restriction, but also a case for undertaking a more focussed assessment of the restriction. The Council considers that this approach complies with the CPA clause 5, provided that a focused assessment is conducted within a reasonable timeframe.

The Government accepted the review recommendations. In August 2002, it announced that it would also introduce legislation to allow optometrists to prescribe certain therapeutic ocular drugs. It consulted on a draft exposure of the Health Professionals Bill 2002, which incorporated all proposed reforms and will replace the existing Optometrists Act and other health professional Act with a consolidated Act. The ACT anticipates considering the final package in the ACT Legislative Assembly spring 2003 session.

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 legislation to replace the Optometrists Act and five other health practitioner registration Acts. The Department of the Chief Minister advised the Council that the current Government approved drafting of an omnibus Health Practitioners and Allied Professionals Registration Bill, which is expected to be introduced to the Legislative Assembly in November 2003. The proposed reforms are consistent with the CPA clause 5 guiding principle.

The Northern Territory has not yet met its CPA obligations, however, because it has not completed the review and reform of its legislation regulating optometrists.

Table 3.5: 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. The *Optometrists Act 2002* implements most of the review's recommendations, but retains ownership restrictions.	Does not meet CPA obligations (June 2003)
Victoria	*Optometrists Registration Act 1958*	Entry, registration, title, practice, discipline, advertising	Review was completed and new legislation was assessed under the CPA clause 5(5). The new Act removes most commercial practice restrictions and the 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 its health professions review in 1999. Its NCP review of core practice restrictions was completed in 2001. Recommendations included retaining title protection and entry restrictions, but removing other unnecessary anticompetitive restrictions (see box 3.1, p. 3.6).	Queensland passed framework legislation in 1999 and enacted the *Optometrists Registration Act 2001*, removing ownership restrictions. It also introduced a Bill to reform practice restrictions in June 2003. All implemented and proposed reforms are in line with NCP review recommendations.	Review and reform incomplete

(*continued*)

Table 3.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Optical Dispensers Act 1966* *Optometrists Act 1940*	Entry, registration, title, practice, discipline, advertising	*Key directions* paper was released in June 2001. It proposed removing prescriptive advertising restrictions; requiring practitioners to hold professional indemnity insurance; removing restrictions on business ownership; and retaining broad practice restrictions for three years pending the outcome of the core practices review (which is under way).	In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the health professions legislation. The proposed reforms retain restrictions on optical dispensing.	Review and reform incomplete
South Australia	*Optometrists Act 1920*	Entry, registration, title, practice, discipline, advertising	Review was completed in 1999. It recommended extending registration to optical dispensers, removing the restriction on training providers and introducing a code of conduct.	A Cabinet submission seeking approval to implement the review recommendations has been prepared. Reform process is expected to be completed in 2004.	Review and reform incomplete
Tasmania	*Optometrists Registration Act 1994*	Entry, registration, title, practice, discipline, advertising	Review completed. The key issues for the review were the extent of restrictions on the ownership of practices and on the advertising of services.	Cabinet accepted all the review recommendations on 21 July 2003.	Review and reform incomplete

(*continued*)

Table 3.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Optometrists Act 1956*	Entry, registration, title, practice, discipline, advertising	The ACT completed its health practitioner legislation review in March 2001. The review recommended revisions to advertising and conduct provisions. It recommended removing practice restrictions.	The Government released an exposure draft of the omnibus Health Professions Bill 2002 (incorporating the review recommendations) in July 2002 and anticipates tabling the final Bill in the Legislative Assembly in late 2003.	Review and reform incomplete
Northern Territory	*Optometrists Act*	Entry, registration, title, practice, discipline, ownership	Review completed in May 2000. Its recommendations included removing ownership restrictions, modifying practice restrictions and retaining title protection.	Omnibus health practitioner legislation is being drafted to replace this and other health practitioner Acts.	Review and reform incomplete

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 2003 NCP assessment considers whether the other jurisdictions have met their CPA obligations in this area and provides an update on proposed new reforms in Queensland.

Queensland

The Queensland NCP review of core practices recommended that the practice of thrust manipulation of the spine be reserved for osteopaths, chiropractors, medical practitioners and physiotherapists (see box 3.1, p. 3.6). A Bill to implement these reforms was introduced into Parliament in June 2003. The Council considers this recommendation to be consistent with the CPA clause 5 guiding principle, but Queensland has not yet met its CPA obligations in this area because it has not completed its reform activity.

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. In addition, it is undertaking a review of core practices to determine appropriate protections to apply to osteopaths (see box 3.2, p. 3.8). Consequently, Western Australia has not met its CPA obligations to complete its review and reform of osteopath legislation.

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, p. 3.9). South Australia has not met its CPA clause 5 obligations in relation to this area because it has not completed its review and reform activity.

The ACT

The ACT included the *Chiropractors and Osteopaths Act 1983* in its review of health practitioner legislation. The review recommendations (see box 3.3, p. 3.10) did not include any specific recommendations regarding osteopaths. The ACT Government approved the drafting of legislation that incorporates

the review recommendations and expected to introduce the resulting Bill to the Legislative Assembly in late 2002.

While the proposed reforms are in line with the CPA guiding principle, the ACT has not completed its review and reform process and therefore has not met its CPA obligations in relation to in this area because it has not completed its review and reform process.

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, p. 3.10). The recommendations regarding osteopaths are consistent with the CPA principles.

The former Northern Territory Government accepted the review recommendations and determined in April 2001 that the current legislation regulating health professionals would be repealed and that an omnibus Act would be created to replace the existing six Acts. The Health Practitioners Bill incorporates the recommendations for legislative change from the NCP reviews of the six Acts and the professional boards 1998 review. (Some recommendations from the 1998 review did not require legislative amendments and have been administratively implemented.)

The review recommendations regarding the regulation of osteopaths are consistent with the CPA clause 5 guiding principle. The Northern Territory Government has not met its NCP obligations in this area, however, because it has not completed the reform process.

Table 3.6: Review and reform of legislation regulating the osteopathy profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*[a]	*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.	The *Osteopaths Registration Act 2001* does not contain practice restrictions. The Health Legislation Amendment Bill 2003 introduces restrictions on the practice of thrust manipulation of the spine. All reforms are in line with NCP review recommendations.	Meets CPA obligations (registration) (June 2001); review and reform incomplete (core practice restrictions)
Western Australia	*Osteopaths Act 1997*	Entry, registration, title, discipline	As for chiropractors.	As for chiropractors.	
South Australia	*Chiropractors Act 1991*	Entry, registration, title, practice, discipline, advertising, business	As for chiropractors.	As for chiropractors.	
Tasmania	*Chiropractors Registration Act 1982*	Entry, registration, title, practice, discipline, advertising	As for chiropractors.	New *Chiropractors and Osteopaths Act 1997 was* 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.	
Northern Territory	*Health Practitioners and Allied Professionals Registration Act*	Entry, registration, title, practice, discipline	As for chiropractors.	As for chiropractors.	

[a] See table 3.1, p. 3.12.

Pharmacists

Pharmacists retail prescription drugs and medicines, over-the-counter medications and related goods and services such as toiletries, cosmetics and health care products. Pharmacists also provide consumers with advice on the safe use of medications.

Each State and Territory requires pharmacists to hold appropriate qualifications and be registered. State and Territory legislation also prohibits people other than registered pharmacists from handling or selling certain pharmaceuticals in a retail environment. Reserving the practice of pharmacy to registered pharmacists ensures consumers receive appropriate professional advice before taking potentially harmful medicines. It may also, however, result in greater costs for pharmacy goods due to proprietors' need to offer salaries sufficient to attract qualified staff pharmacists.

In all States and Territories, except the Northern Territory, pharmacist 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);
- permitted ownership structures (for example, the requirement for all shareholders and directors of bodies corporate to be registered pharmacists); and
- provisions that prevent nonpharmacists from 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).

State and Territory pharmacist legislation is closely interlinked with the regulation of drugs, poisons and controlled substances, and with Commonwealth legislation underpinning the Pharmaceutical Benefits Scheme (PBS), both of which are discussed in later sections of this chapter.

National review of pharmacy legislation

The Council of Australian Governments (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. It considered legislative restrictions in key areas: ownership restrictions and registration requirements in State and

Territory pharmacy legislation, and restrictions on pharmacy locations under the PBS.[1]

The review sought to set the boundaries of acceptable legislative restrictions on competition, considering 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. If a jurisdiction's regulations go beyond that line, however, any excessive regulation should be wound back.* (Wilkinson 2000, p. 19).

In relation to State and Territory pharmacist legislation, the review recommended:

- retaining the statutory registration of pharmacists and continuing to restrict the practice of pharmacy and the use of titles such as 'pharmacist' to registered pharmacists. It found, on balance, that registering a pharmacist as competent to a minimum level of proficiency for unsupervised practice was justifiable in the public interest;

- retaining restrictions on who may own a pharmacy. It found that these restrictions provide a net public benefit to the community through improved professional conduct of pharmacy practice;

- lifting restrictions on the number of pharmacies that a pharmacist can own, but continuing to require pharmacist supervision of pharmacy operations. It found that numerical restrictions are arbitrary, artificial, easy to breach and difficult to enforce, but that requirements for pharmacist supervision of pharmacies ensure the provision of safe and competent services;

- continuing to permit friendly societies to own pharmacies, but prohibiting those not already operating in a given jurisdiction from operating pharmacies in that jurisdiction in the future. It considered that friendly society pharmacies are relics of a bygone era when governments did not fund health services, so found it hard to justify the future entry of new players into the friendly society pharmacy sector; and

- retaining prohibitions on nonpharmacists having a direct proprietary interest in pharmacies, but lifting restrictions on other forms of pecuniary interest. It took the view that regulatory authority scrutiny is generally not needed for the commercial relationships and transactions of pharmacy businesses, so long as authorities can act on matters where safe and competent pharmacy practice is compromised.

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[1] Queensland limited its involvement in the review to ownership provisions because it had a separate NCP process under way for the review of registration provisions in its *Pharmacy Act 1976*. Tasmania also chose not to include its pharmacy registration provisions in the review.

The Council considered the national review recommendations in the 2001 NCP assessment but did not conclude its assessment because governments had yet to announce their responses to the review. CoAG referred the national review to a working group comprising senior Commonwealth, State and Territory officers. The working group released its report in August 2002, recommending that CoAG accept most of the national review's recommendations.

The working group questioned, however, the evidence supporting the national review's conclusion that restricting pharmacy ownership is in the public interest. It found that the national review, in coming to this conclusion, was hampered by a lack of evidence and did not seem to examine the different treatment of business ownership in the context of other Australian professions or overseas experience. It also questioned the value of ownership requirements in view of the review's recognition that requirements for pharmacists' supervision of pharmacies ensures safe and competent pharmacy services.

Nonetheless, the working group recommended that CoAG accept the recommendation to retain the ownership restrictions. It considered that the impact of deregulating ownership could be too disruptive for the industry in the short term, given the other significant reforms proposed by the review (including proposals to limit restrictions on commercial aspects of pharmacy practices and to remove caps on the number of pharmacies that a pharmacist may own).

The working group proposed that CoAG reject the recommendation to prevent friendly societies operating pharmacies in jurisdictions where they are not already present. It considered that the only issue that should determine the extent of friendly societies' participation in community pharmacy is whether they can run good pharmacies. On this basis, it concluded that friendly society pharmacies, as a sector, should be permitted to operate in the same way as other pharmacist proprietors.

The working group endorsed the recommendation to remove restrictions on the number of pharmacies that a pharmacist may own. It noted, however, that New South Wales remains concerned about the potential for monopolies to arise in regional areas and will further assess this issue as part of the reform implementation process.

The working group recommended continuing to reserve the practice of pharmacy as only an interim measure. It questioned the need for any practice reservation, given provisions in drugs and poisons legislation that require various drugs to be obtained through a qualified pharmacist. It also questioned practice reservation without a workable definition of the activities involved, because such an approach does not provide certainty and risks unduly restricting related practices.

Assessment

The Council considers that the review's conclusion that ownership restrictions provide a net benefit to the community is based on questionable evidence (for a detailed discussion of the issues, see NCC 2002 pp. 6.78–6.80). The CoAG senior official's working group, however, provided an alternative public interest case: that is, that deregulating ownership would be too disruptive for the pharmacy industry in the short term given the other reforms being implemented. In this 2003 NCP assessment, therefore, the Council focuses on the evidence supporting the working group's case.

The national review noted that the community pharmacy sector has long enjoyed shelter from the full force of market competition. While there is competition between pharmacies, that competition occurs within a relatively homogeneous, conservative and stable market. Good professionals do not necessarily make good managers and businesspeople. The current regulatory arrangements, however, have made it easier for poorer business performers to be protected from themselves, such that pharmacies (unlike other small to medium-sized businesses) are perceived as low risk businesses by those who own and finance them (Wilkinson 2000).

In this environment, 'providing the best possible professional service to consumers at the best price may not always be the strongest driving factor in pharmacy proprietor's business outlooks and decision-making processes' (Wilkinson 2000). The national review received evidence that levels of service received at pharmacies are often less than optimal, with the quality of service of many pharmacies described as 'relatively indifferent and patchy' (Wilkinson 2000).

This indicates that some pharmacist proprietors would find it difficult to compete with entrepreneurial new entrants. In the United States, Canada and the United Kingdom, consumers have 'voted with their feet'. Chain pharmacies in these countries have increased their market share at the expense of smaller independent pharmacies, suggesting that they provide cost, quality and/or convenience benefits to consumers (PC 1999d).

Consequently, the proprietors of pharmacies that perform under consumer expectations would be likely to find that the capital value of their businesses falls. From a community-wide perspective, this represents an 'income transfer' rather than a true economic cost — the loss to pharmacist proprietors would be matched by an income benefit to consumers (who would spend less on medications) and taxpayers (who would outlay less on the PBS) (PC 1999d).

Existing pharmacist proprietors face substantial challenges in adjusting to a more competitive market environment, however. The pharmacy industry has traditionally been relatively insular and self-contained (Wilkinson 2000, p. 35). Pharmacist proprietors tend to be older, and many are no longer in active practice (AIHW 1996). Further, the small scale of many pharmacies makes it uneconomic for independent pharmacist proprietors to introduce specialist management and retailing skills (PC 1999d, p. 36).

In these circumstances, ownership deregulation in the short-term could raise significant structural adjustment issues. Gradual reform implementation, however, can help to minimise transitional costs to independent pharmacists. The reforms that the working group endorsed provide existing pharmacist proprietors with scope to develop more efficient, innovative and competitive businesses, and enable efficient providers to expand their operations. They thus provide a sound base for successful longer term deregulation of pharmacy ownership.

On this basis, the Council accepts that if governments implement the reforms recommended by the working group, the retaining ownership restrictions in the short term may have a net public benefit (bearing in mind that the CPA obliges governments to review retained restrictions within 10 years).

The following sections consider reform implementation in each jurisdiction.

New South Wales

New South Wales is concerned that lifting the restrictions on pharmacy ownership could lead to the emergence of monopolies in regional areas, and it indicated it would investigate this matter. The CoAG working group (CoAG 2002) found that while the Commonwealth legislation retains location restrictions (which effectively prevent new businesses from entering the market) there is capacity for small pockets of market domination to occur. The national review found, however, that numerical restrictions are readily circumvented, so it is hard to perceive further restriction as necessary or having significant benefits. This finding supports the view that ownership restrictions are not the least restrictive approach to achieving the objectives of the New South Wales pharmacy legislation. For this reason, the restrictions do not comply with CPA obligations.

The New South Wales Government's final proposals for legislative changes to its pharmacy legislation are before Cabinet, but were delayed by New South Wales' pre-election caretaker conventions (Government of New South Wales 2003). Consequently, New South Wales has not complied with its CPA obligations in relation to pharmacy legislation because it has not completed its review and reform activity.

Victoria

Victoria released a discussion paper in August 2002 that considered ways in which to implement the recommendations of the national review, and examined any competition restrictions within the *Pharmacists Act 1973* that were not considered by the national review, along with any proposed regulation that might restrict competition if implemented (Government of Victoria 2003). Victoria advises that the Minister for Health is considering the recommendations arising from responses to the discussion paper. Victoria has not met its CPA obligations in relation to pharmacy legislation because it has not completed its review and reform process.

Queensland

Queensland passed the *Pharmacists Registration Act 2001* to replace the *Pharmacy Act 1976*, as part of its package of health practitioner legislation reforms (see box 3.1, p. 3.6). The new Act contains entry and registration requirements, reserves the title of 'pharmacist' for registered pharmacists, and removes unnecessary anticompetitive advertising restrictions. These provisions are consistent with the CPA clause 5 guiding principle.

The new Act also preserves the practice and ownership restrictions from the Pharmacy Act, pending the outcomes of the national review process. Queensland intends to introduce amending legislation to implement the review recommendations soon, and expects the new arrangements to commence by the end of 2003. To comply with its CPA obligations on this matter, Queensland will need to give effect to the working group recommendations to remove numerical restrictions on ownership and amend the pecuniary interest provisions. The Council thus assesses that Queensland has not met its CPA obligations in relation to pharmacy legislation because it has not completed its review and reform activity.

Western Australia

The Department of Health is considering the recommendations of the national review process in consultation with key stakeholders. Consequently, Western Australia has not met its CPA obligations in relation to pharmacy legislation because it has not completed its review and reform activity.

South Australia

The South Australian Government is considering a draft Bill to implement the decision of the CoAG working party. It anticipates introducing the Bill to Parliament in the second half of 2003 or early 2004. Such reform would be consistent with the CPA guiding principle. South Australia has not complied with its CPA obligations in this area, however, because it has not yet implemented its pharmacy reforms.

Tasmania

Tasmania repealed its *Pharmacy Act 1908* and replaced it with the *Pharmacists Registration Act 2001*. The registration provisions of the new Act are similar to those in other recently enacted Tasmanian health practitioner registration legislation and consistent with the CPA clause 5 guiding principles.

The new Act retains stringent restrictions on the number of pharmacies in which a registered pharmacist may have a direct or indirect interest, contrary to the recommendation of the national review. It also introduced new

restrictions limiting the number of pharmacies that a friendly society may operate in Tasmania.

Tasmania has also advised that the final content of its pharmacy legislation would depend on its assessment of the outcome of the national review of this legislation, including CoAG's recommendations. To comply with its CPA obligations, Tasmania will need to amend its Act to implement the working group's recommended treatment of friendly societies.

The Council thus assesses Tasmania as not meeting its CPA obligations in this area because it has not completed its review and reform activity.

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 requires restricted pharmaceuticals to be dispensed by registered pharmacists). The review considered, however, that the ACT's pharmacy ownership provisions 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 to ensure only registered pharmacists, or companies controlled and managed by registered pharmacists, could own and operate pharmacies (Tucker 2001). The ACT Government advised the Council that these amendments do not impose any additional obligations on 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 in 2002 to provide legal advice to clarify the effect of the amendments. In response, the ACT Government Solicitor's Office advised that the *Pharmacy Amendment Act 2001* limits pharmacy ownership so only registered pharmacists may own a pharmacy and that this approach is consistent with the original provisions and intention of the Pharmacy Act. Section 45(2)(a) of the 1931 Act, however, allows for a company to own a pharmacy, which means someone other than a registered pharmacist can own a pharmacy. The Pharmacy Amendment Act redresses this anomaly.

The ACT considers that the Wilkinson review allowed for a generous interpretation of the ownership provisions of the Pharmacy Act. The review accorded too much weight to the potential for a nonregistered pharmacist to own a pharmacy, rather than recognising the intention of the Act to keep ownership solely in the preserve of pharmacists. The latter approach would have accorded with the conventional interpretation that the review applied to similar legislation in other States.

When the ACT implements the proposed reforms from its review of its health professional legislation, it may provide exceptions to the ownership restrictions to allow operation of friendly society pharmacies. Under its

proposal, the current Pharmacy Act will be replaced through consolidation within the Health Professionals' Bill. The ACT intends to include pharmacy-specific provisions within a schedule to the revised legislation. The health practitioner registration provisions of the Bill are consistent with the CPA clause 5 guiding principle (see section on chiropractors, p. 3.9), but whether the ACT meets its CPA obligations in this area will depend on its decision regarding friendly society pharmacies.

The Council assesses the ACT as not meeting it CPA obligations in relation to pharmacy legislation because it has not completed its review and reform activity.

The Northern Territory

The Northern Territory intends to introduce a consolidating Health Practitioner Registration Bill to Parliament in 2003. The Department of Health and Community Services has advised the Council that the Minister for Health intends use the Bill to introduce ownership restrictions on pharmacies, but provide some discretion for the Minister to grant exemptions to this restriction.

As discussed earlier, the Council questioned the strength of the evidence supporting the national review's conclusion that ownership restrictions are in the public interest. In assessing compliance with the CPA clause 5 guiding principle, therefore, the Council looked for the Northern Territory to provide additional evidence that the benefits of restricting ownership (subject to some discretion to provide exemptions) outweigh the costs, such as evidence that restricting pharmacy ownership is likely to improve pharmacy services in the Northern Territory.

The Wilkinson Review found that the Northern Territory's pharmacy legislation did not rule out the ownership of pharmacies by persons other than pharmacists (although, as in other jurisdictions, the Act requires restricted pharmaceuticals to be dispensed by registered pharmacists). The review considered, however, that the Northern Territory's pharmacy ownership provisions fell within the boundary of acceptable regulation and that the Northern Territory did not need to amend its Act (Wilkinson 2000, p. 48). The Government will nevertheless need to provide a rigorous public interest case that restricting ownership provides a net public benefit and is the least restrictive option available.

The Northern Territory has not met its CPA obligations in relation to pharmacy legislation because it has not completed its review and reform activity.

Table 3.7: Review and reform of legislation regulating the pharmacist profession

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Pharmacy Act 1964*	Entry, registration, title, practice, discipline, advertising, business ownership, licensing	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 maintaining ownership restrictions and removing business licensing restrictions. CoAG referred the national review to a senior officials working group, which recommended that CoAG accept most of the national review recommendations (except the recommendation on nonpharmacy ownership of pharmacies by friendly societies and other nonpharmacists that currently own pharmacies).	A proposal for legislative change is before Cabinet.	Review and reform incomplete
Victoria	*Pharmacists Act 1974*	Entry, registration, title, practice, discipline, advertising, business ownership, licensing		Victoria commenced a further review to examine implementation options for Wilkinson Review recommendations and to assess other outstanding restrictions. It released a discussion paper in August 2002.	Review and reform incomplete
Queensland[a]	*Pharmacy Act 1976*	Entry, registration, title, practice, discipline, advertising, business ownership		Queensland passed the *Pharmacists Registration Act 2001*. Queensland intends to introduce reforms to implement the review recommendations soon and expects the new arrangements to commence by the end of 2003.	Review and reform incomplete
Western Australia	*Pharmacy Act 1974*	Entry, registration, title, practice, discipline, advertising, business ownership, licensing, residence		Western Australia is consulting with stakeholders on the recommendations from the national review.	Review and reform incomplete

a Queensland limited its involvement in the review to ownership provisions because it had a separate NCP process under way for the review of registration provisions in its Pharmacy Act.

(continued)

Table 3.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Pharmacy Act 1991*	Entry, registration, title, practice, discipline, advertising, business ownership, licensing	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 maintaining ownership restrictions and removing business licensing restrictions. CoAG referred the national review to a senior officials working group, which recommended that CoAG accept most of the national review recommendations (except the recommendation on nonpharmacy ownership of pharmacies by friendly societies and other nonpharmacists that currently own pharmacies).	South Australia anticipates a Bill to implement the decisions of the CoAG senior officials' working party will be introduced into Parliament in the second half of 2003.	Review and reform incomplete
Tasmania[b]	*Pharmacy Act 1908*	Entry, registration, title, practice, discipline, advertising, business ownership		Act was repealed and replaced with the *Pharmacists Registration Act 2001,* which retained ownership restrictions pending its consideration of the outcome of the national review process.	Review and reform incomplete
ACT	*Pharmacy Act 1931*	Entry, registration, title, practice, discipline		In July 2002, the ACT released an exposure draft of the omnibus Health Professions Bill 2002 to repeal and replace this and other health practitioner registration Acts. It anticipates introducing the final Bill to Parliament in late 2003.	Review and reform incomplete
Northern Territory	*Pharmacy Act 1996*	Entry, registration, title, practice, discipline		The Government intends to introduce a consolidating Health Practitioner Registration Bill in 2003, which will introduce pharmacy ownership restrictions.	Review and reform incomplete

b Tasmania chose not to include its pharmacy registration provisions in the review.

Physiotherapists

The 2002 NCP assessment reported that New South Wales, Victoria and Tasmania had met their CPA obligations in relation to the review and reform of legislation regulating the physiotherapy profession. This 2003 NCP assessment considers whether the other jurisdictions have complied with their CPA obligations in this area.

Queensland

Queensland enacted the *Physiotherapists Registration Act 2001* to replace the *Physiotherapists Act 1964*. The new Act continues to reserve title for registered physiotherapists in the public interest, but removes other anticompetitive restrictions on commercial and business conduct, including advertising restrictions. The Act also retained broad practice restrictions, but the Government introduced the Health Legislation Amendment Bill 2003 to Parliament in June 2003, which will reserve only the practice of thrust manipulation of the spine for physiotherapist and other related health professions (see box 3.1, p. 3.6). The proposed reforms are consistent with the CPA guiding principle. Queensland has not met its CPA obligations in relation to physiotherapist legislation because it has not completed the implementation process.

Western Australia

In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the *Physiotherapists Act 1950* and other health professions legislation. The Government's *Key directions* paper sets out the policy framework that is the basis for this new legislation and provides details on the core practices review, which is under way (see box 3.2, p. 3.8).

The proposed reform in *Key directions* will remove anticompetitive restrictions found in the NCP review to not be in the public interest, although the Government will retain practice restrictions for three years while undertaking a focused review. The Council assesses that Western Australia has not met its CPA obligations in relation to the physiotherapy profession because it has not implemented any of its proposed health practitioner reforms.

South Australia

South Australia completed a review of the *Physiotherapists Act 1991* in February 1999. The review recommended:

- retaining registration and a requirement that physiotherapists demonstrate continuing competence;

- replacing broad practice restrictions with core practice restrictions;
- publishing a code of conduct (without advertising restrictions);
- removing of the requirement for the board to approve business names;
- removing of restrictions on the ownership of physiotherapy practices; and
- banning the exercise of undue influence over registered physiotherapists.

The Government approved drafting of amending legislation on 28 August 2000. Having completed consultation with the professional board, it expects to release a draft Bill for wider public consultation in the latter half of 2003 and to implement reforms in the first half of 2004 (Government of South Australia 2003). While the review recommendations are consistent with CPA principles, South Australia has not met its CPA obligations in relation to physiotherapy legislation because the reform process is yet to be completed.

The ACT

The ACT included the *Physiotherapists Act 1977* in its review of health practitioner legislation. The review recommendations (outlined in the section on chiropractors) did not include any specific recommendations regarding physiotherapists. The Government accepted the review recommendations and completed consultation on a draft exposure of the Health Professionals Bill 2002. The Bill will repeal the existing health professional Acts and replace them with a consolidated Act. The ACT anticipates considering the final package in the ACT Legislative Assembly spring 2003 session. Box 3.3 (p. 3.10) provides details on ACT's review and reform of health practitioner legislation. The proposed reforms are in line with CPA principles. The ACT is yet to meet its CPA obligations with regard to physiotherapist legislation because it has not completed its review and reform process.

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, p. 3.10). The review recommendations in relation to physiotherapists are 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 current Government endorsed this position and approved drafting of the new legislation on 18 March 2003. The legislation is not expected to be introduced in the Legislative Assembly until the November 2003 sittings. The Council

thus assesses the Northern Territory as not meeting its NCP obligations in this area because it has not completed the reform process.

Table 3.8: 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 its health professions review in 1999. Its NCP review of core practice restrictions was completed in 2001. Recommendations included retaining title protection and entry restrictions, but removing other unnecessary anticompetitive restrictions (see box 3.1, p. 3.6). It also recommended preserving the restriction for thrust manipulation of the spine.	Queensland passed framework legislation in 1999 and enacted the *Physiotherapists Registration Act 2001.* It also introduced a Bill to reform practice restrictions in June 2003. All implemented and proposed reforms are in line with NCP review recommendations.	Review and reform incomplete
Western Australia	*Physiotherapists Act 1950*	Entry, registration, title, practice, discipline	*Key directions* paper was released in June 2001. It proposed removing prescriptive advertising restrictions; requiring practitioners to hold professional indemnity insurance; removing restrictions on business ownership; and retaining broad practice restrictions for three years pending the outcome of the core practices review (which is under way).	In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the health professions legislation.	Review and reform incomplete

(*continued*)

Table 3.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Physiotherapists Act 1991*	Entry, registration, title, practice, discipline, advertising, ownership	Review completed in 1999. It recommended removing ownership and advertising restrictions, retaining registration subject to a demonstration of ongoing competence and replacing broad practice restrictions with core practice restrictions.	Consultation on a draft Bill designed to implement the reforms is being undertaken. Bill is likely to be introduced into Parliament in 2004.	Review and reform incomplete
Tasmania	*Physiotherapists Registration Act 1951*	Entry, registration, title, practice, discipline, advertising	Tasmania assessed the replacement legislation through its new legislation gatekeeping process under the CPA clause 5(5).	Act was repealed and replaced by the *Physiotherapists Registration Act 1999*.	Meets CPA obligations (June 2001)
ACT	*Physiotherapists Act 1977*	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 recommended removing practice restrictions.	The Government released an exposure draft of the omnibus Health Professions Bill 2002 (incorporating the review recommendations) in July 2002 and anticipates tabling the final Bill in the Legislative Assembly in late 2003.	Review and reform incomplete
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. The Government expects to introduce the Bill into Parliament in November 2003.	Review and reform incomplete

Podiatrists

The 2002 NCP assessment reported that Victoria and Tasmania had met their CPA obligations in relation to the review and reform of legislation regulating the podiatry profession. The Northern Territory does not regulate the podiatry profession. This 2003 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 and completed the review in March 2003. The Government commenced consultation with stakeholders after the release of the draft report. While the report has not been released to the public yet, the Council understands that the review's major proposal is to replace the current whole-of-practice restrictions on podiatry with three core practice restrictions, restricting certain foot treatments to podiatrists, nurses and medical practitioners (Government of New South Wales 2003). It also recommended the removal of technical contraventions of the Act where other regulated practitioners such as physiotherapists administer foot treatment within their legitimate scope of practice.

The Government introduced an exposure draft of the Podiatrists Bill 2003 into the Legislative Assembly on 1 July 2003. The Bill will repeal and replace the Podiatrists Act 1989 and incorporates the review recommendations on practice restrictions. It also contains provisions to ensure that podiatrists maintain their competence through a more robust annual renewal process and introduces a new disciplinary system. The proposed reforms are consistent with the CPA guiding principle. New South Wales has not met its CPA obligations in relation to the regulation of podiatrists, however, because it has not completed the review and reform process.

Queensland

Podiatry regulation is being considered as part of a wider Queensland reform program for health professions (see box 3.1, p. 3.6). Queensland replaced the *Podiatrists Act 1969* with the *Podiatrists Registration Act 2001*, which retains those competition restrictions found in the NCP review to be consistent with the CPA guiding principle.

The Government is in the final stages of implementing core practice reforms, which will remove the outstanding restriction on the practice of soft tissue and nail surgery of the foot. A Bill to implement these reforms was introduced into Parliament in June 2003. This legislation had not been passed, so Queensland has not met its CPA obligations in relation to podiatry legislation.

Western Australia

In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the *Podiatrists Registration Act 1984* and other health professions legislation. The Government's *Key directions* paper sets out the policy framework that is the basis for this new legislation and provides details on the core practices review, which is under way (see box 3.2, p. 3.8). Western Australia has not introduced to Parliament the template health practitioner legislation drafted in 2001, however, so has not met its CPA obligations in this area.

South Australia

South Australia completed a review of the *Chiropodists Act 1950* in January 1999. The review recommended changing references to chiropody in the Act to podiatry, limiting practice reservation and removing ownership and advertising restrictions. The review recommendations are consistent with CPA clause 5 guiding principle.

The Government prepared a Bill to implement reforms and finalised consultation with the Podiatrists Board. After undertaking wider public consultation on a draft Bill, the Government intends to introduce reforms to Parliament in the second half of 2003 (Government of South Australia 2003). South Australia has not met its CPA obligations in relation to podiatry legislation because it has not completed its review and reform activity.

The ACT

The ACT included the *Podiatrists Act 1994* in its omnibus health practitioner legislation review. Box 3.3 (p. 3.10) provides details on the ACT's progress with its review and reform of health practitioner legislation. The review did not make any specific recommendations regarding podiatrists (Department of Health and Community Care 1999). While the proposed reforms are in line with the CPA guiding principle, the ACT has not completed its review and reform process and therefore has not met its CPA obligations in relation to podiatrist legislation.

Table 3.9: 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	Review was completed in March 2003. Its key recommendation was the replacement of broad practice restrictions with three core practice restrictions.	The Government introduced an exposure draft of the Podiatrists Bill 2003 into the Legislative Assembly on 1 July 2003. The Bill will repeal and replace the Podiatrists Act 1989.	Review and reform incomplete
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	Queensland completed its health professions review in 1999. Its NCP review of core practice restrictions was completed in 2001. Recommendations included retaining title protection and entry restrictions, but removing other unnecessary anticompetitive restrictions (see box 3.1, p. 3.6). Removal of the current practice restrictions was also recommended.	Queensland passed framework legislation in 1999 and enacted the *Podiatrists Registration Act 2001*. It also introduced a Bill to reform practice restrictions in June 2003. All implemented and proposed reforms are in line with NCP review recommendations.	Review and reform incomplete
Western Australia	*Podiatrists Registration Act 1984*	Entry, registration, title, practice, discipline	*Key directions* paper was released in June 2001. It proposed removing prescriptive advertising restrictions; requiring practitioners to hold professional indemnity insurance; removing restrictions on business ownership; and retaining broad practice restrictions for three years pending the outcome of the core practices review (which is under way).	In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the health professions legislation.	Review and reform incomplete

(*continued*)

Table 3.9 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Chiropodists Act 1950*	Entry, registration, title, practice, discipline, advertising [ownership, business licensing?]	Review was completed in 1999. It recommended removing ownership and advertising restrictions and limiting reserved practice.	The Government prepared a draft Bill containing the amendments, and consultation will occur before the Bill is introduced to Parliament in the second half of 2003.	Review and reform incomplete
Tasmania	*Podiatrists Registration Act 1995*	Entry, registration, title, discipline, advertising	Review was completed in 2000.	Amending legislation passed November 2000 removing advertising and ownership restrictions.	Meets CPA obligations (June 2001)
ACT	*Podiatrists Act 1994*	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 recommended removing practice restrictions.	The Government released an exposure draft of the omnibus Health Professions Bill 2002 (incorporating the review recommendations) in July 2002 and anticipates tabling the final Bill in the Legislative Assembly in late 2003.	Review and reform incomplete

Psychologists

The 2002 NCP assessment reported that New South Wales, Victoria Queensland and Tasmania had met their CPA obligations in relation to the review and reform of legislation governing the psychology profession. This 2003 NCP assessment considers whether the other jurisdictions have complied with their CPA obligations in this area.

Western Australia

In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the *Psychologists Registration Act 1976* and other health professions legislation. The Government's *Key directions* paper sets out the policy framework that is the basis for this new legislation and provides details on the core practices review, which is under way (see box 3.2, p. 3.8).

The proposed reform in *Key directions* will remove anticompetitive restrictions that the NCP review found not to be in the public interest. Practice restrictions, however, are being retained for three years while a focused review is undertaken. In relation to psychologists, the NCP review concluded that given the definitional difficulties and the lack of clearly definable harm, psychological testing and psychotherapy should not be included in the core practices model. The discussion paper on core practices review sought views on this conclusion and recommended that hypnosis be deregulated.

Western Australia has not implemented any of its proposed health practitioner reforms and so has not met its CPA obligations in relation to the psychology profession.

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 are consistent with the State's CPA obligations.

Review and reform activity is still progressing. In its 2003 NCP annual report, South Australia advised that Cabinet approved drafting of amendments to the Act on 23 April 2001. The Government completed consultation with the professional board and intends to release a draft bill for wider public consultation in the second half of 2003. It plans to introduce any reforms to Parliament in 2004.

South Australia has not met it CPA obligations in this area because it has not completed its review and reform activity.

The ACT

The ACT included the *Psychologists Act 1994* in its omnibus health practitioner legislation review (see box 3.3, p. 3.10). The review did not make any specific recommendations regarding psychologists (Department of Health and Community Care 1999). The Government accepted the review's recommendations and has completed consultation on an exposure draft of the Health Professionals Bill 2002. The Bill will repeal the existing health professionals Acts and replace them with a consolidated Act. The ACT anticipates considering the final package in the ACT Legislative Assembly spring 2003 session.

While the proposed reforms are in line with the CPA guiding principle, the ACT has not completed its review and reform process and therefore has not met its CPA obligations in relation to the psychology profession because it has not completed its review and reform activity.

The Northern Territory

The Northern Territory registers psychologists 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, p. 3.10).

The former Northern Territory Government accepted the review recommendations in May 2001 and decided to prepare a new omnibus legislation to replace the Health Practitioners and Allied Professionals Registration Act and five other health practitioner registration Acts. In its 2003 NCP annual report, the Northern Territory advised that the current Government approved drafting of an omnibus Health Practitioners and Allied Professionals Registration Bill, which is expected to be introduced to the Legislative Assembly in November 2003. The proposed reforms are consistent with the CPA clause 5 guiding principle. The Northern Territory has not met its CPA obligations in this area because it has not completed the review and reform of its legislation regulating psychologists.

Table 3.10: 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 in 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	Queensland completed its health professions review in 1999. Its NCP review of core practice restrictions was completed in 2001. Recommendations included retaining title protection and entry restrictions, but removing other unnecessary anticompetitive restrictions (see box 3.1, p. 3.6).	Queensland passed framework legislation in 1999 and enacted the *Psychologists Registration Act 2001*, which does contain practice restrictions. All implemented and proposed reforms are in line with NCP review recommendations.	Meets CPA obligations (June 2001)
Western Australia	*Psychologists Registration Act 1976*	Entry, registration, title, practice, discipline	*Key directions* paper was released in June 2001. It proposed removing prescriptive advertising restrictions; requiring practitioners to hold professional indemnity insurance; removing restrictions on business ownership; and retaining broad practice restrictions for three years pending the outcome of the core practices review (which is under way).	In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the health professions legislation.	Review and reform incomplete

(*continued*)

Table 3.10 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Psychological Practices Act 1973*	Entry, registration, title, practice, discipline, advertising	Review was completed in 1999. It recommended removing advertising and practice restrictions.	The Government prepared a draft Bill and the consultation process is under way. The Bill is expected to be introduced into Parliament in 2004.	Review and reform incomplete
Tasmania	*Psychologists Registration Act 1976*	Entry, registration, title, discipline, advertising	Review was 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	The ACT completed its health practitioner legislation review in March 2001. The review recommended revisions to advertising and conduct provisions. It recommended removing practice restrictions.	The Government released an exposure draft of the omnibus Health Professions Bill 2002 (incorporating the review recommendations) in July 2002 and anticipates tabling the final Bill in the Legislative Assembly in late 2003.	Review and reform incomplete
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. The Government expects to introduce the Bill to Parliament in November 2003.	Review and reform incomplete

Review and reform of legislation regulating other health professions

Four health professions are regulated in only some Australian jurisdictions: occupational therapists, speech therapists, radiographers and practitioners of traditional Chinese medicine.

Recognising the difficulties raised by partially registered professions, Governments 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 the registration of radiographers in all States but found no case for the continued registration of occupational therapists or speech therapists (VEETAC 1993, pp. 35–6).

The 2002 NCP assessment reported that:

- Victoria had met its CPA obligations in relation to legislation regulating traditional Chinese medicine practitioners; and
- Queensland and Tasmania had met their CPA obligations in relation to legislation regulating radiographers.

This 2003 NCP assessment considers whether Queensland, Western Australia, South Australia and the Northern Territory have complied with their CPA obligations for the outstanding issues regarding the regulation of these four professions.

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 — namely, 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 provided a detailed public benefit rationale to support retaining title protection (Government of Queensland 2002), arguing that title protection:

- protects consumers from the risk of being harmed by inadequately trained or incompetent providers, by ensuring registered providers are competent and subject to a 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 A$120 initial registration fee and A$181 annual renewal fee).

Queensland considered that the benefits of title protection for occupational therapists, while significant, may not be 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 these benefits, along with the minimal impacts on the Government, the profession and nonregistrants, produce 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. It gave 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 that they 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, because 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 impose greater costs on the Government from the need to take court action against providers.

The Council questions the strength of the evidence supporting Queensland's claim of significant consumer protection benefits from protecting the 'occupational therapist' title. Title protection can be expected to protect patients from risks of harm only if there is a risk that incompetently performed occupational therapy will result in harm to the patient and if title reservation is likely to reduce the risk of occupational therapy being incompetently performed.

The first criterion might have been met. Legislation reviews in other jurisdictions identified harms that could result from occupational therapy activities. The South Australian occupational therapy legislation review acknowledged that 'there is not a significant risk of irreversible harm or injury as in the case of other professions, the risk of harm caused by an incompetent practitioner is significant' (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, who may have limited knowledge of the competency of individual therapists. The referring practitioners can be expected, however, to use alternative information sources, such as colleagues who regularly refer patients to occupational therapists. In addition, the TPA protects patients against unqualified practitioners holding themselves out to be qualified occupational therapists.

Further, considerable evidence suggests that the reservation of the title 'occupational therapist' is not necessary to protect patients. As noted above, 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. OT Australia administers and markets an occupational therapist accreditation scheme, which helps patients, referrers and employers identify therapists who 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 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 and Victoria's Health Services Commissioner has received one complaint in the past five years, while the Health Care Complaints Commission in New South Wales did not receive any in the past four years (Health Care Complaints Commission 2000, 2001; Health Rights Commission 1999, 2000, 2001; Health Services Commissioner 1999, 2000, 2001).

No legislation review 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 is further 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 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

In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the *Occupational Therapists Registration Act 1980* and other health professions legislation. The Government's *Key directions* paper sets out the policy framework that is the basis for this new legislation and provides details on the core practices review, which is under way (see box 3.2, p. 3.6).

The *Key directions* paper 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. Western Australia's justification for maintaining title protection is that a range of activities (for example, the use of electromyography and ultrasound equipment, which if not used properly may cause burns to a patient) practised by occupational therapists pose a potential risk of harm to the public that outweighs the benefits of further competition and therefore should continue to be regulated (Government of Western Australia 2002). As discussed in the assessment of Queensland's occupational therapy legislation, the Council doubts the strength of the evidence of significant patient protection benefits from reserving the title of 'occupational therapist'. In addition, considerable evidence suggests that title reservation is not necessary to ensure adequate patient protection.

In the 2002 NCP assessment, the Council considered that Western Australia had not met its CPA obligations in relation to the review and reform of occupational therapy legislation, but that the costs of retaining this restriction on competition are insignificant (as discussed in the assessment of Queensland's legislation). Based on the Council's assessment, Western Australia decided to reconsider this restriction in the context of the core practices review, which is under way. Western Australia has not met its CPA obligations in this area, therefore, because it has not completed its review and reform activity.

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 has been prepared. The Government intends to undertake public consultation before introducing the Bill to Parliament in the first half of 2004 (Government of South Australia 2003).

In the 2002 NCP assessment, the Council considered that the review did not provide a robust case for 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), while 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.
  - Title restriction is not required for registration. Instead of title protection South Australia could make it an offence for unregistered practitioners to pretend to be registered professionals. This is the approach being adopted for registration of many health professionals in the ACT (see box 3.3, p. 3.10).
- The Government introduced a Health and Community Services Complaints Bill to Parliament in 2001. The Bill lapsed following the calling of the State election. The new Government introduced a more comprehensive version of the Bill on 19 February 2003; if passed, the Bill 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.

The Council considers that the review recommendations on title protection are not consistent with the CPA clause 5 guiding principle. South Australian Government is undertaking consultation and expects to introduce the Bill to Parliament in 2004. Consequently, South Australia has not met its CPA obligations is this area.

The costs of the noncompliance in this case are not significant, however. As discussed in the assessment of Queensland, 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 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, p. 3.10).

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 2000e, 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 legislation to replace the Health Practitioners and Allied Professionals Registration Act and five other health practitioner registration Acts. In its 2003 NCP annual report, the Northern Territory advised that the current Government approved drafting of an omnibus Health Practitioners Bill, which is expected to be introduced to the Legislative Assembly in November 2003.

The Council doubts the review's public interest reasoning for retaining registration. As discussed in the assessment of Queensland's occupational therapist legislation, the Council doubts the strength of the evidence that significant consumer protection benefits arise 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 that 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 noted that fair trading legislation is sufficient, in principle, to prevent service users from being misled without title protection under the Health Practitioners and Allied Professionals Registration Act (CIE 2000e, p. 35). Consequently, the Council considers that the legislation and review recommendations do not meet the CPA clause 5 guiding principle.

The costs of any noncompliance are insignificant, however. As discussed in the section on Queensland's occupational therapy legislation, title protection hinders nonregistrants' ability to promote their services, but the adverse impacts on competition are likely to be negligible given that nonregistrants can still use unrestricted titles. The registration system's administration costs are also low. In any case, the Northern Territory has not completed the review and reform of its legislation regulating occupational therapists so it has not met its CPA obligations.

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 completed its review of the *Radiographers Act* in May 2000, but is yet to complete the reforms. 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 Officer under the *Radiation (Safety Control) Act*. Such reform is consistent with the CPA clause 5 guiding principle.

To avoid double handling the reform, the Northern Territory Government elected to delay the repeal of the Radiographers Act pending finalisation of the national review of radiation protection legislation, which includes the Radiation (Safety Control) Act and associated regulations (Government of the Northern Territory 2002). This review was completed in May 2001, and the Australian Health Ministers' Conference endorsed the recommendations (with some minor revisions) and Implementation Plan in September 2002. Development of new radiation protection legislation has commenced, and the Government plans to introduce it to the Legislative Assembly in November 2003.

The Council accepts that benefits can arise from synchronising reforms, so long as this approach does not result in unreasonable delays. If the Northern Territory can meet its proposed timetable for reform, then the delay would not appear unreasonable. Nevertheless, the Northern Territory has not met its CPA obligations regarding review and reform of radiographer legislation because it has not completed its review and reform activity.

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 retains restrictions on the use of the 'speech pathologist' title, but does not restrict the practice of speech pathology.

Queensland's argument for providing title protection for speech pathologists is identical to that 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, p. 3.72).

The Council doubts 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 patient harm. Many speech pathologists work in hospitals, health centres, community clinics and schools, which are well positioned to assess the competency of their staff and have a common law duty to ensure their employees do not undertake activities in 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 protects patients against unqualified practitioners presenting themselves as qualified occupational therapists.

Further, there is considerable evidence that the 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 Health Rights Commission, which is an independent body that has the power to investigate and conciliate complaints about any health care provider (regardless of whether they are registered).

In every other State and Territory, consumers use alternative information sources to determine competency, such as whether the speech pathologist is a member of 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 unqualified providers could form their own association, but this does not appear to be an issue. Casting further doubt on Queensland's public interest case for registration is the AHMAC conclusion that no case has been established for the 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 the registration of occupational therapists, however, the adverse impacts on competition from retaining title protection are insignificant. The cost of the restriction is trivial because nonregistrants can promote their services using unrestricted titles such as 'speech tutor' and because the registration system's administration costs are low.

Table 3.11: 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 were amended in 2002 to require Ministerial approval of any guidelines issued by the Board.	Meets CPA obligations (June 2002)
Queensland	Occupational therapists	*Occupational Therapists Act 1979*	Entry, registration, title, practice, discipline	Queensland completed its health professions review in 1999. Its NCP review of core practice restrictions was completed in 2001. Recommendations included retaining title protection and entry restrictions, but removing other unnecessary anticompetitive restrictions (see box 3.1, p. 3.6).	Queensland passed framework legislation in 1999 and enacted the *Occupational Therapists Registration Act 2001*, which retains title protection.	Does not meet CPA obligations (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 meet CPA obligations (June 2002)

(*continued*)

Table 3.11 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 would maintain title protection for occupational therapists. The Government is reconsidering this issue in the core practices review.	In April 2001, the Government approved the drafting of new template health practitioner Acts to replace the health professions legislation.	Review and reform incomplete
South Australia	Occupational therapists	*Occupational Therapists Act 1974*	Entry, registration, title, practice, discipline	Review was completed in 1999. It recommended maintaining registration requirements.	The Government is consulting on a draft Bill which it expects to introduce to Parliament in 2004.	Review and reform incomplete
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 removed practice and advertising restrictions, but contains 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 health practitioner Bill is being drafted to replace this and other Acts.	Review and reform incomplete
	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 approved the drafting of legislation in line with review recommendations.	Review and reform incomplete

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 section focuses on drugs and medicines for human use; agricultural and veterinary chemicals are discussed in chapter 1, volume 2.

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 *Therapeutic Goods Act 1989* (Commonwealth), 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 each substance under the Standard for the Uniform Scheduling of Drugs and Poisons schedules according to its toxicity, the purpose of use, the potential for abuse and safety in its 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).

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 products covered by this legislation have considerable benefits for the community: for example, medicines help to improve health, 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 regulate drugs, poisons and controlled substances, even though many of these controls restrict competition (Galbally 2001). The review also found, however, that:

- the level of regulation should be reduced in some areas, while a co-regulatory approach is appropriate in other areas;
- 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 of 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 Australian Health Ministers Conference referred the review report to AHMAC, which established a working party to develop a draft response, in consultation with the Primary Industries Ministerial Council, for CoAG consideration. The working party sought comments from State and Territory health and agricultural departments and other stakeholders. AHMAC endorsed the draft response, which was considered by the Primary Industries Ministerial Council. The Therapeutic Goods Administration advised that it expects that CoAG will receive the final response, together with the Galbally Report, by September 2003 (Commonwealth of Australia 2003a).

Much of New South Wales' regulatory structure already reflected the recommendations of the national review. The Government amended the Poisons and Therapeutic Goods Regulation 2002, however, to implement the review's recommendations to automatically recognise in New South Wales any exemptions from the packaging and labelling requirements granted by the Commonwealth or another State or Territory, and to standardise the regulation of the distribution of clinical samples. These changes commenced on 1 September 2002 (Government of New South Wales 2003).

Other jurisdictions

Western Australia has already implemented some recommendations of the Galbally report, by:

- adopting all the scheduling decisions covered in the Standard for the Uniform Scheduling of Drugs and Poisons by reference;
- repealing the provisions applying to licences for substances with low and moderate potential for causing harm, and streamlining conditions that apply to poisons licenses in relation to schedule 2; and
- amending the record-keeping requirements to improve the efficiency and consistency of the regulations.

Tasmania is drafting a new Poisons Act to account for the outcome of the national review. In August 2003, the Northern Territory passed amendments to the *Poisons and Dangerous Drugs Act,* which included the adoption of the Standard for the Uniform Scheduling of Drugs and Poisons by reference The Northern Territory Government is awaiting CoAG's final response to the national review before implementing other reforms. The remaining jurisdictions — the Commonwealth, Victorian, Queensland, South Australian and ACT Governments — are also awaiting CoAG's final response to the national review before implementing reforms.

Assessment

As discussed in chapter 14 (volume 2), the Council recognises that the requirement for intergovernmental consultation slows governments' response to reviews. In this case, the need to coordinate input from both health and agriculture portfolios has created additional delays. In the 2002 NCP assessment, however, the Council urged jurisdictions to finalise their response to the review and develop firm transitional arrangements for implementing reforms within a reasonable period.

New South Wales and Western Australia demonstrated a commitment to meeting their CPA obligations by implementing those reforms that could be achieved in the absence of CoAG's final response. New South Wales thus completed its review and reform activity in this area, so it has complied with its CPA clause 5 obligations in relation to the regulation of drugs, poisons and controlled substances. Western Australia and other jurisdictions, however, have not complied with their CPA obligations in this area because they have not completed their review and reform activity.

Table 3.12: National review of drugs, poisons and controlled substances

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Therapeutic Goods Act 1989*	Controls on labelling, packaging, advertising and sales of listed substances	Final report was presented to the AHMC in early 2001. It found a net benefit from regulating drugs, poisons and controlled substances, but also found that controls could be reduced in some areas, efficiency improved, and nonlegislative policy responses used in some areas.	The AHMC referred the review report to AHMAC to develop a draft response, in consultation with the Primary Industries Ministerial Council. AHMAC endorsed the draft response. CoAG is expected to receive the final response by September 2003.	Review and reform incomplete
New South Wales	*Poisons and Therapeutic Goods Act 1966* *Drugs Misuse and Trafficking Act 1985*	As above	As above.	New South Wales implemented the recommended reforms in 2002. See Commonwealth for details of the CoAG response.	Meets CPA obligations (June 2003)
Victoria	*Drugs, Poisons and Controlled Substances Act 1981*	As above	As above.	See Commonwealth for details of the CoAG response.	Review and reform incomplete
Queensland	*Health Act 1937*	As above	As above.	See Commonwealth for details of the CoAG response.	Review and reform incomplete
Western Australia	*Poisons Act 1964* *Health Act 1911 (Part VIIA)*	As above	As above.	Western Australia amended its regulations to remove or alter some unnecessarily restrictive provisions and to implement the review recommendations on record keeping requirements. See Commonwealth for details of the CoAG response.	Review and reform incomplete

(continued)

Table 3.12 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Controlled Substances Act 1984*	Controls on labelling, packaging, advertising and sales of listed substances	Final report was presented to the AHMC in early 2001. It found a net benefit from regulating drugs, poisons and controlled substances, but also found that controls could be reduced in some areas, efficiency improved, and nonlegislative policy responses used in some areas.	See Commonwealth for details of the CoAG response.	Review and reform incomplete
Tasmania	*Poisons Act 1971* *Alcohol and Drug Dependency Act 1968* *Pharmacy Act 1908* *Criminal Code Act 1924*	As above	As above.	As above.	Review and reform incomplete
ACT	*Drugs of Dependence Act 1989* *Poisons Act 1933* *Poisons and Drugs Act 1978*	As above	As above.	As above.	Review and reform incomplete
Northern Territory	*Poisons and Dangerous Drugs Act* *Therapeutic Goods and Cosmetics Act* *Pharmacy Act*	As above	As above.	As above.	Review and reform incomplete

Commonwealth health legislation

The Commonwealth's *Health Insurance Act 1973* and the *National Health Act 1953* establish a fee-for-service approach to health care funding arrangements, which have three key aspects.

1. Australia's universal health insurance scheme, Medicare, provides free access to medical emergency services (except ambulances) and benefits for fees paid for medical practitioner consultations, pathology tests, x-rays, eye tests performed by optometrists, most surgery and therapeutic procedures performed by medical practitioners, and some dental surgery.

2. The Pharmaceutical Benefits Scheme (PBS) provides that consumers purchasing approved medicines pay up to a fixed maximum fee, with the Commonwealth Government meeting the remaining cost of the medicine.

3. Private health insurance provides added benefits for insured people — such as choice of doctor, choice of hospital and choice of timing of procedure — and can also help with meeting the costs of private sector services not covered by Medicare.

Regulating in the public interest

The Commonwealth's funding arrangements aim to provide universal access to good quality and cost-effective health care. The Commonwealth imposes some restrictions on the providers of health services to achieve these objectives. Alternative health care funding arrangements could reduce or remove the need for Commonwealth regulation of health service providers; but structural reform of health care funding falls outside the scope of the CPA. Accordingly, in assessing compliance with CPA clause obligations, the Council has looked for the Commonwealth Government to provide evidence that the retained restrictions provide net benefits to the community and represent the minimum necessary to achieve legislative objectives within the context of the current funding system.

Restrictions on providers of publicly funded services

The Commonwealth Government regulates who can provide services that attract Medicare or pharmaceutical benefits. The main aims of these restrictions are to:

- ensure the quality of the services that the Commonwealth funds;
- promote equitable geographical access to services; and

- limit the cost of Medicare and PBS.

For providers of publicly funded services, the key competition restrictions that raise NCP questions relate to restrictions on:

- Medicare provider numbers;
- pathology collection centre approvals; and
- PBS dispensing rights for pharmacies.

These regulations form significant barriers to entry to the medical services, pathology services, and community pharmacy markets. While the regulations do not prevent unapproved providers from offering services to consumers (subject to any relevant State and Territory health practitioner legislation), unapproved providers generally cannot compete with approved providers because their services do not attract a Government subsidy. The national review of pharmacy legislation, for example, found that a pharmacy business without PBS rights is all but unsustainable (Wilkinson 2000).

Restrictions on private health insurance

The Government regulates the products that registered health funds offer and the prices that they may charge for their products. It mandates community rating of private health insurance, for example, and requires private health funds to pay rebates for certain services while prohibiting rebates for other services. These regulations aim to encourage private funding of health services and ensure private health insurance is open to a wide range of people in the community. They constrain competition among health funds, however, by restricting choice in the private health insurance market and increasing the health funds' business costs (IC 1997).

Review and reform activity

Restrictions on Medicare provider numbers

The Commonwealth Government introduced legislation — the (*Health Insurance Amendment Act (No. 2) 1996* — that restricts access to private medical practice by requiring new medical graduates to complete additional training before they may be granted a Medicare provider number. The legislation aims to increase the quality of general practice and promote a fairer distribution of medical practitioners in rural and remote areas, while restraining the rise in Medicare costs from an increase in the supply of general practitioners.

The Commonwealth Government did not assess the Act under its new legislation gatekeeping process. The Act contained review mechanisms for assessing public interest matters, however, including a sunset clause and provisions establishing a Medical Training and Review Panel to report on employment opportunities for medical practitioners (Commonwealth of Australia 1999, 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 Government amended the Health Insurance Act in 2001 to repeal the sunset clause. It prepared a regulation impact statement, approved by the Office of Regulation Review, supporting the retention of the restriction on Medicare provider number restrictions. The regulation impact statement found that the restrictions had 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. It reasoned that medical practitioners who have not undergone the additional training attract lower Medicare rebates for their services, so they may ask patients to pay more than would a practitioner with postgraduate qualifications who attracts a higher Medicare rebate.

The Commonwealth Government had provided sufficient evidence that the restrictions on access to Medicare provider numbers result in a net benefit to the community. Although the Government did not clearly assess whether there are alternative less restrictive approaches that would achieve its health care objectives. Such an analysis would be consistent with best practice principles for regulation making. Nevertheless, the additional training places funded under the 2000 Federal Budget reduce the degree to which the postgraduate training requirements serve as a barrier to entry. Consequently, the Council considers that the Commonwealth has met its CPA obligations with regard to Medicare provider numbers.

Restrictions on pathology services under Medicare

Part IIA of the Health Insurance Act specifies the criteria that pathology services must meet for Medicare benefits to be payable.

- The pathology service must be requested by a registered medical or dental practitioner, and a clinical need must be identified for the service.
- If the specimen is collected at a collection centre, then the centre must be an approved collection centre.
  - The approved collection centre scheme replaced the licensed collection centre scheme on 1 December 2001. Under this new scheme, the number of collection centres that an approved pathology authority may operate is based on pathology episode activity over a 12-month period.

Previously it was based on shares of a global entitlement calculated from the number of participants in the scheme.

- Pathology services must be provided by an approved pathology practitioner in an accredited pathology laboratory owned by an approved pathology authority.

The regulatory framework established through the Health Insurance Act is completed by two agreements between the Commonwealth Government and the pathology profession, which seek to restrain the growth of Medicare outlays on pathology services, facilitate structural reforms in the sector and improve quality.

The Commonwealth added part IIA of the Health Insurance Act to its legislation review schedule in 1998-99. A Steering Committee made up of two senior officials from the Department of Health and Ageing and one from the Commonwealth Department of the Treasury commenced the review in February 2000 and presented the final report to the Government in December 2002.

The steering committee found that the objectives of the legislation are to provide access to pathology services for all eligible Australians; ensure quality of service; and prevent fraud and overservicing. It concluded that it is necessary (so long as the current fee-for-service arrangements are maintained) to maintain the current legislative framework to achieve these objectives. It found, however, that the legislative requirements for approving pathology practitioners, laboratories and authorities were unnecessarily cumbersome and out of step with the corporate environment. The committee thus recommended:

- streamlining the approval process, and replacing the business conduct undertaking required of pathology practitioners with a strengthened undertaking from pathology authorities;

- revising the accreditation requirements for pathology laboratories to place greater emphasis on quality assurance and public disclosure; and

- amending the regulations to provide for point-of-care pathology testing, following trials to determine areas where it would be cost-effective and provide increased benefits to patients.

The committee also found that the approved collection centre scheme may not be appropriate or sustainable in the longer term. Given that the scheme had only recently been put in place, however, the committee recommended deferring further changes in this area to provide time to realise any benefits arising from the new arrangements.

Assessment

The Council considered the public interest case for deferring further reforms to the approved collection centre scheme. The approved collection centre scheme replaced the licensed collection centre scheme under which the Commonwealth limited the issue of licences in order to reduce the total number of collection centres. The licence restriction (in conjunction with collection centres' role in attracting business) gave licensed collection centres a commercial value greatly exceeding that of their physical assets.

The approved collection centre scheme represents a partial deregulation of pathology collection centres because although the Commonwealth still restricts the number of collection centres that an approved pathology authority may operate, the method for allocating approvals is based on market activity (rather than the number of approved pathology authorities) and this promotes competition. This partial deregulation should promote structural changes within the industry that will provide a sound foundation for further deregulation. Consequently, given that the approved collection centre scheme is being phased in over four years from December 2001, the Council accepts that there is a public interest case for retaining this system until 2005 to realise its benefits. If the Commonwealth Government were to accept the steering committee's recommendation and announce a review of regulations affecting the approved collection centre scheme to be conducted in 2005, then the Council would assess the Government as having complied with its CPA obligations in this area. The Commonwealth is yet to announce its response to the review, however, and so has not put in place adequate arrangements for completing its review and reform process and thus has not complied with its CPA obligations.

PBS dispensing rights

Commonwealth legislation underpins the PBS, supplemented by a contract between the Commonwealth and the Pharmacy Guild of Australia — the Australian Community Pharmacy Agreement. The agreement sets out the terms under which the Commonwealth Government remunerates pharmacies for dispensing PBS medicines, and the conditions for the approval of new pharmacies and the relocation of existing pharmacies dispensing PBS medicines.

In accordance with the Australian 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. (Some exemptions apply for relocations to shopping centres or private hospitals.)

CoAG commissioned a major national review of restrictions on competition in State, Territory and Commonwealth pharmacy legislation in 1999 (see the section on pharmacist registration legislation). The review found that the Commonwealth Government has a legitimate interest in ensuring pharmacy numbers provide satisfactory access and do not exceed a level that taxpayers can sustain. It also found, however, that restrictions on pharmacy relocations place a higher priority on protecting pharmacies from competitors than on assuring communities of high quality and efficient services. It was not convinced, therefore, that the restrictions provide a net benefit to the community. It concluded that remuneration tools offer the most effective means of delivering a manageable pharmacy network while promoting vigorous competition among pharmacies. It recommended:

- considering a remuneration-based approach and phasing out controls on the location of new pharmacies by 1 July 2001;
- if a remuneration-based approach is not practicable, revising the new pharmacy location controls by:
  - making the 'definite community need' criterion more relevant to the needs of underserviced communities, and
  - exempting new pharmacies in eligible medical centres, private hospitals and aged care facilities from the distance criterion; and
- phasing out all restrictions on the relocation of existing pharmacies.

The Commonwealth Government and the Pharmacy Guild of Australia signed a new Community Pharmacy Agreement in May 2000. The third such agreement, it operates from 1 July 2001 to 30 June 2005. The Commonwealth Government subsequently amended the National Health Act to implement changes arising from the agreement.

The Commonwealth Government accounted for the national review findings in negotiating the third Community Pharmacy Agreement (Wooldridge 2000). While accepting that the review recommendations may offer real alternatives to the existing location rules, the Government instead opted for an incremental and targeted easing of existing regulations in the third agreement, with an opportunity to review these arrangements and consider the national review's recommendations in the lead-up to the next agreement (CoAG Working Group 2002).

The regulation impact statement relating to the amendments indicates that the Commonwealth Government rejected the review recommendation to replace location controls with a remuneration-based approach because it considered that:

- the reforms it had implemented address the shortcomings of the current location controls and provide a base for longer term deregulation;

- rapid and substantial deregulation would skew already imbalanced pharmacy distributions; and
- such changes could be progressed only against the resistance of pharmacists and possibly the wider community (Wooldridge 2000).

The Office of Regulation Review assessed that this analysis (as per the regulation impact statement) of the pharmacy location controls was adequate (PC 2000b).

Assessment

In the 2002 NCP assessment report, the Council found that Commonwealth Government's arguments may justify phased reforms but not indefinite retention of the location restrictions, particularly given the findings of the national review. The Council did not finalise its assessment of compliance in 2002, however, because governments (through CoAG) had yet to finalise their approach to pharmacy regulation.

CoAG referred the national review recommendations to a working group of senior officials, which reported in August 2002. The signing of the third Community Pharmacy Agreement before the working group began its deliberations effectively precluded a consideration of the location rules in a CoAG context. The working group noted, however, that the location restrictions have the most impact of all the restrictions on pharmacy businesses and are inherently anticompetitive in their operation and effects. It suggested that a thorough examination over the next five years of the possible of revising the pharmacy location rules would prepare the way for implementing revised arrangements to be implemented through the next agreement.

Having considered the working group report, the Council still considers that there is a public interest case for phasing in reforms to the location restrictions, but not for retaining them indefinitely. Further, the Council recognises that the Commonwealth and the Pharmacy Guild agreed to a further review of the location restrictions in the lead-up to the next community pharmacy agreement. The Council considers, therefore, that the Commonwealth has met its CPA obligations in relation to pharmacy location restrictions. It stresses, however, that the proposed review of location restrictions should adhere to NCP principles for robust and independent review processes (see chapter 4, volume 2).

Regulation of private health insurance

The Commonwealth Government regulates private health insurance funds under the National Health Act and associated regulations. Provisions in the Health Insurance Act also govern the conduct of health funds. The following restrictions are the key components of the regulation:

- *Registration requirements.* Funds must be registered and, as a condition of registration, maintain minimum levels of financial reserves.

- *Product controls.* Funds must offer some types of product and benefit but cannot offer others, and they must not apply initial waiting periods longer than the specified maximums.

- *Price controls.* Funds must not discriminate in premiums and benefits on the basis of factors such as age and health status (community rating), and changes in premiums must be subject to government screening.

The Commonwealth Government referred the private health insurance industry to the former Industry Commission in 1996. The Industry Commission found that there were no effective regulatory barriers, of a discriminatory kind, to the entry of new companies. It found, however, major regulatory constraints on all players that make the industry unattractive to enter. It considered that the price and product regulations (particularly community rating) have a restrictive effect on consumer choice, and impose costs on business (IC 1997).

Price controls: community rating

The Industry Commission inquiry made two recommendations proposing changes to community rating for private health insurance. These were:

1. the adoption of a 'lifetime community rating';[2] and

2. that community rating no longer apply to ancillary cover (but noted that the gains from this change are likely to be low).

The commission argued that implementation of these recommendations would moderate the effects of adverse selection in the short term and would be equitable. The Commonwealth Government accepted and implemented the first recommendation.

The commission did not consider the fundamental question of whether the community rating requirements comply with the CPA tests because the inquiry terms of reference precluded this (IC 1997). It did, however, caution that the adoption of a lifetime community rating 'still leaves many of the anomalies of the current system untouched' over the long term (IC 1997, p. 325). It recommended, therefore, that community rating principles be examined as part of a wider review of the health system. Such a review has

[2] Under community rating, health insurance premiums are based on the average risk of all members. The premiums of low risk members include an element of subsidy for high risk members, so high risk members have an incentive to retain cover and lower risk members have an incentive to drop out of private health insurance (adverse selection). This weakens risk profiles, leading to higher premiums, which in turn drive out more of the lower risk members and thus exaggerate cost pressures.

not been undertaken, so the Commonwealth Government has still to demonstrate explicitly the net benefit of community rating.

The Commonwealth Department of health and Ageing subsequently advised the Council that no review of the community rating policy is planned. It explained that that community rating is part of the Government's overall policy framework to give Australians greater choice in health care while ensuring a sustainable and balanced health system by supporting a private health sector that complements the public health system. Community rating is a regulatory requirement that applies equally to all private health insurance funds and is part of their competitive environment. It does not prevent funds from competing on the basis of price or product type offered. The Government considers that community rating provides a net public 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 hospital system. In finalising its assessment, the Council considered the strength of the evidence supporting these public interest arguments.

There is limited evidence to support the argument that community rating provides a net benefit by ensuring high risk groups can afford private health insurance. Premiums for high risk groups are lower under community rating, even lifetime community rating, than under risk rating, but the higher costs incurred by healthier and younger policyholders (under the current scheme those under thirty) partly offsets this benefit. Further, community rating leads to higher premiums overall by dulling incentives for funds to reduce costs, and it reduces consumer welfare by distorting the range of products offered by funds (IC 1997 p. xxxiii).

There is stronger evidence to support the argument that community rating is in the public interest because it helps to maintain a significant element of private funding of health care. The existence of the publicly funded Medicare system weakens the incentives for consumers to purchase private health insurance. The Industry Commission inquiry forecast that if the government retained Medicare but deregulated private health insurance, then such insurance would tend to become peripheral to the health system, largely confined to those with the greatest income and risk aversion (IC 1997).

The commission considered that 'the objective of displacing public funding under Medicare can be seen as providing justification for some form of community rating of private health insurance', but noted that it will not resolve the inherent and ongoing tension between universal access under Medicare and voluntary community-rated private health insurance (IC 1997, p. 29). Given the current health funding system and the Government's objectives for the role of private health insurance within this system, therefore, the Council considers that lifetime community rating may be consistent with the CPA principles. Nevertheless, it is not clear that lifetime community rating provides a longterm net benefit. This benefit should be formally tested by reviewing the community rating principles, possibly as part of a wider review of the health system.

Product restrictions

The Industry Commission inquiry found that the prohibition on health funds providing insurance for certain services (including PBS medicines and the medical gap for out-of-hospital medical care) is intended to counteract some of the perverse incentives that the current health care system generates. The commission noted that these restrictions affect the ability of insurers to cover all aspects of care and to limit uncertain and potentially high out-of-pocket costs to consumers. It found, in the context of the current health care system, that these product restrictions have the rational motive of deterring cost shifting (IC 1997).

Commonwealth regulation also prevents health funds from paying rebates for certain hospital services unless they are provided by, or on behalf of, medical practitioners, midwives or dental practitioners. This restricts competition by preventing substitute health care providers (such as podiatrists) from negotiating with private health insurance funds to attract a rebate for their services. The Council raised this matter with the Commonwealth Government in December 2000.

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 health funds to attract rebates for in-hospital podiatric surgery, as well as for podiatric treatments provided under ancillary insurance cover. The Commonwealth Department of Treasury advised that formal trials have not yet commenced given the complexities in establishing cooperative industry-based trials (including the need to develop appropriate evaluation criteria). The Department of Health and Ageing conducted consultation with stakeholders, and several funds entered into agreements with private hospitals in Victoria and Western Australia for the purposes of the trials. A trial has commenced on an informal basis in Western Australia, arranged between the participating funds and private hospitals.

The Department of Health and Ageing is in the process of seeking Executive Council's approval in July–August 2003 for formal trials to commence. The trial results will be assessed to enable the Minister to determine whether legislative amendment is warranted. Consequently, the Commonwealth Government has not complied with its CPA obligations in this area because it has not completed its review and reform of product restrictions on private health insurance funds.

Table 3.13: Review and reform of Commonwealth health legislation

Legislation	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Human Services and Health Legislation Amendment Act (No. 2) 1995[a] *Health Insurance Amendment Act (No. 2) 1996*[a]	Prevention of 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 was 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 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 which prevents entry to the market	NCP review was commenced in 2000 and was completed in December 2002. The review found under the current funding arrangements that it is necessary to maintain the current legislative framework to achieve the Government's objectives. It also found that the approved collection centre scheme may not be appropriate or sustainable in the longer term, but recommended deferring reforms in this area until 2005 to provide time to realise any benefits arising from the new arrangements.	Legislation to modify the licensed collection centre scheme was introduced in June 2001. The Commonwealth has not announced its decision on recommendations in the final review report, which it received in December 2002.	Review and reform incomplete

(*continued*)

Table 3.13 continued

Legislation	Key restrictions	Review activity	Reform activity	Assessment
National Health Act 1953 (part 6 and schedule 1) *Health Insurance Act 1973* (part 3)[a]	Via community rating of private health insurance, prevention of 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 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.	Meets CPA obligations (June 2003)
National Health Act 1953[a] *Health Insurance Act 1973*	Limit on 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	Department of Health is establishing 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.	Executive Council expected to consider whether it will approve the commencement of formal trials in July–August 2003.	Review and reform incomplete

[a] These Acts and regulations were not included in the 1996 Cabinet agreed list of legislation — the *Commonwealth Legislation Review Schedule.*

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 scheduled for review several legislative instruments that are concerned with maintaining of public health and safety. These include:

- the licensing of occupational groups that undertake potentially dangerous activities, such as skin piercing;
- the 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.

Any overlap between the general objectives of public health legislation (to protect community health and safety) and those of environmental protection legislation can require persons to meet standards set in two or more legislative instruments. As a result of the review and reform process, a number of governments discovered 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.

4 Legal services

Legal services play an important role in ensuring justice according to the law for 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 a turnover of more than A$10 billion and employed more than 90 000 people in 2001-02 (ABS 2003a).

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 protect consumers by setting standards for who may practise law and how they may represent themselves. Legal practitioner legislation sets certain character, training and practice experience requirements for entry into the legal profession. It requires practitioners to be licensed by a registration board to practise, and it reserves for those practitioners the exclusive right to perform certain types of legal work. It also regulates the business conduct of registered legal practitioners.

The National Competition Council released a staff paper in 2001 that sets out how these legislative 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 those objectives;
- ensuring the restrictions represent the minimum necessary to achieve the objective; and
- applying best practice principles of transparency, consistency and accountability in the regulatory process.

In its 2001 National Competition Policy (NCP) assessment report, the Council considered that the licensing and registration of legal practitioners provide a net public benefit in principle. For all other restrictions, however, the Council looks for a robust public interest case and regulatory outcomes that meet best practice principles. It uses these criteria to assess jurisdictions' compliance with their obligations under the Competition Principles Agreement (CPA)

clause 5. Other restrictions applied to legal practitioners that may raise competition issues relate to:

- reserved areas of practice;
- restrictions on advertising;
- restrictions on legal practice ownership; and
- the monopoly provision of professional indemnity insurance for solicitors.

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 the services. The work reserved for lawyers varies across jurisdictions, but generally includes probate work and preparation of wills or documents that affect rights between parties, affect real or personal property or relate to legal proceedings. Reserving practice helps to protect the public by ensuring legal work is carried out by qualified practitioners who are subject to a disciplinary system.

The reservation of broadly defined practices can raise competition issues, however, by preventing suitably trained nonlawyers from performing some work that they could undertake without undue risk to the community. This hindrance can stifle innovation in the delivery of legal services and increase costs to consumers. Conveyancing service fees, for example, fell by 17 per cent in New South Wales between 1994 and 1996, after the Government removed the legal profession's monopoly on this service. It also removed price scheduling and advertising restrictions.

All jurisdictions except Queensland, Tasmania and the ACT permit conveyancers to settle real estate transactions (for assessment of the legislation regulating conveyancers, see volume 2, chapter 5). 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, however, 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.

Some jurisdictions 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, these governments must support the advertising restrictions 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. Historically, controls over the ownership and organisation of legal practices have been used to help preserve the confidentiality and trust of the lawyer/client relationship. Lawyers are able to pursue their clients' interests to the exclusion of the interests of third parties involved in the practice. In addition, nonlawyer owners or partners are not bound by the legal practitioners' professional obligations, which require, for example, lawyers to decline to act where an actual or potential conflict of interest exists.

Ownership restrictions potentially impose significant costs on legal practices, however, and thus on consumers of legal services. Such 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 legal firms or limit existing 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. For achieving professional legal objectives, maintaining a clear focus on the accountability of individuals may be more effective than restricting ownership.

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. In 2001, 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, Victoria 2002).

Chapter 6 (volume 2) examines the competition questions related to statutory insurance monopolies providing compulsory insurance. In this chapter, the Council's assessment of jurisdictions' compliance with CPA obligations in relation to compulsory professional indemnity insurance for solicitors is based on the chapter 6 analysis. In the area of legal professional indemnity insurance, the issues relate to coverage, the cost of premiums, the delivery of run-off cover, risk management and prudential supervision.

A current Productivity Commission inquiry (due for completion in March 2004) on workers compensation arrangements and occupational health and safety may make recommendations relevant to NCP compliance issues in all cases of statutory monopoly provision of insurance — namely, compulsory third party insurance for motor vehicles, workers compensation insurance and legal professional indemnity insurance. Given this outstanding national process, the Council will not complete in 2003 its assessment of review and reform in these areas. The focus of this chapter, therefore, is on aspects of legislation affecting the reservation of legal practice and the restrictions on advertising, business ownership and association.

Harmonising legislation regulating the legal profession

In March 2002, the Standing Committee of Attorneys-General (SCAG) agreed on the need for uniform rules to govern the legal profession. It asked a working group to develop policy options for aspects of legal profession regulation, including practice reservation, professional indemnity insurance

requirements and business structures. Ministers subsequently instructed the Parliamentary Counsel's Committee to draft model provisions for admission and legal practices, the reservation of legal work, costs and costs disclosure, and complaints and discipline.

In November 2002, SCAG asked that consultation versions of the model provisions be circulated and that final versions be submitted for consideration at the next meeting of SCAG in April 2003. Commonwealth, State and Territory Attorneys-General agreed to endorse comprehensive model provisions as a basis for consistent laws to facilitate a national profession in August 2003. Further work is now under way to refine the model provisions.

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. The Council accepts the benefit in this approach, provided that unreasonable delays do not result (NCC 2002).

Review and reform activity

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 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 professions in other areas.

The review recommended removing the rule that solicitors must 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 help maintain solicitors' professional and ethical obligations, and ensure insurance and fidelity cover are at least as favourable to clients as when they use 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 such management 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.

Reform activity

New South Wales is progressively implementing reforms. It amended legislation in October 2000 to allow solicitors to incorporate. Its incorporation model requires that individual solicitors (but not their incorporated practices) hold practising certificates and that incorporated legal practices have at least one solicitor on their board of directors (Government of New South Wales 2001). It passed legislation in 2002 implementing other reforms recommended by the review, except the recommended reforms of the professional indemnity insurance requirements (NCC 2002).

Professional indemnity insurance

The Government rejected the recommendation to deregulate professional indemnity insurance; instead, it proposed to establish a new mutual fund to cover all solicitors (excluding those who have exemptions). This proposal did not proceed, however, after the Australian Prudential Regulatory Authority advised that the entity managing the scheme would require a licence under the *Insurance Act 1973* (Commonwealth) and would be subject to its capital adequacy requirements (Government of New South Wales 2003).

As part of the National Legal Profession Model Laws Project, SCAG is exploring the possibility of a national insurance scheme. New South Wales advised the Council that it intends to consider arrangements for solicitors' professional indemnity insurance in this context (Government of New South Wales 2003).

The New South Wales Cabinet Office also advised that recent civil liability reforms — in particular those provisions relating to the standard of care for professionals and proportionate liability — could have an impact on legal professional indemnity insurance in the State. The provisions relating to proportionate liability have not yet commenced, because their interaction with the TPA is being considered. The Government has asked the Commonwealth to introduce similar reforms to damages provisions under the TPA as soon as possible (Government of New South Wales 2003).

New restrictions on advertising

Regulations introduced in New South Wales in May 2001 restrict advertising of workers compensation services by legal practitioners. 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:

- includes only the name and contact details of the lawyer, together with information about their area of practice or speciality (although advertising the availability of 'no-win, no-fee' arrangements is not permitted); and

- is published by only certain allowable methods such as printed publications and Internet databases/directories (advertising in hospitals or on the radio or television is not permitted).

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.

The New South Wales Government introduced the advertising restrictions with the expectation that they would help to keep public liability insurance premiums affordable. It cited evidence that that the increasing number and cost of personal injury claims are contributing to an increase in public liability insurance premiums — a rise in premiums is adversely affecting nongovernment service delivery and small business (Government of New South Wales 2002).

Limits 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 the Legal Profession (Advertising) Regulation, while restricting advertising of personal injury services, does not prohibit or constrain advertising of other legal services. The adverse impacts on competition are thus limited.

Given concerns, however, that some lawyers are ignoring or attempting to circumvent the advertising restrictions, the New South Government has implemented the Legal Profession Amendment (Personal Injury Advertising) Regulation 2003, strengthened the restrictions to:

- prohibit a barrister or solicitor from advertising personal injury services in any way and in any media; and

- increase penalties for breaches of the regulations, including making a breach professional misconduct, which is subject to criminal charges.

The new amendments implemented by the New South Wales Government result in an effective *prohibition* on advertising, which is a severe restriction on competition. This would be justified only if the Government had shown that the restrictions are in the public interest and could not be achieved without restricting competition.

While New South Wales acknowledges that the advertising restrictions raise competition issues, its evidence of the link between restricting advertising and maintaining affordable public liability insurance is much less clear. New South Wales deregulated advertising in 1994. If, as a result (perhaps) of advertising by lawyers, 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, 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 whether this would lead to lower premiums. Other drivers of recent premium increases include increases in the compensation awarded and the state of the insurance market cycle (Trowbridge Consulting 2002) — factors that may be more significant influences than the number of claims.

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.

Although the stated object of the Legal Profession (Advertising) Regulation (as set out in the Explanatory Note to the Regulation) is to 'restrict [or prohibit, in the case of the 2003 amending regulation] the manner in which barristers and solicitors advertise personal injury services', the Government's policy objective appears to be to maintain affordable public liability insurance. There may be alternative ways of achieving this objective that are less restrictive of competition. Governments across jurisdictions are considering and/or have implemented a range of reforms in response to the recent public liability insurance premium rises.

- Commonwealth, state and territory governments agreed to a series of reform during 2002, which included changes to the application of tort law, the use of structured settlements, legal system reforms, data collection and risk management strategies.

- Trowbridge Consulting (2002) identified possible reforms (without drawing any conclusions on appropriate responses), some of which have been or will be adopted across the jurisdictions. In addition to restrictions on legal advertising and legal fees, and limits on damages, these reforms include:

  - reducing the number of successful claims by changing what counts as 'negligence' in certain situations or amending the standard of negligence through tort law reforms.

  - exempting certain volunteers and organisations from negligence actions, or allowing valid contractual waivers of liability for participation in inherently risky activities;

- promoting alternatives to legal action for resolving issues, by increasing the cost of unsuccessful litigation or mandating alternative dispute resolution systems;

- facilitating the public liability insurance market by arranging market access through local government, and publishing data to help set and evaluate prices; and

- supplementing the public liability insurance market by allowing pooling of risks outside the insurance regulatory framework or by providing subsidies to insurance buyers in critical segments.

Many of the reform options appear, in principle, less restrictive of competition than is the restriction on advertising by lawyers. Without assessing the feasibility and effectiveness of the alternatives, it is not possible to demonstrate the necessity of restricting legal advertising.[1] The fact that a comparative analysis of possible regulatory options was not undertaken indicates that New South Wales' new legislation gatekeeping mechanism is not consistent with it CPA clause 5(5) obligations for review of new and amended legislation (for details see volume 2, chapter 13)

New South Wales advises that it will consider reviewing the need for the advertising restrictions as part of tort law reforms in New South Wales or under the national reform process (Government of New South Wales 2003).

Assessment

New South Wales has almost completed its review and reform of its legal practitioner legislation. The outstanding issues relate to the national model laws project and professional indemnity insurance which are beyond the direct control of the New South Wales Government. While New South Wales has made good progress with its review and reform obligations under CPA clause 5, it has not provided clear evidence that advertising restrictions help maintain affordable public liability insurance. Further, it has implemented a prohibition on advertising of personal injury legal services without considering whether there are less restrictive means for achieving this objective. Moreover, the Council considers the recent implementation of a prohibition on advertising of personal injury services a significant breach of CPA obligations, which has not been supported by substantial new evidence that demonstrates a net public benefit. For these reasons the Council considers that these advertising-related regulations do not comply with CPA obligations.

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[1] PriceWaterhouseCoopers (2002), for example, have assessed the potential financial impact of the tort law reform recommendations of the *Review of the law of negligence*, but there has been no assessment of the merits of such reforms compared with restrictions on advertising.

Victoria

Legal services are regulated in Victoria by the *Legal Practice Act 1996*. This legislation was enacted following a legal practitioner regulation review that commenced before the NCP. Subsequently, it has been assessed against the CPA guiding principles. The Legal Practice Act introduced a range of reforms, which included:

- removing the distinction between solicitors and barristers;
- allowing direct access by clients to barristers;
- introducing nonlawyer property conveyancing, but restricted to the nonlegal aspects of conveyancing only;
- allowing the incorporation of legal practices and multidisciplinary practices; and
- removing binding fee scales and abolishing compulsory membership of professional associations.

The Act provided for competition in legal professional indemnity insurance from 1999. It also provided for a further review before the onset of the sunset clause removing the Legal Practice Liability Committee's professional indemnity insurance monopoly. This review, conducted by the Legal Practice Board in June 1998, recommended that the monopoly continue. Parliament subsequently amended the Act to remove the sunset clause.

In its 1999 NCP assessment, the Council considered that Victoria had met its CPA commitments to legal practice review and reform, except in retaining the professional indemnity insurance monopoly (NCC 1999). The then Government agreed to review the monopoly and provide the Council with a supplementary report on this matter in June 2001.

The supplementary report noted that Victorian solicitors must hold professional indemnity insurance for consumer protection reasons. It observed that a move to a competitive scheme would risk solicitors being denied insurance cover (because their risk is difficult to assess even where their professional competence is not in doubt). It also considered that it is necessary to require all solicitors to insure through the Legal Practice Liability Committee, to ensure the provision of adequate run-off insurance. Victoria confirmed its decision to retain the monopoly arrangement, but will review this decision in light of any national scheme developed by SCAG.

In June 2000, the Victorian Attorney-General announced a review of the Legal Practice Act. This was not an NCP review, but the final report (November 2001) made recommendations on the profession's regulatory structure that could have an impact on competition, although not substantially. The review proposed to simplify the regulatory system to improve its efficiency and reduce compliance and administrative costs. In

particular, the complaints-handling mechanism would be centralised. The Government has yet to announce its response to the review.

Assessment

The Council assesses Victoria's legal services legislation (except for professional indemnity insurance, which is subject to national processes) as complying with the State's obligations under CPA clause 5.

Queensland

The Queensland Government conducted a two-stage review of its regulations covering the legal profession. The first stage was a broad review of contemporary regulatory issues affecting the profession. The review resulted in a discussion paper in 1998, followed by a green paper in 1999.

Recommendations in the green paper included introducing a new complaints-handling mechanism, allowing common admission of barristers and solicitors, removing the reservation of conveyancing practice, developing a framework for facilitating the incorporation of legal practices and maintaining mandatory professional indemnity insurance requirements but providing competition in the insurance market.

In December 2000, the Queensland Government accepted the green paper recommendations to introduce a new complaints-handling 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 another three years;
- consider the incorporation of legal practices through SCAG, in light of concerns about the States adopting different approaches and the implications of this for national firms; and
- consider the issue of removing reservation of conveyancing work through a separate NCP review.

The second stage review considered competition-related issues in Queensland's legal profession legislation (including the December 2000 proposals). It examined restrictions such as the requirements for admission to the legal profession, qualifications for practice, ownership restrictions, practice reservation (including the reservation of conveyancing work) and the legislated arrangements for professional indemnity insurance. The Government is considering the review's recommendations on these issues, in conjunction with the draft national model laws proposed by SCAG. The Government is expected to announce its response soon, so as to have a Bill for

reforming its legal profession legislation ready for introduction into Parliament in the latter half of 2003.

New restrictions on advertising

At the meeting of the Heads of Treasuries on 30 May 2002, Commonwealth, State and Territory Ministers and the President of the Australian Local Government Association met to continue work on addressing issues associated with the availability and affordability of public liability insurance. Among other things, Ministers noted a perception that advertising of personal injury legal services, including through 'no-win, no-fee' arrangements, could encourage inappropriate social expectations about assumption of risk and personal responsibility. Ministers agreed that limits on advertising and legal fees would be considered on an individual jurisdictional basis.

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 and placing caps on economic loss, the Act restricts lawyer advertising to address the pressure on insurance premiums from the increasing volume of claims.

The advertising restrictions, which are similar to those implemented in New South Wales in March 2002, prohibit lawyers from advertising personal injury services except by means of a statement that:

- includes only their name and contact details, together with information about their area of practice or speciality and the conditions under which they are prepared to provide personal injury services (although advertising the availability of 'no-win, no-fee' personal injury services is not permitted); and

- is published by only certain allowable methods such as printed publications and Internet databases/directories (advertising in hospitals or on the radio or television is not permitted).

Queensland expects that the proposed reforms would reduce the overall liability of insurers and, as a result, lead to more affordable insurance, while encouraging insurers to widen the scope of risks they are prepared to underwrite. It noted that an actuarial report by PricewaterhouseCoopers found that the reforms advocated by the expert panel reviewing the law of negligence (which forms the basis of many of Queensland's reforms) could theoretically reduce public liability insurance premiums by around 13.5 per cent. The Council adds, however, that the expert panel did not make recommendations in relation to advertising restriction and consequently no cost assessment of the impact of such restrictions was included in the actuarial report.

In presenting this evidence, Queensland noted that it is difficult to accurately determine the overall impact of these reforms on insurance premiums, given the long tail nature of the industry and the wide range of risks covered by liability insurance. It also noted that the insurance industry has not committed to reduce premiums or provide insurance in those areas for which they recently withdrew coverage.

Queensland considered that existing restrictions on advertising were not working effectively. Under the Queensland Law Society Rules, for example, advertising that is false, misleading or deceptive, would contravene the Fair Trading Act 1989 or the *Trade Practices Act 1974* (Cwlth), and constitute a breach of the rules. The society has recently notified practitioners that it has advice from senior counsel that 'no-win, no-fee advertising' is misleading and deceptive and will constitute a breach of the Queensland Law Society Rules in the absence of full cost indemnity being given by the solicitor to the client. The society has not observed a reduction in 'no-win, no-fee' advertising.

The Australian Plaintiff Lawyers Association has a voluntary code of conduct that specifically addresses practices related to soliciting at times of trauma or distress, soliciting in a manner which is likely to offend or distress and the visiting of accident scenes for the purposes of solicitation. The code applies to all association members, but not all plaintiff lawyers are members of this organisation. Existing provisions in the *Criminal Code Act 1899* prohibit the payment of secret commissions for the acquisition of business, but an offence is only committed when the payment of a commission is undisclosed.

By placing restrictions on the allowable methods of publications, Queensland's advertising restrictions in the *Personal Injuries Proceedings Act 2002* go beyond restriction of no-win, no-fee advertising and touting. (The Council does, however, recognise that restrictions on radio and television advertising may be an indirect means of addressing touting.)

Queensland did not provide any evidence to demonstrate that restrictions on advertising might contribute to reducing insurance premiums. Further, it did not provide any evidence that advertising restrictions provide a net benefit or that such restrictions are necessary to meet its policy objectives. The Council considers, therefore, that Queensland's restrictions on legal profession advertising are not consistent with the CPA guiding principle.

Assessment

Queensland has not met it CPA clause 5 obligations in relation to the legal profession as it has not completed its review and reform activity. It has not implemented any of the recommendations from its NCP review of legal profession regulations, in part because it is waiting on the outcome of the national process. Its current legislation contains significant restrictions on competition — including restrictions on entry to the profession as a barrister or solicitor and the reservation of conveyancing practice — which have been shown not to be in the public interest. In addition, Queensland has imposed

advertising restrictions without demonstrating that they meet the CPA guiding principle.

Western Australia

Western Australia's review of the *Legal Practitioners Act 1893* and related legislation commenced in 2000, with the final report released in June 2002. Key recommendations in the final report were to:

- reserve core areas of legal work (such as appearances in court, probate work and the drawing up of wills and documents that create rights between parties) for certified legal practitioners, but:
  - remove restrictions on the practice of tribunal-related work by nonlawyers;
  - prescribe arbitration services that can be undertaken by nonlawyers who satisfy prescribed competency standards and/or comply with consumer protection and transparency safeguards under the Law Council of Australia's Policy Statement and Model Legislative Scheme on the Reservation of Legal Work for Lawyers; and
  - continue to permit settlement agents to arrange or effect the settlement of real estate or business transactions for reward.
- retain compulsory professional indemnity insurance and the requirement to insure through the Law Society, but codify in legislation the Law Society's practice of allowing practitioners to opt out of its scheme if they give adequate notice and provide evidence of having made suitable alternative arrangements for professional indemnity insurance; and
- remove restrictions on lawyers forming incorporated practices and multidisciplinary practices (Department of Justice, Western Australia 2002).

The draft review report noted that benefits would arise from delaying the implementation of the review proposals (even those that could be implemented unilaterally) so the Government could progress reforms as a single package following the outcomes of the national model laws project. The final report maintained this view, but recommended that reforms be pursued where agreement and commitment already exist, and that matters awaiting national resolution be dealt with separately. This recommendation supported the Government's decision to commence drafting new legislation before knowing the outcome of the national review.

Reform implementation

The Government introduced the Legal Practice Bill 2002 into Parliament in October 2002 to repeal and replace the Legal Practitioners Act and reform associated legislation. The new legislation provides 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 for foreign lawyers into the local market; and
- the introduction of national practice certificates that allow automatic recognition of certificates from other Australian jurisdictions, removing the barriers to competition for interstate lawyers wishing to practise in Western Australia.

The Bill introduces new provisions to clarify that unqualified persons are prohibited from practising law in Western Australia, but expands opportunities for nonlawyers to practise within the regulatory framework. It also expands the definition of unsatisfactory conduct to include any contravention of the Act and any conduct that does not match the level of competence and diligence that could reasonably be expected. The Bill was passed in the Legislative Assembly on 24 June 2003.

Advertising restrictions

Via the *Civil Liability Act 2002*, the Government introduced new restrictions on advertising of personal injury services. In addition, the Act implements a number of recommendations from the joint Commonwealth, State and Territory commissioned review of the law of negligence. It caps economic losses, provides for structured settlements, sets a minimum threshold below which general damages cannot be awarded and limits gratuitous attendant care.

The Civil Liability Act aims to slow the rate at which premiums increase and to make public liability insurance more readily available, by improving the predictability and containing the costs of such insurance for lawyers. In addition, its advertising restrictions aim to strike a balance between providing access to legal services and avoiding the type of advertising that detracts from the interests of injured persons (McGowan 2002).

The advertising restrictions are based on those introduced in Queensland and, to a lesser extent, New South Wales. For television, radio, print and electronic advertising of personal injury legal services, the legislation limits advertising content (allowing only the name, contact details, area of practice and specialty of the firm) and publication methods (allowing only certain

printed publications and web sites). Advertising in or around hospitals is prohibited as is touting at the scene of an accident.

Western Australia did not provide any evidence of how advertising restrictions help reduce insurance premiums or meet other objectives of the Act. Further, it did not show that advertising restrictions are the least restrictive option available to meet this objective. The Council considers, therefore, that Western Australia's restrictions on advertising are not consistent with the CPA guiding principle.

Assessment

Western Australia has not met it CPA clause 5 obligations in relation to legal profession regulation because it has not completed its review and reform activity. The Council recognises, however, that Western Australia has implemented most of the recommendations from its NCP review of legal profession (except those issues being dealt with at the national level) although the Council also notes that advertising restrictions implemented in 2002 do not comply with CPA obligations.

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 areas of reserved work to nonlawyers with appropriate alternative formal qualifications;
- continuing to monitor developments in business structures, but considering 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 SCAG to devise a national legislative model for incorporated legal practices (Government of South Australia 2001a). It introduced a Bill to implement the remaining recommendations, but the Bill lapsed when the State election was called.

The current Government has incorporated the review recommendations — with the exception of allowing multidisciplinary practices, which is being

progressed as part of the national model laws — into a draft Miscellaneous Amendment Bill for introduction into Parliament in July or September 2003.

Assessment

South Australia has not completed its review and reform of legal services regulation. Even excluding the issue of insurance monopolies, significant restrictions related to residency requirements and the prohibition of incorporation/multidisciplinary practices are still in place. These have the potential to impose significant ongoing costs on consumers and the economy.

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 6, volume 2);
- removing restrictions on advertising; and
- improving the disciplinary system.

The review team provided its final report (yet to be publicly released) to the Attorney-General and the Treasurer in August 2001.

Following the review, the Department of Justice commenced a proposal for a new complaints-handling system and associated disciplinary proceedings for lawyers, with the aim of introducing legislation into Parliament in the first half of 2003. It also proposed conveyancing reform to the Attorney-General, and the Conveyancing Regulation Bill 2003 is being drafted. The Government is reconsidering the review's remaining recommendations in the light of the March 2003 decision of SCAG to prepare and adopt uniform national laws for the legal profession. A legislative package addressing the recommendations of the review of the Legal Profession Act and adoption of the uniform national laws is expected before the end of 2003 (Government of Tasmania 2003).

Assessment

Tasmania has not implemented reforms to its legal services legislation. While it is working actively with other jurisdictions to develop model legislation consistent with NCP obligations, significant restrictions on business structure and advertising are still in place.

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 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. The Government ceased this review, however, so all outstanding review and reform activity could be progressed through the national model laws project to ensure a uniform and nationally consistent framework for the industry. As an interim measure, however, the Government amended the Legal Practitioners Act to introduce a second insurance provider (Government of the ACT 1999). The ACT expects to repeal its existing Act once the national framework is complete.

Assessment

The ACT has introduced reforms to professional indemnity insurance in advance of the outcome of national processes. It does not have other reforms to its legal services legislation in place, however, because it intends to implement these in conjunction with the national model laws developed through SCAG. Finalisation of this process is beyond the direct control of the ACT Government. Nevertheless restrictions on business structure relating to corporate legal practices remain. The ACT advised that it sought Commonwealth amendments to the *ACT (Self-Government) Act 1988* to allow it to enact nationally-agreed provisions to deal with this matter, but the Commonwealth has not yet made the required amendments.

The Northern Territory

The Northern Territory completed reviews of the *Legal Practitioners Act* and the *Legal Practitioners (Incorporation) Act,* but neither review considered the provisions relating to professional indemnity insurance. The Government has deferred the NCP review of the legislative provisions relating to professional indemnity insurance pending a re-assessment of what the insurance market is able to deliver once the national model laws project is finalised.

The Legal Practitioners Act review found that practising certificates, fidelity fund requirements and the reservation of title are necessary and provide a net public benefit, but that other significant anticompetitive provisions in the Act could not be justified in the public interest. It recommended that:

- areas of work reserved for legal practitioners should accord with areas of work that are reserved on a national basis (that is, appearances in court, probate work and the drawing up of wills and documents that create rights between parties, except conveyancing);

- the provisions that prohibit barristers from acting independently of one another should be repealed, but barristers should continue to be subject to regulations suitable to that kind of sole practice;

- there should be no significant differential treatment of lawyers forming incorporated practices and multidisciplinary practices; and

- controls over fees for work conducted outside of the courts and tribunals are not justifiable.

The review also found that rules on the number of articled clerks, the appointment of Queen's Counsel, trust monies, auditing and the disciplinary system, while necessary, should be reformed to reduce their anticompetitive and efficiency effects.

The Northern Territory Government accepted the review recommendations and decided to implement the reforms in conjunction with the national model laws being developed by SCAG. The Government asked the Department of Justice to work with the Law Society to develop an implementation plan for the reforms. It also announced that, subject to progress made by the national model laws project, legislation would be introduced during the October 2003 sitting of the Legislative Assembly. In August 2003, the Northern Territory advised that the reforms are not likely until 2004, but this still depends on the implementation of the national model laws.

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. The review recommended removing business structure and ownership restrictions, and replacing them with:

- a requirement that incorporated legal practices nominate at least one solicitor director to be responsible for ensuring the firm delivers legal services in accordance with professional obligations and for dealing with unsatisfactory professional conduct by employees; and

- a negative licensing scheme, under which firms 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. The Attorney-General introduced the Legal Practitioners Amendment (Incorporated Legal Practices and Multi-Disciplinary Partnerships) Bill into Parliament on 30 April 2003, which will repeal the Legal Practitioners (Incorporation) Act. The Bill was passed on 20 August 2003.

Assessment

The reforms implemented to repeal and replace the Legal Practitioners (Incorporation) Act comply with CPA obligations. The reforms recommended by the reviews of the Legal Practitioners Act are also consistent with CPA principles, but are yet to be implemented pending the outcome of national processes.

Table 4.1: 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.	Reforms have been completed except for issues related to the national model laws project and professional indemnity insurance. 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 has been implemented. New regulations prohibit advertising for all personal injury legal services.	Review and reform incomplete
Victoria	*Legal Practice Act 1996*	Licensing, registration, entry requirements, the reservation of title and practice(including legal aspects of conveyancing), disciplinary processes, business conduct (including monopoly professional indemnity insurance)	Review completed in 1996. Two reviews of professional indemnity insurance arrangements were subsequently conducted. 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. It also 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.	Victoria implemented the *Legal Practice Act 1996*, which removed the distinction between solicitors and barristers, allowed clients direct access to barristers, allowed incorporation of legal practices, removed binding fee scales, abolished compulsory membership of professional associations, permitted nonlawyer property conveyancing, but retained restrictions on preparing documents that create, vary, transfer or extinguish an interest in land, or to giving legal advice. The Government decided to retain the Legal Practice Liability Committee's monopoly over the provision of professional indemnity insurance for solicitors, but has delayed implementation so this issue along with any national scheme developed by SCAG.	Meets CPA obligations (June 1999) Review and reform incomplete (professional indemnity insurance)

(*continued*)

Table 4.1 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. The review has been completed, but the report has not been released publicly.	Queensland implemented the *Personal Injuries Proceedings Act 2002*, which restricts lawyers from advertising personal injury services. Queensland expects to introduce a Bill in 2003 to implement the reforms emanating from the NCP review and national model laws project.	Review and reform incomplete
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)	Review was completed in June 2002. It recommended 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.	The Government introduced advertising restrictions similar to those in Queensland through the Civil Liability Act 2002. The Legal Practice Bill was passed in the Legislative Assembly on 24 June 2003. The Bill clarifies the standards required of, and regulation of, legal practitioners; modernises the structure and function of the Legal Practice Board, the complaints committee and disciplinary tribunal; enables the creation of incorporated legal practices and multidisciplinary partnerships; and introduces national practising certificates into Western Australia. Further reforms may be introduced following the outcome of the national model laws project.	Review and reform incomplete

(*continued*)

Table 4.1 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
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. A Bill to implement other reforms lapsed at the State election. In July 2001 the Government adopted the review recommendations in full. The recommendations (except for the issue of multi-disciplinary practices, which is being progressed as part of the national model laws project) have been incorporated into a draft Miscellaneous Amendment Bill for introduction in September 2003.	Review and reform incomplete
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 the 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 is reconsidering the review in light of the current SCAG review of possible national laws. 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.	Review and reform incomplete

(*continued*)

Table 4.1 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
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 SCAG 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 SCAG process is expected to develop model legislation before the end of 2002.	Review and reform incomplete
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 was completed. Recommendations included reserving core areas of legal work; removing restrictions on incorporated and multidisciplinary practices; and removing controls on fees for worked conducted outside of court. The Government has delayed its NCP review of professional indemnity insurance given recent insurance market developments and the outcome of the national model laws project.	The Government has delayed responding to the review until completion of the national model laws project. It anticipated, however, introducing legislation into the Northern Territory Legislative Assembly in August 2003.	Review and reform incomplete
	Legal Practitioners (Incorporation) Act	Business structure and ownership	Review 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. The Legal Practitioners Amendment (Incorporated Legal Practices and Multi-Disciplinary Partnerships) Bill, which will repeal the Legal Practitioners (Incorporation) Act was passed on 20 August 2003.	Meets CPA obligations (June 2003)

5 Other professions and occupations

This chapter provides the National Competition Council's assessment of States' and Territories' progress against their National Competition Policy (NCP) obligations to review and reform certain professional and occupational regulation — namely, the regulation of motor vehicle dealers, real estate and auctioneer agents, second-hand dealers, travel agents, hairdressers and hawkers. Other chapters in this volume provide the Council's NCP assessment of jurisdictions' progress in reviewing and reforming the regulation covering veterinary surgeons (chapter 1), health professions (chapter 3), the legal profession (chapter 4), teachers (chapter 9) and building-related professions (chapter 10).

Legislative restrictions on competition

Governments' regulation of professions and occupations restricts competition in several ways. Common restrictions include entry requirements (rules or standards governing who may provide services), registration and/or licensing requirements, the reservation of practice (whereby 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 apply to individual practitioners; in others, they apply to the business rather than the practitioner.

For a number of professions and occupations, the regulating legislation specifies service standards and/or establishes mechanisms for consumer protection. For motor vehicle dealers, legislation typically sets standards for the disclosure of information, minimum warranties and behaviour standards. For real estate agents, legislation sets requirements for fidelity funds, trust accounts and maximum permissible fees. For travel agents, the licensing process aims to ensure service and quality standards, and a compulsory consumer compensation scheme (the Travel Compensation Fund) aims to protect consumers from financial loss if a travel agent defaults. In addition, general consumer protection mechanisms in fair trading laws in each State

and Territory provide avenues for redress of complaints about service provision (see chapter 8, volume 2).

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 to regulate a range of occupations; such regulation, however, can impose costs as well as benefits. The net public benefit is likely to be greatest where regulatory restrictions directly help protect 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 only some jurisdictions. In this 2003 assessment, as in previous years, the Council paid particular attention to cases of partial licensing because a government's decision not to require licensing or registration of particular occupations raises questions about the public interest case supporting licensing elsewhere.

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. In previous assessments, the Council has found that licensing arrangements in some areas comply with NCP requirements. This section addresses outstanding compliance issues.

Commercial agents, inquiry agents and security providers

Jurisdictions generally license and/or register 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, employees of security companies, body guards and workers in the cash transit industry), process servers and private bailiffs. In

the course of their work, these agents may be entrusted with large sums of other people's money, may have to collect confidential information about people and their businesses and may have to use force against people. The aim of a licensing/registration system, therefore, is to protect consumers and clients.

The 2002 NCP assessment found that:

- in relation to legislation regulating commercial agents, Queensland, Tasmania, the ACT and Northern Territory had complied with their Competition Principles Agreement (CPA) obligations;

- in relation to legislation regulating inquiry agents, Western Australia, Tasmania, the ACT and the Northern Territory complied with their CPA obligations; and

- in relation to legislation regulating security providers, New South Wales, Western Australia, Tasmania and the ACT complied with their CPA obligations.

The section considers review and reform activity in jurisdictions that had outstanding compliance matters under the CPA in terms of commercial agent, inquiry agent and security provider legislation after the 2002 NCP assessment. The Council also assesses the ACT's new legislation regulating the security industry introduced after the 2002 NCP assessment.

New South Wales

New South Wales regulates the private investigation and debt collection industry under the *Commercial Agents and Private Inquiry Agents Act 1963*. The government established a working party in late 1997, which recommended replacing the Act 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 Commercial Agents and Private Inquiry Agents Act in November 2001 and completed the final report in April 2002. The review found that the Act provides a net public benefit by reducing costs to clients and reducing the risk of criminal activity or harm to the public. It found that regulatory objectives may be achieved only through a licensing system. It also recommended removing the following restrictions, which could not be justified in the public interest: the requirement for licensees to be in charge of a business; the distinctions between commercial agent and private inquiry agent licences; and certain compliance requirements for licence holders. The Government anticipates introducing any legislative reforms arising from the NCP review during 2003 (Government of New South Wales 2003).

While the review's recommended approach to regulating commercial agents and private inquiry agents is consistent with the approach taken in other

jurisdictions and appears to be consistent with the CPA clause 5 guiding principle, New South Wales has not yet met its CPA obligations in relation to this legislation as reforms have not been completed.

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 of the commercial agents surety scheme. The review also recommended reviewing whether the exemptions provided to certain occupational groups are still appropriate.

The Government delayed its response to the NCP review while it conducted a broader policy review of the Act and undertook further consultation (Department of Treasury and Finance 2002). A discussion paper was released in July 2000 and the review has been completed, but the final report has not been publicly released. The Department of Treasury and Finance advised that the Department of Justice intends to seek Cabinet approval to introduce legislative reform in Parliament's autumn 2004 session. Victoria has not met its CPA obligations in this area, however, as it did not complete its review and reform activity.

Queensland

The *Security Providers Act 1992* requires licensing of private investigators, crowd controllers, security guards and security companies. The Office of Fair Trading completed a review of the Act and released the public benefit test report in 2002. The report concluded that licensing of private investigators, crowd controllers, security officers and security companies is necessary to protect consumers and the public, and that the existing entry requirements provide a net benefit to the community and should be retained.

The public benefit test report recommended that the Office of Fair Trading assess some proposals by stakeholders during the review. These proposals 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 licences.

The Government endorsed the review recommendations, meaning that it does not need to amend the Act to achieve CPA compliance. The Council considers, therefore, that Queensland has met its CPA obligations in relation to the review and reform of its legislation regulating commercial agents, inquiry agents and security providers. If Queensland introduces new restrictions on

competition, however, it will need to demonstrate that they are in the public interest, as per the CPA's new legislation gatekeeping requirements (see chapter 13, volume 2).

Western Australia

Western Australia advised the NCP review of the *Debt Collectors Licensing Act 1964* has been completed and the recommendations endorsed by Cabinet. The review recommended that the licensing system, trust account provisions, the requirement to lodge a fidelity bond and the upper limit on fees chargeable to debtors by debt collectors be retained in the public interest. It also recommended that licensing be extended to cover employees and that debt collectors be made responsible for licensing their employees. The review found other restrictions not to be in the public interest. It recommended that limits on fees charged to creditors by debt collectors and the requirement for written contracts between creditors and debtors be removed. It also recommended that the age restriction for a licence be reduced from 21 to 18 years of age and the annual licence be replaced with a three year licence, but random inspections of trust accounts be conducted to ensure compliance. Nevertheless, Western Australia has not met its CPA obligations in this area, as it has not implemented the proposed reforms.

South Australia

South Australia's review of its *Security and Investigation Agents Act 1995* was completed in April 2003. It recommended retaining the licensing system but making minor amendments, such as introducing a two-tiered licensing system that distinguishes between contractors and employees. This means that the Government would not need to amend the Act in order to meet its CPA obligations in relation to this matter. As such the Council considers that South Australia has met it CPA obligations in relation to security and investigation agents.

The ACT

Prior to 2003, the ACT security industry was governed by five mandatory codes of practice issued under section 34 of the *Fair Trading Act 1992*. The Department of Justice and Community Safety commissioned an independent review of the codes in 2001. The review found that the codes' registration requirements and conduct standards provide a net benefit to the community. Consequently, the Council found in its 2002 NCP assessment that the ACT had met its CPA obligations in relation to the review and reform of legislation regulating the security industry.

The review also found, however, that the codes of practice were failing to fully support the legislation's objectives, including the objectives of ensuring security providers operate in a safe and ethical manner, and establishing adequate procedures to resolve complaints. Subsequently, the ACT

Government implemented the *Security Industry Act 2003* to replace the security codes of practice. Based on the New South Wales *Security Industry Act 1997*, the Act strengthens entry requirements (by imposing mandatory training and criminal record checks), sets out conduct standards and enhances the compliance systems. Similar provisions in other jurisdictions have also been found to provide a net public benefit. Consequently, the ACT has met its CPA obligations in relation to new legislation for the security industry.

Table 5.1: 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, age, experience, character, not convicted of offence), reservation of practice, disciplinary processes, business conduct (requirements that advertising specify agent's name and place of business, maintenance of records, trust account, fidelity bonds)	Commercial agents, private inquiry agents and their subagents	A working party was established in 1997 to look at private inquiry industry legislation in the context of reforms to security industry regulation. It recommended adopting business licensing for commercial agents, rather than occupational licensing, and removing licensing for repossession agents and process servers. A formal NCP review commenced in November 2001 and was completed in April 2002.	The Government anticipates that any legislative reforms arising from the NCP review will be addressed during 2003.	Review and reform incomplete
	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, reservation of practice, entry requirements (qualifications, age, fit and proper person, experience, competency, no conviction of relevant offence), business conduct (advertising must contain licence number), disciplinary processes	Security providers	Act was assessed under new legislation gatekeeper process.		Meets CPA obligations (June 2002)
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 companies, private inquiry agents, commercial agents, subagents	Freehills Regulatory Group completed the NCP review in October 1999. It supported retaining occupational licensing for security providers, making efforts to develop a national regulatory model for the industry, using 'light-handed' registration for commercial agents instead of licensing; reforming the surety scheme; and considering the establishment of a compensation fund or minimum insurance requirement. Another broader review of the Act has been completed, but not released publicly.	The Department of Justice intends to seek Cabinet approval to introduce legislative reform in the Parliament's Autumn 2004 session.	Review and reform incomplete

(*continued)*

Table 5.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Auctioneers and Agents Act 1971* (commercial agents)	Licensing, registration, entry requirements (residency, age, character, written exam for auctioneers), reservation of practice, business conduct (suitable premises, trust account receipts, audits, no misleading or deceptive advertising, no unlawful entry)	Commercial agents, managers, commercial subagents	PricewaterhouseCoopers completed a review in 2000. It recommended 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 act for only one party.	The Act was repealed and replaced by the *Property Agents and Motor Dealers Act 2000.*	Meets CPA obligations (June 2001)
	Security Providers Act 1992	Licensing, entry requirements, reservation of practice	Security officers, private investigators, crowd controllers (not in-house security officers)	Minor departmental review was completed in 2002. Public benefit test report concluded that the restrictions are in the public interest and should be retained.	No amendments were required.	Meets CPA obligations (June 2003)
Western Australia	*Debt Collectors Licensing Act 1964*	Licensing, entry requirements (age, fit and proper person), reservation of practice, business conduct (trust accounts, fidelity bonds)	Debt collectors (commercial agents)	Department review completed in 2003. It found many of the restrictions in the licensing system to be in the public interest, but recommended that limits on fees charged to creditors by debt collectors and the requirement for written contracts between creditors and debtors be removed. It also recommended that licensing be extended to cover debt collector's employees.	The Government has endorsed the review recommendations.	Review and reform incomplete
	Inquiry Agents Licensing Act 1954 Securities Agents Act 1976	Licensing	Inquiry and security agents		Acts repealed and replaced by the *Security and Related Activities (Control) Act 1996*.	Meets CPA obligations (June 2001)

(*continued*)

Table 5.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Security and Related Activities (Control) Act 1996*	Licensing, registration, reservation of practice, entry requirements (training, character, possible medical exam for security officers), business conduct (no advertising unless licensed, operating restrictions), business licensing	Providers of security and inquiry activities	Western Australian Police Service completed a review without consultation. It concluded that the legislation is effective and necessary to ensure high standards, instil public confidence (especially in the area of crowd control) and maintain and improve the industry.	The Government endorsed the review recommendations 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	Review completed January 2003. It supported retention of licensing and other minor changes that do not impact on competition.	No reform required.	Meets CPA obligations (June 2003)
Tasmania	*Commercial and Inquiry Agents Act 1974*	Licensing, entry requirements (suitable person, not convicted of an offence of dishonesty, financial reputation), reservation of practice, disciplinary processes, business conduct (trust accounts, maintain records, audits)	Commercial agents, inquiry agents, security guards, process servers, security agents, commercial sub-agents	Review completed. Report recommended retaining most restrictions, including the option to impose education requirements, but removing process server licensing requirements, making minor changes to entry requirements, and giving the Commissioner for Corporate Affairs, rather than the courts, responsibility for licence approval.	Act repealed and replaced by the *Security and Investigations Agents Act 2002.*	Meets CPA obligations (June 2002)
ACT	*Fair Trading Act 1992*	Code of practice: registration, entry requirements (competency, criminal record check), reservation of practice, disciplinary processes, business licensing (except for debt collectors who are subject to a ban on harassment)	Bodyguards, security guards, cash transit industry, crowd marshals, guard and patrol services, debt collectors	Independent review was completed in 2001. The review found that the restrictions in the code of practice provided significant benefits (by minimising public risk) that outweigh their costs, but recommended considering introducing a licensing model because the code had failed to fully deliver its objectives.	The Government introduced the Security Industry Act 2003 to establish a statutory licensing scheme.	Meets CPA obligations (June 2002 and 2003)

(*continued*)

Table 5.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Commercial and Private Agents Licensing Act*	Licensing, registration, reservation of practice, 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), 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 completed in 1999. It recommended: negative licensing for all types of agent, continuing licensing of employees and subagents; issuing licences for a fixed rather than indefinite period; transferring responsibility for licensing from the courts to the Industries and Business portfolio; reforming business conduct requirements (requirement to issue receipts, a change to trust account arrangements and reconsideration of bonds and indemnity insurance in late 2000); and undertaking a further review to implement best practice licensing processes.	The Government approved the review recommendations and enacted legislation in 2000, which introduced 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 keep learner drivers safe. Generally, driving instructor legislation reserves the practice of teaching learners to drive for fee or reward to registered or accredited instructors. Most jurisdictions require instructors to demonstrate their competency (which may involve attending a training course or passing a test), be of good character and have held a driver's licence for three years before they can register. These requirements potentially restrict entry to the market for driving instruction.

This 2003 assessment considers whether New South Wales, Western Australia and South Australia have met their CPA obligations in relation to legislation regulating driving instructors. The 2002 NCP assessment found that the other States and Territories had met their CPA obligations in this area.

New South Wales

New South Wales completed a review of its driving instructor legislation in September 2001. The review recommended administrative changes to strengthen consumer protection, including creating a formal system within the Road Traffic Authority to conduct character and criminal records checks of licence applicants. The review recommended that the Government:

- remove the requirement for post-licence trainers (such as trainers providing advanced, defensive and recreational driving courses) to hold a driving instructor's licence;
- remove the licensing exemption for Government bodies;
- require the holders of a driving instructor's licence must have comprehensive motor vehicle insurance for the vehicle used for driving instruction;
- remove the requirement for duplicate driving controls;
- require driving schools to report allegations of improper behaviour by driving instructors to the Road Traffic Authority;
- provide for temporary suspension of licences pending investigation of allegations of serious improper behaviour by a driving instructor; and
- replace advertising restrictions with advertising guidelines that incorporate the driving instruction industry code of practice.

The Government supported the majority of the review's recommendations, but undertook a further review of the health and safety implications of some recommendations. The Government subsequently decided not to relax the current provisions for licence tenure because that would result in drivers being able to qualify for instruction without a reasonable level of experience.

It also decided not to remove the requirement for duplicate driving controls because it viewed their absence as an unacceptable safety risk. The Council notes that other jurisdictions, such as Victoria and Tasmania, do not require driving instructors' vehicles to be fitted with dual controls. Such restrictions increase the cost of entering into the market, but they do not raise significant competition concerns. New South Wales implemented the reforms through the *Driving Instructors Amendment Act 2002*, which received assent on 16 December 2002. New South Wales has met its CPA obligations in relation to legislation regulating driving instructors.

Western Australia

Completion of the NCP review of the *Motor Vehicle Driving Instructors Act 1963* has been delayed to allow the peak industry body more time to put in a submission. The Government expects the review to be completed in time for Cabinet to consider the review's final recommendations in September 2003. The Act aims to protect consumers purchasing driving tuition by ensuring they receive proficient tuition from a person of good character, who possesses appropriate skills and knowledge, and who conducts their business dealings fairly and honestly. The Act seeks to achieve this objective by requiring the licensing of anyone who wishes to work as a driving instructor for reward.

The review's preliminary assessment is that, although applicants for licences and licence renewals incur some costs in obtaining and maintaining their licences, these costs are outweighed by the benefits derived from licensing, particularly in view of the young age, inexperience and vulnerability of many of the consumers of driving tuition, and the environment in which driving tuition is necessarily provided.

The review's preliminary conclusion is that retention of the licensing restrictions in the Act is justified in the public interest. While the Government's acceptance of this recommendation would not require legislative reform, Western Australia has not met its CPA obligations in this area because it has not completed the review and reform process.

South Australia

South Australia completed a review of the tow truck operator and driving instructor provisions of the Motor Vehicles Act 1958. The review of driving instructors did not raise any significant competition issues because the restrictions in the Act are substantially equivalent to other jurisdictions' provisions regulating driving instructors, which were found to be in the public interest. The review proposed minor changes to the Act to reflect the terminology used by the industry. The Government is considering the review findings and expects to introduce a Bill to Parliament to implement the review recommendations in 2003. The Council considers that South Australia has met its CPA obligations in relation to legislation regulating driving instructors.

Table 5.2: 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 (completion of 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, possible provisions for displaying identification and advertising)	Final report was completed in September 2001.	The Driving Instructors Amendment Act 2002 removed advertising restrictions and the requirement for post-licence trainers (such as trainers providing advanced, defensive and recreational driving courses) to hold a driving instructor's licence.	Meets CPA obligations (June 2003)
Victoria	Road Safety (Driving Instructors) Act 1998	Licensing, entry requirements (passing of a training course, a fit and proper person, holding of licence for at least three years, criminal and driving record checks), reservation of practice (teaching someone without a licence on a highway for financial gain), business conduct (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		Act was 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, possible requirement to complete test or course), reservation of practice (teaching for reward), business conduct (use of dual control vehicle, possible provisions for displaying identification)	Completion of the NCP review has been delayed to allow the peak industry body more time to put in a submission. The review's preliminary assessment is that the licensing regime should be retained.		Review and reform incomplete

(continued)

Table 5.2 continued

Jurisdiction	Legislation	Key restrictions	Review activity	Reform activity	Assessment
South Australia	Motor Vehicles Act 1958 (Part 3A) (driving instructors)	Licensing, entry requirements (proficiencies as instructor, fit and proper person, holding licence for at least three years), practice reservation (teaching for reward), business conduct (requirement to display licence)	Review of tow truck operators, motor driving instructors and compulsory third party insurance did not recommend any changes to driving instructor rules that impact on competition.	No competition reforms were required. The Government is considering the review recommendations and expects to implement minor reforms in 2003.	Meets CPA obligations (June 2003)
Tasmania	Traffic Act 1925 (driving instructors)	Licensing, entry requirements (appropriate knowledge and experience [possible test and/or course], aged at least 21 years, good character, suitable person, 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, which retains competency and character restrictions.	Meets CPA obligations (June 2002)
ACT	Road Transport (Driver Licensing) Act 1999 (driving instructors)	Licensing, entry requirements (accreditation: skills, completion of training course, aged at least 21 years, suitable person, medically fit), business conduct (vehicle requirements unless vehicle provided by person under instruction, must display certificate)	Act assessed under new legislation gatekeeper process. It requires accredited instructors to display their accreditation when using a motor vehicle for instruction.		Meets CPA obligations (June 2002)
Northern Territory	Motor Vehicles Act (driving instructors)	Licensing, entry requirements (proficiency as driving instructor [possible test], good character, holding of licence for at least three years), reservation of practice (teaching for reward)	Review completed in 1999. It concluded that the restrictions are justified and provide a net public benefit through helping lower accident and injury rates.	The Government endorsed the review recommendation.	Meets CPA obligations (June 2001)

Motor vehicle dealers

The 2002 NCP assessment reported that all jurisdictions had met their CPA obligations in relation to legislation regulating motor vehicle dealers.

Table 5.3 summarises their review and reform activity.

All governments except Tasmania license motor vehicle dealers (or traders). Tasmania's Fair Trading (Code of Practice for Motor Vehicle Traders) Regulations 1996 also impose 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 obtain information on price and quality. 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, falsely representing the age of vehicles, misleading advertising and unfair sales techniques (PricewaterhouseCoopers 2000a).

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; Centre for International Economics (CIE) 2000b).

Table 5.3: 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), reservation of practice, disciplinary processes, business conduct (record-keeping, compensation fund)	Review completed. 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 one licensee operates multiple locations.	The Government accepted the review recommendations, making amendments via 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 (aged at least 18 years old, sufficient financial resources, solvency, 'likely to carry on such a business honestly and fairly', and no conviction 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 completed. 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 Motor Car Traders Guarantee Fund.	Government accepted the review recommendations, making amendments via the *Tribunals and Licensing Authorities (Miscellaneous Amendment) Act 1998*.	Meets CPA obligations (June 2001)

(*continued*)

Table 5.3 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, aged at least 21 years, fit and proper person, three of past five years as licensed manager or salesperson [or employee who has that experience], written test), 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 by the *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 (1) restrictions on licensing for motor vehicle dealers and yard managers, and (2) statutory warranties for used vehicles, but repealing (1) restrictions on licensing for car market operators and salespersons and (2) 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 completed. 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 5.3 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 completed. It found that the restrictive provisions (those 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 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 Act 2002* implements the review recommendations with the exception of the recommendation to remove requirements for approval of dealer managers. The Government considered that the costs of keeping this restriction are low, while the potential costs to consumers from not having a designated responsible person on site could be significant.	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. The 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 potential operators are fit and proper persons, requiring sellers of goods to produce identification and provide the police with access to information on the trade of second-hand goods. Regulation also aims to protect consumers by increasing transparency and clarifying consumer rights in dealing with pawnbrokers (Centre for International Economics 2000a).

Governments have similar competition restrictions in their legislation regulating pawnbrokers and second-hand dealers (table 8.4). Most require people in these occupations to obtain a formal licence. South Australia and Tasmania have negative licensing systems (which disqualify people from carrying on a pawnbroker business if, for example, they have been convicted of an offence of dishonesty) and require pawnbrokers to notify (or register with) the police.

The Council's 2002 NCP assessment reported that Victoria, Western Australia, South Australia, Tasmania, the ACT and the Northern Territory had met their CPA obligations for legislation governing pawnbrokers and second-hand dealers. This 2003 NCP assessment considers New South Wales' and Queensland's compliance with their CPA obligations, and provides an update on review and reform activity in Western Australia.

New South Wales

The Department of Fair Trading completed an NCP review of the *Pawnbrokers and Second-hand Dealers Act 1996* in 2001. The review found that regulation of pawnbrokers and second-hand dealers is necessary to address property crime and ensure customers are properly informed of their rights and obligations under a pawn agreement.

The review concluded that the current licensing regime is the regulatory option that best achieves the objectives of the Act and provides the greatest net public benefit. It identified reforms that would enhance the licensing system and reduce the regulatory burden for licensees. These reforms include measures to clarify and update record-keeping and proof-of-identity requirements, and measures to allow pawnbrokers to sell unredeemed goods at either their business premises or auction.

To ensure the Act covers only goods that are at a high risk of being stolen, the review recommended that the Department of Fair Trading continue to monitor the prescribed list of second-hand goods. Further, it recommended that the department continually review the exemptions from the Act to

ensure the Act is not regulating known low risk areas for stolen goods (such as recycling programs conducted on behalf of local governments).

The New South Wales Parliament passed the *Pawnbrokers and Second-hand Dealers Amendment Act 2002*, which implements the reviews recommendations. New South Wales has thus met its CPA obligations in relation to the review and reform of this legislation.

Queensland

The Office of Fair Trading completed the review of the *Pawnbrokers Act 1984* and the *Second-hand Dealers and Collectors Act 1984* in June 2002. It recommended introducing a single licence type to apply to pawnbrokers and second-hand dealers, but repealing the provisions that require collectors to be licensed. It also recommended: introducing a multisite licence to replace the current requirement for a business to have a licence for each separate site; reforming the 'fit and proper person' test; and streamlining business conduct restrictions. The proposal to retain licensing restrictions is consistent with reforms in other jurisdictions and does not raise significant competition issues.

The Government accepted the recommendations of the review, but has delayed implementation of the reforms to allow time to simplify the legislation by consolidating the two Acts. Queensland Treasury advised that the Government expects to introduce the new legislation to Parliament around June 2003. Queensland has not met it CPA obligations in relation to pawnbroker and second-hand dealer legislation, therefore, because it did not complete its reform activity.

Western Australia

The Government recently endorsed the recommendations of the *Pawnbrokers and Second-hand Dealers Act 1994* and prepared the Pawnbrokers and Second-hand Dealers Amendment Bill 2003. The review recommended placing general licence conditions (those intended to apply to all licensees) in the Regulations rather than on individual licences, as a way of improving consistency. It also recommended amendments designed to further the public interest by providing law enforcement agencies with stronger powers to police licensees' adherence to the legislation. These amendments make illegal the repurchasing of goods by pawn brokers, increase fines for serious breaches of licence conditions, require separate business premises to be licensed separately, and require dealers to display their licence number (for example, in newspaper advertisements) to the public. While the review concluded that some of the amendments impose restrictions, the Government stated that they are in the public interest because they ensure more effective policing. Nevertheless, Western Australia has not complied with its CPA obligations in this area as it did not complete the review and reform activity.

Table 5.4: 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, no mental incapacities, no undischarged bankruptcy, 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 A$50, minimum redemption period, operation from fixed premises; second-hand dealers: prescribed records, computer records, prescribed minimum period for holding goods, requirements that seller provide identification, cooperation with police)	Review was completed in 2001 and released for public consultation in May 2002. Recommendations included updating the list of prescribed goods covered by the Act, requiring licensees to be 'fit and proper', clarifying record-keeping requirements and specifying the information that licensees must provide to pawners. It also recommended that the Department of Fair Trading continue to monitor the prescribed goods list (to ensure it covers high risk goods) as well as exemptions (to ensure it does not cover low risk goods).	Recommendations implemented by the *Pawnbrokers and Second-hand Dealers Amendment Act 2002*.	Meets CPA obligations (June 2003)
Victoria	*Second-hand Dealers and Pawnbrokers Act 1989*	Licensing (pawnbrokers, second-hand dealers for non-exempt goods), registration, entry requirements (no conviction of disqualifying offence in past five years, solvency), practice reservation, disciplinary processes, business conduct (pawnbrokers: prescribed records, auction of unredeemed goods over A$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 and made amendments via the *Law and Justice Legislation Amendment Act 1997.*	Meets CPA obligations (June 2001)

(*continued*)

Table 5.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Pawnbrokers Act 1984*	Licensing, entry (aged at least 18 years old, no mental incapacity, fit and proper person, not a collector, no conviction of fraud or dishonesty offence in past five years), practice reservation, disciplinary processes, business conduct (prescribed records, public auction of unredeemed goods over A$40, cooperation with police)	Review of both Acts was completed June 2002. It recommended introducing: a single licence type to apply to dealers and a multisite licence to replace the requirement for a separate licence for each site. It also recommended reforming the 'fit and proper person' test and streamlining business conduct restrictions.	The Government accepted the review recommendations but has delayed implementation to allow time to simplify the legislation by consolidating the two Acts.	Review and reform incomplete
	Second-hand Dealers and Collectors Act 1984	Licensing (second-hand dealers for nonexempt goods), registration, entry (age, no mental incapacity, fit and proper person, no conviction of fraud or dishonesty offence in past five years), practice reservation, disciplinary processes, business conduct (prescribed records, prescribed period for holding goods, requirement that sellers provide identification, cooperation with police)	The Review (see above) made one recommendation specific to second-hand dealers: that is, to repeal provisions requiring collectors to be licensed.	As above	Review and reform incomplete
Western Australia	*Pawnbrokers and Second-hand Dealers Act 1994*	Licensing (pawnbrokers, second-hand dealers for nonexempt goods), registration, entry requirements (good character, adequate management, supervision and control of business operations, no conviction of dishonesty, fraud or stealing offence in past five years), practice reservation, disciplinary processes, business conduct (pawnbrokers: prescribed records, computer records, notification of pawner of surplus of proceeds of sale; second-hand dealers: prescribed records, prescribed period for holding goods, requirement that seller provide identification, cooperation with police)	First 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 has been in operation for an additional three years; and examining alternative approaches, including those likely to be introduced in other States. Second review undertaken.	The Government endorsed both reviews' recommendations. An amendment bill has been prepared.	Review and reform incomplete

(*continued*)

Table 5.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Second-hand Dealers and Pawnbrokers Act 1996*	Negative licensing (pawnbrokers, second-hand dealers for all goods except cars), registration (notification to police), entry (no conviction of dishonesty offence in past five years, no undischarged bankruptcy/insolvency), practice reservation, disciplinary processes, business conduct (pawnbrokers: prescribed records, selling of unredeemed goods; second-hand dealers: prescribed records, prescribed period for holding goods, requirements that seller 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)
Tasmania	*Pawnbrokers Act 1857* *Second-hand Dealers Act 1905*	Licensing, business conduct	Act was not for review.	Act 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), reservation of practice, disciplinary processes, business conduct (pawnbrokers: prescribed records, redemption period of six months, auction of forfeited goods; second-hand dealers: prescribed records, prescribed period for holding goods, 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)

(*continued*)

Table 5.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Pawnbrokers Act 1902* (NSW) in application to ACT	Licensing, registration, entry requirements (aged over 18 years, fit and proper person), reservation of practice, business conduct (prescribed records, public auction unredeemed goods over A$10, cooperation with police)	Intradepartmental review completed in 2001. It recommended the restructuring and modernisation of existing regulations.	The 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), reservation of practice (dealing in certain second-hand goods), business conduct (prescribed records, prescribed period for holding of goods, cooperation with police)	Department review was completed in 2000. It recommended: updating the definition of second-hand goods; altering business conduct requirements to account for new technology; 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)
Northern Territory	*Pawnbrokers Act*	Licensing		Act was repealed in1998.	Meets CPA obligations (June 2001)
	Consumer Affairs and Fair Trading Act (pawnbrokers and second-hand dealers)	Licensing (pawnbrokers, second-hand dealers for nonexempt exempt goods), registration, entry requirements (minimum age, no undischarged bankruptcy, no conviction 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 completed in 2000. It recommended retaining the provisions with no amendment.	The Government approved the review recommendations in November 2000.	Meets CPA obligations (June 2001)

Real estate agents

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 and their employees 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, generally because 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. Financial loss may also arise from the misappropriation of funds (such as deposits on transactions and rent) held in trust. Further, the sale of a property has legal implications.

All States and Territories prohibit a person from providing real estate services for payment on behalf of an owner or purchaser unless they are licensed. In addition to licensing real estate agents, some States and Territories license real estate office managers and agents' representatives (sales consultants). Liquidators and trustee companies are generally exempt from the licensing requirement, as are legal practitioners in some States.

The Council's 2002 NCP assessment reported that New South Wales and South Australia had met their CPA obligations in relation to legislation regulating real estate agents. This 2003 NCP assessment considers the remaining jurisdictions' compliance with their CPA obligations in this area.

Victoria

KPMG Consulting completed the *National Competition Policy Review of Victorian legislation relating to the regulation of estate agents* in 2000. This review of the *Estate Agents Act 1980* was overseen by a steering committee comprised of representatives from Consumer and Business Affairs Victoria, the Department of Premier and Cabinet, and the Department of Treasury and Finance.

- The review found that there is limited information asymmetry between property owners and estate agents in the commercial property sales, business sales and property management markets. It recommended applying a less restrictive form of licensing to these areas — one that

focuses on limiting defalcation rather than regulating the quality of agents' services — by establishing a two-tier licensing system.

- The review concluded that there was a benefit in maintaining regulations that seek to deliver minimum competency standards and quality services for residential property sales, but recommended making the education and experience requirements for residential real estate agents less restrictive. It recommended introducing a competency-based alternative to the ordinary education requirements and, in addition, deeming certain professions (in particular, legal practitioners) to be competent.

- The review recommended retaining regulation to protect against defalcation. It considered that this regulation is important to ensure consumers have recourse to compensation if trust monies are misappropriated. It also recommended, however, investigating the feasibility of giving agents the choice of being covered by the Estate Agents Guarantee Fund or taking out alternative forms of fidelity guarantee protection (such as a prescribed minimum level of professional indemnity insurance).

- The review recommended removing the requirement for half of the directors of corporate real estate agents to be licensed agents, as well as the restriction on agents' representatives holding shares in the corporation for which they work. It found that the objective of these restrictions — to ensure adequate supervision of all agents and agents' representatives employed by a business — could be achieved by the less restrictive option of requiring corporations to have a licensed agent (who meets the education and experience requirements) who supervises all agents' representatives and is responsible and accountable for all real estate transactions.

The Government released the review report in December 2000 and following consultation, introduced the Estate Agents and Sale of Land Acts (Amendment) Bill to Parliament in October 2002. The Bill lapsed when Parliament was prorogued for the State election. It was reintroduced to Parliament in April 2003 and passed without amendment.

The amended Act incorporates the majority of the review recommendations, except the recommendation to apply a less restrictive licensing approach to agents that are not involved in residential real estate sales. The Government presented the following reasons to the Council in support of this decision.

- Training is relevant not only to the objective of ensuring minimum service quality standards, but also the objective of avoiding embezzlement. Training of licensees in trust accounting is vital to equip them to detect embezzlement by subordinates. Trust money is susceptible to theft regardless of the source, although the Government acknowledged that business vendors and commercial property vendors and landlords make few claims on the Estate Agents Guarantee Fund.

- Residential vendors are not alone in being exposed to potentially large losses from broader agent incompetence. While the level of experience and sophistication may be higher among other client groups *on average*, some individuals may be ill-equipped to identify competent agents in the absence of a licensing 'signal' and thus are open to suffer potentially significant losses.

- There is no alternative or practical way of removing licensing from some segments of the market (such as small business/investor commercial transactions), while retaining it for others. Using the dollar value of a transaction, for example, provides only a rough indicator of the parties' sophistication or capacity to shoulder risk, and it would be costly to police a system where different licensing requirements applied above and below a given transaction value.

- A two-tiered licensing system has the potential to create public misunderstanding about its requirements and application while the industry is largely composed of broad-based businesses rather than specialist estate agencies.

- Property management involves dealings with tenants, whose rights need to be understood and respected by the agent despite the lack of direct contractual relationship between them. The Government acknowledged that self-managing landlords are not required to demonstrate any competence before letting out and managing their properties, but considered that mandatory training would place an unreasonable burden on this group because most have other full-time occupations. It noted that an effective minimum standard for third party managers places some competitive pressure on the standards of self-managing landlords.

- Two-tier licensing would create the potential for numerous, trivial complaints to Consumer and Business Affairs Victoria from agents alleging that operators from outside the mainstream industry had dabbled in business reserved for fully licensed estate agents.

The Council does not find the arguments about a two-tiered licensing system creating public misunderstanding or potential for trivial complaints compelling, particularly without any consideration of alternatives or transitional arrangements such as appropriate information, education and disclosure rules.

The Council accepts that residential vendors are not alone in being exposed to potentially large losses from broader agent incompetence. The review found that poorly drafted contracts or poor advice provided to vendors is prevalent even when licensed estate agents are involved. The review observed that vendors in the commercial property sector already engage in behaviour to mitigate the risks of estate agent incompetence — for example, vendors may seek independent advice or hire other professionals to guide them through the sale process. It also noted that existing mandatory training requirements largely focus on work with residential property, and the current licensing system does not oblige an agent to demonstrate specialist knowledge of other

forms of real estate in any depth. KPMG Consulting considered that if licensing were revoked, then voluntary accreditation and company reputation and brand recognition would become important devices for signalling service quality.

In the property management market, the review found that approximately 48 per cent of complaints made to Consumer and Business Affairs Victoria relate to agents' activities in property rental. It did not, however, dispute that licensing could have a positive impact (KPMG Consulting 2000).

To comply with the CPA clause 5 guiding principle, the Victorian Government must demonstrate that licensing reduces the risks of financial losses associated with agent incompetence. This link is yet to be established. Nevertheless, the Council accepts that there may be no easy or practical means of segmenting the business, commercial and property management markets to ensure minimum quality standards for those judged to be most vulnerable to the risks associated with purchases in these markets. It also notes that a single licence type (for all real estate agents) and education and experience requirements are common features of licensing arrangements in all the States and Territories. Most other NCP reviews of real estate legislation did not recommend adopting a less restrictive approach to licensing. The exception was the draft Tasmanian review, which recommended that property managers not be licensed, but instead should be subject to general trust accounting and record management requirements.

Given some divergence in the findings of jurisdictions' legislation reviews, the Council considers that Victoria's public interest arguments fall within a range of outcomes that could reasonably be justified by the available evidence. It thus assesses Victoria as having complied with its CPA obligations in relation to the review and reform of its legislation regulating real estate agents and their employees.

Queensland

PricewaterhouseCoopers completed a review of the *Auctioneers and Agents Act 1971* in 2000. Queensland implemented the majority of the review recommendations when it replaced the Act with the *Property Agents and Motor Dealers Act 2000,* including retaining caps on maximum commissions as a transitional arrangement.

In the 2002 NCP assessment, the Council accepted that there might be a net community benefit in temporarily retaining maximum commissions while educating market participants about their rights and responsibilities. It postponed finalising its assessment of this issue pending Queensland's review of the matter. The review of commissions commenced in April 2002, assisted by a working party of key stakeholders. The Government is now considering the regulatory options. While making progress on this issue, Queensland has not complied with its CPA obligations because it did not complete its review and reform activity.

Western Australia

Western Australia completed its review of the *Real Estate and Business Agents Act 1978*. The review recommended:

- retaining licensing because it is necessary to protect consumers against the risk of significant financial loss should agents or sales representatives engage in dishonest, incompetent or negligent conduct;
- allowing the Real Estate and Business Agents Board to recognise qualifications other than those prescribed;
- legislating explicit criteria to determine whether a person has a conflict of interest and whether they have sufficient material and financial resources;
- removing restrictions on who may audit trust accounts and the requirement for board approval of franchise agreements; and
- requiring only one director or partner to be licensed, regardless of the number of directors or partners in a licensed partnership or body corporate.

The Government endorsed the review recommendations in February 2003 and commenced drafting amendments. The proposed reforms are consistent with the CPA guiding principle and practices in other jurisdictions. Western Australia has not met its NCP obligations in this area, however, because it did not complete its reform activity.

Tasmania

The Department of Justice and Industrial Relations released the draft report of its review of the *Auctioneers and Real Estate Agents Act 1991* for public comment in November 2001. The draft report's preliminary recommendations proposed that:

- real estate agents should be licensed, subject to the achievement of competency-based qualifications and to good character checks (both personal and financial), but that:
  - real estate managers and sales consultants should not be licensed, because the educational qualifications and reputation checks of employees should be a matter for the employing agents; and
  - property managers should not be licensed, but have to comply with general trust accounting and record management requirements;
- legal practitioners should continue to be exempt from the licensing requirement, and accountants should be exempt in relation to the sale of businesses that do not involve the sale of land;

- real estate agents should be allowed to enter multidisciplinary partnerships; and
- the regulatory and disciplinary functions of the Auctioneers and Real Estate Agents Council should be transferred to the Office of Consumer Affairs and Fair Trading.

Tasmania intended to introduce new legislation in the spring 2002 session of Parliament, but was delayed by the State election. The legislation is expected to be introduced in the spring 2003 session. While the proposed reforms are consistent with the CPA guiding principle, Tasmania has not met its NCP obligations in this area, because it did not complete its review and reform activity.

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 (Government of the ACT 2002). The Government accepted the department's recommendations. In May 2003, the ACT Legislative Assembly passed the *Agents Act 2003*, which on commencement repeals the *Agents Act 1968*. The new Act was subjected to the ACT's gatekeeping arrangements (see chapter 13, volume 2), which found that the Act's registration and licensing requirements help to overcome information asymmetries and ensure probity in the handling of consumers' finances, so are justified on public interest grounds.

The legislation presents no competition issues requiring reform, so the ACT has met its CPA obligations in this area.

The Northern Territory

The Northern Territory *Agents Licensing Act* regulates entry to the occupations of real estate agent, business agent, conveyancing agent and agents' representative; restricts the employment of agents' representatives; and regulates the business conduct of licensed agents. The CIE completed a review of the Agents Licensing Act in October 2000, finding that the main objective of the Act is to protect consumers of real estate, business and conveyancing services from agent misconduct or negligence. The review considered, however, that partial deregulation of the real estate industry could deliver this objective at a lower cost. It recommended retaining the licensing of business principals and the registration of their employees, but removing statutory educational requirements for agents' representatives.

The review also recommended amending the Act to:

- provide objective assessment criteria for establishing whether an applicant is a fit and proper person to hold a licence;
- enable the Agents Licensing Board (in conjunction with industry) to specify the education requirements for licence applicants;
- permit any registered training organisation to receive funding from the agents' fidelity fund to provide realty education;
- remove the requirement for agents to maintain an office in the Northern Territory and remove the requirement to have a licensed agent in charge of each office, where a real estate business has multiple offices in the same town or city;
- remove provisions that, if exercised, would give the Real Estate Institute of the Northern Territory an exclusive authority to arrange professional indemnity insurance for its members;
- remove requirements for agents to abide by the Real Estate Institute of the Northern Territory's rules of practice; and
- provide for the real estate members of the Agents Licensing Board to be drawn from all of the industry and not just the Real Estate Institute of the Northern Territory's nominees.

The Government implemented the majority of the review recommendations through the *Agents Licensing Amendment Act 2002*. It rejected the recommendation to partly deregulate the real estate industry by leaving agents to determine the appropriate educational requirements for their representatives. Given that agents' representatives are the main people in contact with the public and often work offsite and under limited supervision, the Government considers it critical that they have the knowledge to perform competently and ethically for their clients and the public (Toyne 2002).

Requirements for agents' representatives to hold particular qualifications act as a barrier to entry to the occupation. They impose costs on the industry (and potentially on consumers of real estate services) by limiting the flexibility of employers to employ people with alternative areas of expertise (such as law or marketing) as sales representatives. Further, while they provide consumer protection benefits, prescribed educational standards for agents' representative may not be necessary to deliver adequate levels of protection for consumers.

The Northern Territory review argued that 'competitive edge' would provide an incentive for businesses to ensure their representatives maintain high standards. It also noted that requirements for agents to hold professional indemnity and fidelity insurance provide fallback protection for consumers against financial or consequential loss where employer screening fails (CIE 2000b, pp. 61–3). Similarly, the review of Tasmania's real estate agent

legislation found no justification for requiring a sales consultant to be licensed or hold specific qualifications. It considered that it is not unreasonable to expect an employer to take responsibility for employing suitably qualified and honest staff, and providing the necessary training for staff' (Department of Justice and Industrial Relations 2001).

NCP reviews in other jurisdictions, however, argued that there is a public interest case for retaining minimum educational requirements for agents' representatives. The review of South Australia's *Land Agents Act 1994* found that removing education requirements could expose consumers to significant risks, because sales representatives are often involved in risky areas of real estate transactions — including negotiations, marketing, appraisal and the settlement of contracts (Office of Consumer and Business Affairs 1999b). By highlighting concerns that training inadequacies would often not be identified until after a significant problem arose, the South Australian review implicitly argued in favour of entry barriers over reactive mechanisms such as reputation and insurance.

The review of Victoria's real estate agent legislation also recommended retaining education requirements for agents' representatives, given their involvement in risky areas of transactions (KPMG Consulting 2000). Similarly, the Queensland review found that while its legislation relies on agents' supervision of salespeople to protect consumers, the requirement for sales representatives to pass an examination[1] benefits consumers and the industry by ensuring sales representatives are better equipped to avoid delays or complications in contractual and other aspects of real estate transactions (PricewaterhouseCoopers 2000a).

Given the divergent findings of jurisdictions' legislation reviews, the Council considers that the position adopted by the Northern Territory government falls within a range of outcomes that could reasonably be justified by the available evidence. It thus assesses the Northern Territory as having complied with its CPA obligations in relation to the review and reform of its legislation regulating real estate agents and their employees.

[1] Since the review the examination has been replaced by competency-based assessments under the Property Agents and Motor Dealers Act.

Table 5.5: 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), reservation of practice, disciplinary processes, business conduct (auctions, trust accounts)	Review completed. It recommended introducing competency standards, compulsory professional indemnity insurance and annual licence renewal, and replacing the multilicensing system with a single licence.	Parliament passed the *Property, Stock and Business Agents Act 2002* in June 2002. The Act implements the review recommendations, except the review's proposal to adopt a single licensing system.	Meets CPA obligations (June 2002)
Victoria	*Estate Agents Act 1980*	Licensing of real estate agents (their representatives are negatively licensed), registration, entry requirements (agents: licensed in past five years or qualifications and experience, age, fit and proper person [solvency, no conviction for prescribed offence, no disqualification 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, funding of Estate Agents Guarantee Fund from interest on trust accounts to pay for administration and defalcation), business licensing	Review 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. The Estate Agents and Sale of Land Acts (Amendment) Bill introduced to Parliament in April 2003 was passed without amendment. The amended Act implements the majority of the review recommendations except the recommendation to apply a less restrictive licensing approach to agents who are not involved in residential real estate sales.	Meets CPA obligations (June 2003)

(*continued*)

Table 5.5 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, fit and proper person, good character, 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)	PricewaterhouseCoopers completed review in 2000. It recommended retaining caps on maximum commissions as a transitional arrangement while market participants are educated about their rights (see also table 5.1, p. 5.8).	The Act was repealed and replaced by the *Property Agents and Motor Dealers Act 2000.* An ongoing community education program regarding agents commissions began in 2001. This has been reviewed and the Government is considering the regulatory options.	Review and reform incomplete
Western Australia	*Real Estate and Business Agents Act 1978*	Licensing (agent's licence, sales representative's certificate), registration, entry requirements (aged 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 completed. It recommended licensing be retained, the board be allowed to recognise qualifications other than those prescribed; legislation include explicit criteria for determining conflict of interest and for deeming who has sufficient material and financial resources; restrictions on who may audit trust accounts be removed; the requirement for board approval of franchise agreements be removed and only one director/partner need be licensed.	Maximum fees removed in 1998. The Government endorsed the review recommendations in February 2003 and commenced drafting proposed amendments.	Review and reform incomplete

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Land Agents Act 1994*	Licensing of agents, negative licensing of sales representatives, registration, entry requirements (qualifications, no conviction for an offence of dishonesty, no undischarged bankruptcy or suspension/disqualification from practising an occupation, trade or business), reservation of practice, 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 by the Standing Committee of Attorneys-General).	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), reservation of practice, disciplinary processes, business conduct	Draft review report (released November 2001) recommended: retaining licensing of real estate agents, but removing this requirement for office managers and sales consultants; granting an exemption for accountants in relation to the sale of businesses not involving the sale of land; and transferring regulatory and disciplinary functions to the Office of Consumer Affairs and Fair Trading.	The Act will be repealed and replaced by new legislation. Reform implementation has been delayed by the State elections. The Government expects to introduce new legislation in spring 2003.	Review and reform incomplete

(*continued*)

Table 5.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Agents Act 1968*	Licensing (real estate agents, travel agents, business agents, stock and station agents), registration, entry requirements, reservation of practice, disciplinary processes, business conduct	Intradepartmental review completed in 2001. It recommended the Act be replaced, but found no competition policy issues requiring reform. The new Act was subjected to the ACT's new legislation gatekeeping arrangements.	The Government accepted the review findings. The *Agents Act 2003* replaces the 1968 Act.	Meets CPA obligations (June 2003)
Northern Territory	*Agent's Licensing Act*	Licensing (real estate agents, agents representatives, conveyancing agents), registration, entry requirements (fit and proper person, age, competency, education or experience), reservation of practice, disciplinary processes, business conduct (trust monies, professional indemnity insurance, fidelity fund, maintenance of an office in the Northern Territory)	Review was completed in 2002. It recommended retaining licensing of real estate agents but partially deregulating agents' representatives. The review also recommended reforms to entry requirements and business conduct restrictions.	The Government rejected the recommendation to partially deregulate agents' representatives but implemented the remaining recommendations through the *Agents Licensing Amendment Act 2002*.	Meets CPA obligations (June 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. The regulation of travel agents involves a licensing process and a compulsory consumer compensation scheme (CIE 2000g). All jurisdictions have similar eligibility requirements for travel agent licences: agents must be 18 years or older, be a fit and proper person, and have the experience and/or qualifications to operate a travel agency (or have a manager with the relevant experience and/or qualifications) (CIE 2000a).

Governments are taking a national approach to reviewing their travel agent legislation (see chapter 14, volume 2). The Ministerial Council on Consumer Affairs commissioned the CIE, overseen by a council working party, to review legislation regulating travel agents. It released the review report for public comment in August 2000. The review recommended removing entry qualifications for travel agents and retaining the requirement for travel agents to hold insurance. It also recommended dropping the compulsory membership of the Travel Compensation Fund in favour of a competitive insurance system, whereby private insurers compete with the Travel Compensation Fund (CIE 2000a). Other recommendations included changing the current licence exemption threshold and removing the Crown exemption.

The Western Australian Department of Consumer and Employment Protection coordinated the preparation of the review response to the working party, in liaison with the CoAG Committee on Regulatory Reform. The working party, which reported to Ministers in August 2002, supported all of the review's recommendations except the two key recommendations.

- The working party did not accept the recommendation that the competitive insurance model be introduced, because it had concerns about continuity of private supply, premium levels, price volatility and the risk minimisation strategies of private insurers. It preferred the review's option to retain the Travel Compensation Fund but reviewed contribution arrangements to establish a risk-based premium structure and make prudential and reporting arrangements more equitable.

- The working party did not support the recommended removal of entry qualifications. Instead, it recommended that qualification requirements in each participating jurisdiction be reviewed and amended to ensure uniformity. It argued that this uniformity would overcome the problems identified in the review report.

The Ministerial Council on Consumer Affairs endorsed the working party's recommendations in November 2002, and the Standing Committee of Officials of Consumer Affairs will oversee implementation of the reforms.

All States and Territories are progressing towards implementing the working party's recommendations. The following jurisdictions have provided some details on implementation of proposed reforms affecting travel agents.

- New South Wales advised that it anticipates it will implement the necessary legislative reforms in late 2003 or early 2004.

- Victoria advised that it is investigating the implications of the review recommendation to repeal the Crown exemption. Legislation to address this and issues relating to prescribed qualifications for managers may be introduced in spring 2003.

- Western Australia advised that Cabinet endorsed the national review on 23 June 2003. It has commenced implementation of the proposed reforms, but all regulatory amendments will need to be agreed at the national level before being tabled in Parliament. Full implementation is scheduled for completion in 2003.

- The Northern Territory advised that it is likely to support dropping compulsory membership of the Travel Compensation Fund in favour of a competitive insurance system, whereby private insurers compete with the Travel Compensation Fund. The matter is awaiting consideration by the Government.

None of the States and Territories has met their CPA obligations in relation to travel agents legislation because they did not complete their review and reform activity.

Table 5.6: Review and reform of legislation regulating travel agents

Jurisdiction	*Legislation*	*Key restrictions*[a]	*Review activity*[b]	*Reform activity*[c]	*Assessment*
New South Wales	*Travel Agents Act 1986*	Licensing, compulsory insurance, business restrictions	See table notes for detail of the national review.	See table notes for details on the response to the national review. New South Wales anticipates that it will implement the reforms in late 2003 or early 2004.	Review and reform incomplete
Victoria	*Travel Agents Act 1986*	Licensing, compulsory insurance, business restrictions	See table notes for detail of the national review.	See table notes for details on the response to the national review.	Review and reform incomplete
Queensland	*Travel Agents Act 1988*	Licensing, compulsory insurance	See table notes for detail of the national review.	See table notes for details on the response to the national review.	Review and reform incomplete
Western Australia	*Travel Agents Act 1985* and Regulations	Licensing, compulsory insurance	See table notes for detail of the national review.	See table notes for details on the response to the national review. Western Australia intends to implement the Ministerial council's recommendations through the next Acts (Amendment and Repeal) Competition Bill.	Review and reform incomplete
South Australia	*Travel Agents Act 1986*	Licensing, compulsory insurance	See table notes for detail of the national review.	See table notes for details on the response to the national review.	Review and reform incomplete
Tasmania	*Travel Agents Act 1987*	Licensing, registration, compulsory insurance, business restrictions	See table notes for detail of the national review.	See table notes for details on the response to the national review.	Review and reform incomplete
ACT	*Agents Act 1968*	Licensing, registration, compulsory insurance, entry requirements, reservation of practice, disciplinary processes, business conduct	See table notes for detail of the national review.	See table notes for details on the response to the national review. The Government considered the review findings, and decided to retain an agents licensing board.	Review and reform incomplete
Northern Territory	*Consumer Affairs and Fair Trading Act*	Licensing, compulsory insurance	See table notes for detail of the national review.	See table notes for details on the response to the national review.	Review and reform incomplete

[a] Travel agents must have compulsory insurance through membership of the Travel Compensation Fund. [b] The national review, released in 2000, recommended removing entry qualifications for travel agents and retaining compulsory insurance, but opening insurance provision to competition. The final review report has been released for further consultation. [c] In November 2002, the Ministerial Council on Consumer Affairs decided to maintain the Travel Compensation Fund monopoly, but consider establishing a risk-based premium structure and making prudential reporting arrangements more equitable. It recommended that each participating jurisdiction review and amend its entry qualifications to ensure uniformity, so as to address problems identified by the review.

Occupation 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 (legislation that generally also includes business conduct requirements). Governments' objectives for licensing auctioneers include increasing consumer confidence in the auction system, protecting vendors and purchasers from 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).

The licensing of particular auctioneers and business conduct requirements are also contained in other legislation. 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 2002 NCP assessment reported that Victoria, South Australia and the Northern Territory had met their 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 in this area.

Queensland

As discussed, PricewaterhouseCoopers completed a review of the Queensland Auctioneers and Agents Act in 2000. The review recommended reforms to the restrictions on market entry and business conduct, including the deregulation of maximum commissions and the removal of the maximum cap on buyers' premium commissions. The review proposed transitional arrangements to support the implementation of these reforms — for example, a public education campaign to make market participants aware of the changes to their rights and responsibilities.

The Queensland Government accepted the review recommendations, including the proposed transitional arrangements. It repealed the Auctioneers and Agents Act and replaced it with the *Property Agents and*

Motor Dealers Amendment Act 2001 and began an ongoing community education campaign. In April 2002, the Government, assisted by a working party of key stakeholders, commenced a new review of the cap on commissions.

In its 2002 assessment, the Council accepted that there may be a net community benefit in temporarily retaining maximum commissions while educating market participants about their rights and responsibilities. Given that Queensland expected to complete a review of restrictions on commissions during 2002, however, the Council indicated it would finalise its assessment of compliance in 2003. The review of commissions has since been completed and the Government is considering the regulatory options. The Council thus assesses Queensland as not having met its CPA obligations in relation to the licensing of auctioneers because it did not complete its review and reform activity.

Western Australia

The Ministry of Fair Trading completed an NCP review of the *Auction Sales Act 1973* in 2001. It recommended retaining the current licensing system while it assessed the licensing against the CPA guiding principle in the context of a broader review of the Act. The Department of Consumer Protection is finalising a general review of the *Auction Sales Act 1973* in line with the recommendations of the NCP review. In its 2003 NCP annual report, Western Australia advised that it expected the general review to be completed and forwarded to the Minister for Consumer and Employment Protection in the latter half of 2003. Depending on the findings of the general review, alternative industry-specific regulation (such as voluntary accreditation or auctioneer registration) may replace the Act's occupational licensing provisions.

Western Australia has not met its CPA obligations in relation to the licensing of auctioneers because it has not completed its review and reform activity.

Tasmania

Tasmania completed a review of the *Auctioneers and Real Estate Agents Act 1991*. The 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.

The final report, which has not been publicly released, has been provided to the Minister. A legislative response is expected in the spring 2003 session of Parliament.

The ACT

The ACT completed an NCP review of the *Auctioneers Act 1959* in conjunction with the Agents Act 1968 in 2001. The review found that the regulatory costs are minor, but the benefits appear insufficient to justify licensing auctioneers (Stefaniak 2001). In May 2003, the ACT Legislative Assembly passed the Agents Act 2003, which repeals the Auctioneers Act on its commencement. Consequently, the ACT has met its CPA legislation review and reform obligations in relation to the licensing of auctioneers.

Table 5.7: 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), reservation of practice (auctioneering 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 was 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 was replaced by the *Auction Sales (Repeal) Act 2001*, with effect from 1 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, aged at least 21 years, good fame and character, fit and proper person, two years experience [including four auctions] on provisional licence before general licence), reservation of practice, business conduct (suitable business premises, maximum commission)	Review by PricewaterhouseCoopers was 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 the *Property Agents and Motor Dealers Act 2000*. New Act incorporates most of the review recommendations. Restrictions on commissions were retained to allow for a community education campaign before deregulation. The Government is reviewing the commissions.	Review and reform incomplete.
Western Australia	*Auction Sales Act 1973*	Licensing of auctioneers, entry requirements (fit and proper person, two years experience on restricted licence before general licence), reservation of practice, business conduct (maintenance of records in relation to livestock and vendor accounts)	Review completed in 2001. It 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 in 2003.		Review and reform incomplete

(*continued*)

Table 5.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Land and Business (Sale and Conveyancing) Act 1994* (Auctioneers)	Business conduct (requirement that auctioneers selling land or small business 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 that auctioneers selling land or a small business by auction make the vendors statement available.	The Government endorsed the review recommendation.	Meets CPA obligations (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, no bids by owners or collusion at auctions)	Review completed. 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 2003 session of Parliament.	Review and reform incomplete
ACT	*Auctioneers Act 1959*	Licensing, entry requirements (age, good character, no pawnbrokers), 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 implemented the Agents Act 2003, which repeals the Auctioneers Act on its commencement.	Meets CPA obligations (June 2003)
Northern Territory	*Auctioneer's Act*	Licensing, entry requirements (aged over 18 years, good character, fit and proper person), reservation of practice, business conduct (maintenance of records for at least 12 months, auctions between 8 am and 11 pm)	Intradepartmental review was completed in May 2002. It recommended replacing current licensing system with a negative licensing system through an Industry Code of Practice under the Consumer Affairs and Fair Trading Act. It also recommended that the Government consider imposing some requirements for handling of trust money and trust accounts.	The Government introduced the Auctioneers Act Repeal Bill to the Legislative Assembly in June 2002.	Meets CPA obligations (June 2002)

Conveyancers

This section examines the review and reform of legislation specifically governing conveyancers. Practice restrictions on conveyancing contained in legal practitioner legislation are discussed in chapter 4 (volume 2).

New South Wales, Victoria, Western Australia, South Australia and the Northern Territory have legislation permitting nonlawyers to undertake certain activities traditionally reserved for legal practitioners, including conveyancing. Apart from Victoria, each has separate legislation regulating nonlawyer conveyancers (or settlement agents). The objective of this legislation is to ensure conveyancers are accountable for the safety of monies held in trust 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).

- In Victoria, the *Legal Practice Act 1996* permits nonlawyer conveyancing firms to undertake the nonlegal work associated with conveyancing only, 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.

- 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.

- Northern Territory conveyancing agents may facilitate the transaction of real property by performing land title searches, preparing and executing sale contracts, arranging settlement, lodging documents and completing powers of attorney, and recently implemented reforms that permit appropriately qualified conveyancers to provide mortgage lease and business sale contract services.

These differences in the licensing requirements make it difficult for licensees in one jurisdiction to obtain a licence in another jurisdiction. 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 Government submission which noted:

> *OCBA [the 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, para 5.2.25)

Pro-competitive reforms to conveyancing regulation can provide substantial benefits, including improved market information, a wider choice of service providers and lower prices. Conveyancing fees in New South Wales, for example, fell by 17 per cent between 1994 and 1996, after the abolition of the legal profession's monopoly and the removal of price scheduling and advertising restrictions, leading to an annual saving to consumers of at least A$86 million.

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 completed a review of the *Conveyancers Licensing Act 1995* in October 2001. The review found that consumers experience risks in their dealings with conveyancers and that these risks justify continued regulation of the conveyancing industry. It recommended retaining the current occupational licensing model as the regulatory option that best meets the objectives of the Act, but proposed a series of reforms to increase the efficiency and effectiveness of the legislation, reduce the regulatory burden for conveyancers and clarify the operation of the Act. These reforms included:

- introducing competency standards and a 'fit and proper person test' as part of licensing requirements;
- introducing mandatory continuing education requirements for all licence holders;
- prescribing conduct rules for conveyancers;
- providing for multidisciplinary partnerships (except partnerships with real estate agents) and the licensing of corporations;

- providing for the Director-General to investigate and act on suspected unlicensed trading; and

- considering changes to the disciplinary scheme after the completion of a review of part 10 of the Legal Profession Act[2].

The Government accepted the majority of the review recommendations, but after considering the proposal to defer modification of the disciplinary scheme, decided that it was more appropriate to undertake any changes as part of the *Conveyancers Act 1991* review (Department of Fair Trading 2002). The Government implemented the review recommendations in the *Conveyancers Licensing Act 2003*, which repealed the Conveyancers Licensing Act 1995. New South Wales has met its NCP obligations with regard to this matter.

Western Australia

The review of the *Settlement Agents Act 1981* found a net public benefit in licensing settlement agents, because the benefits from reducing the risks of financial loss and increasing consumer confidence outweighed the costs of reduced competition. The review recommended, however:

- replacing the requirement for agents to have 'sufficient material and financial resources' with provisions that:

  - prevent people from holding settlement agents licences if they are insolvent or have a recent history of insolvency; and

  - prevent businesses from 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 the 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 on 6 May 2002, but is yet to implement the reforms (Department of Treasury and Finance 2002). Consequently, Western Australia has not met its CPA obligations in this area as it has not completed its review and reform activity.

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[2] The complaint and disciplinary procedures (set out in part 10 of the legal profession Act) for conveyancers are the same as for solicitors in respect of professional misconduct and unsatisfactory professional conduct.

South Australia

South Australia's *Conveyancers Act 1994* protects consumers by imposing strict controls on entry to the conveyancing profession, mandating professional indemnity insurance, regulating trust accounts and establishing a disciplinary system. The Office of Consumer and Business Affairs completed a review of the Act in December 1999, which found that most restrictions were justified in the public interest, but some were not.

The review panel recommended amending the probity requirement, which excludes a person (or company) convicted of an offence of dishonesty from being registered as a conveyancer. The panel noted that this requirement may exclude people whose offence has little relevance to the work of a conveyancer. The panel therefore recommended that convictions for summary offences of dishonesty result in a 10-year ban, while convictions for more serious offence continue to result in a permanent ban.

The review panel found that the Act's restrictions on the ownership of incorporated conveyancing businesses could not be justified. It noted that the restrictions inhibit the development of multidisciplinary practices, which may offer economies of scale and flexibility of service provision. It recommended replacing the ownership restrictions with provisions that require the proper management and supervision of a registered incorporated conveyancer by a registered conveyancer, and that make it an offence for directors to unduly influence conveyancers in the performance of their duties.

The review also recommended removing the requirement that the sole object of an incorporated conveyancer be carrying on a business as a conveyancer. The review noted that no submission raised any compelling evidence of benefits arising from this restriction, which prevents incorporated conveyancers carrying on business such as mortgage financing but does not apply to natural persons who are conveyancers.

A Bill to remove the ownership restrictions and prohibit undue influence was introduced to Parliament in late 2000, but lapsed with the calling of the election. The current Government is consulting with stakeholders on this issue and intends to introduce a new Bill to Parliament in the second half of 2003. South Australia, therefore, has not met its CPA obligations in this area as it has not completed its review and reform activity. The Council notes, however, that while this is an important area of reform, some delay in its implementation is unlikely to impose a significant cost on the South Australian economy.

The Northern Territory

The Northern Territory Agent's 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:

- replacing the years-of-experience requirement with a competency-based approach, and amending the 'fit and proper person' test to signal to applicants the assessment criteria;

- allowing conveyancers who possess the necessary qualifications to provide mortgage lease and business sale contract services, and investigating whether to establish a 'restricted' conveyancing licence to overcome problems if some agents choose not to upgrade their skills;

- removing the requirement to maintain an office in the Northern Territory, but maintaining the requirement for professional indemnity insurance and fidelity fund contributions.

- recomposing the Agents Licensing Board to include licensed conveyancing agents (CIE 2000b).

The Government accepted the review recommendations relating to conveyancers, which it implemented through the Agents Licensing Amendment Act 2002. The Northern Territory has met its CPA obligations in relation to the review and reform of its legislation regulating conveyancers.

Table 5.8: 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 being able to provide these services), disciplinary processes, business conduct (record keeping, trust monies, receipts, professional indemnity insurance)	Review completed. Issues paper was released in March 2000. Final report was submitted to the Minister for Fair Trading in October 2001.	The Government implemented the reform in the *Conveyancers Licensing Act 2003*, which repeals the 1995 Act.	Meets CPA obligations (June 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), 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 from 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 endorsed the review report.	Review and reform incomplete

(*continued*)

Table 5.8 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 probity; removing ownership restrictions (but introducing a 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 but the Bill lapsed. The current Government is consulting with stakeholders on this issue and intends to introduce a new Bill to Parliament in the second half of 2003.	Review and reform incomplete
	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 period, subdivided land, relationship between agent and principal, preparation of conveyancing instruments, representations)	Review completed. 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, aged at least 18 years, education or experience, competency), 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 implemented the review recommendations through the *Agents Licensing Amendment Act 2002*.	Meets CPA obligations (June 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). 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).

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 (although Victoria's legislation had never been brought into operation). The ACT introduced licensing of employment agents through a private member's Bill in 1999. 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.

Victoria repealed the *Employment Agents Act 1983* (which had never been brought into operation) in 2000. New South Wales replaced the *Employment Agents Act 1996* agent licensing legislation with specific consumer protection mechanisms inserted into fair trading legislation. Queensland transferred fee-charging restrictions to its industrial relations legislation; its licensing of employment agents will expire in 2004.

New South Wales, Victoria and Queensland have thus met their CPA obligations in relation to the review and reform of legislation regulating employment agents. The following section assesses Western Australia, South Australia and the ACT's compliance with their CPA obligations in this area.

Western Australia

Western Australia advised that it completed a review of the *Employment Agents Act 1976* but is awaiting final comments from key stakeholders before submitting the report to the Minister for Consumer and Employment Protection. The review report is expected to be submitted by 31 August 2003. The Council assesses that Western Australia has therefore not met its CPA obligations in this area as review and reform is incomplete.

South Australia

South Australia completed the review of the *Employment Agents Registration Act 1993* in October 2000. The review recommended current licensing arrangements be removed from the Act. The review concluded that employment agents should be precluded from charging a fee to a jobseeker simply because the employment agent had the jobseeker on their books, or the employment agent is seeking employment on behalf of that person; and that charging a recurring fee to a jobseeker or a fee for engagement of the jobseeker by the employment agent be prohibited. It recommended that the Act require the development of and adherence to an industry specific code of conduct and that appropriate penalties be determined for breaches of the Act (Government of South Australia 2003).

The previous Government did not respond to the review, so the current Minister for Industrial Relations is considering the review recommendations. The Minister has noted Queensland's proposal to include relevant job seeker protection provisions from the employment agents legislation in the Industrial Relations Act and develop an appropriate industry code for the State. This approach appears to avoid the duplication and overlap of continuing to regulate the sector through separate legislation. Consequently, the Minister requested that information and any recommendations concerning the Queensland recommendations be presented to him by the end of May 2003 (Government of South Australia 2003). A report on the Queensland approach has been presented to the Minister for Industrial Relations, but the Minister is yet to make a decision on the Government's preferred approach to regulating employment agents.

The Council assesses that South Australia has not met its CPA obligations in this area as review and reform is incomplete.

The ACT

In the ACT, employment agents are regulated under the Agents Act 1968, which was reviewed in conjunction with a review of the Auctioneers Act 1959 in 2001. 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.

Following a further review in June 2002, the fee payable for a licence under s. 54A of the Agents Act 1968 for an employment agent was substantially reduced from A$1023 to A$371 — Attorney-General (Determination of Fees and Charges for 2002/2003) – 2002 (No 1).

The Legislative Assembly passed the Agents Act 2003 in May 2003, which repealed the 1968 Act (including the provisions dealing with employment agents) on its commencement. The new Act removed restrictions about place of work, which agents cited as a significant restriction on their capacity to

operate in the ACT. The regulation impact statement for the 2003 Act concluded that the regulation of agents, including employment agents, would encourage optimal market performance and protect the financial interests of consumers. It found that the costs for employment agents under the new Act's revised fee structure are negligible compared with the significant public benefits that flow from the legislation. In particular, it found that the cost of licensing agents would remain at an appropriate cost recovery level.

The fact that New South Wales, Victoria, Queensland and the Northern Territory do not require licensing of employment agents (or are transitioning to a deregulated environment) casts doubt on the robustness of the ACT's public interest case for retaining the licensing for employment agents. The Council considers, therefore, that the ACT has not met its CPA obligations in this area. It notes, however, that the reduction in licence fees has reduced the costs of the legislative restriction on employment agents.

Table 5.9: 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 (age, fit and proper person, suitable premises, no previous cancellation), reservation of practice, business conduct (separate licence for each premises, registered person in charge, no charge to jobseekers, maintenance of records, no misleading advertising)	Review was completed in February 2001. It recommended abolishing the licensing of employment agents. It also recommended repealing the Act and inserting specific consumer protection mechanisms in relation to employment agents in the *Fair Trading Act 1987.*	Review recommendations were implemented through the *Fair Trading Amendment (Employment Placement Services) Act 2002*.	Meets CPA obligations (June 2003)
Victoria	*Employment Agents Act 1983*		Act was not for review.	Act repealed in 2000. It had never operated.	Meets CPA obligations (June 2001)
Queensland	*Private Employment Agencies Act 1983*	Licensing, entry requirements (residency in Queensland, fit and proper person, suitable premises), reservation of practice, business conduct (no charge to jobseekers except performers and models, no misleading advertising, maintenance of records)	Review completed. It recommended that the Act be expired over two years (with simplified licensing scheme used during transition), an advisory committee be established to develop a code of conduct, and fee-charging rules be moved 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), reservation of practice, business conduct (maintenance of records, scale of fees, no misleading advertising)	Departmental review completed and is expected to be submitted to the Minister by 31 August 2003.		Review and reform incomplete

(*continued*)

Table 5.9 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 must have sufficient knowledge and experience), practice reservation, business conduct (maintenance of records, no misleading advertising)	Review was completed in October 2000. The review recommended the removal of licensing, that controls be placed on fee charging arrangements and that a mandatory industry specific code of conduct be developed.	The Minister is considering the review recommendations in conjunction with a Queensland proposal for reforms.	Review and reform incomplete
ACT	*Agents Act 1968*	Licensing, entry requirements (age, police check, no disqualification from holding a licence, character references, must advertise intention to seek registration), reservation of title, ownership (restricts partnerships, not-for-profit organisations ineligible for licence), business conduct (no charge to job-seekers).	Review was completed in 2001. It questioned the imposition of a licensing regime on the employment agent market.	Licence fee was reduced from A$1023 to A$371 in 2002. The Act was repealed and replaced by the *Agents Act 2003.*	Does not meet CPA obligations (June 2003)

Hairdressers

Hairdressers provide a range of services including cutting, colouring, setting, permanent waving and styling hair. Most State and Territories have occupational health and safety and/or public health legislation regulating hairdressing premises. This legislation is generally aimed at minimising the risk of disease or infection transmission by requiring hairdressing premises to meet hygiene standards.

Some jurisdictions also regulate the occupation of hairdressing. When governments developed their legislative review timetables in 1996, New South Wales, Western Australia, South Australia and Tasmania had legislation requiring hairdressers to be registered or licensed. Tasmania subsequently repealed its *Hairdressers Registration Act 1975,* thus meeting its CPA obligations in relation to hairdressers. This assessment considers whether the remaining jurisdictions have met their CPA obligations in this area.

New South Wales

In 2000, the Department of Industrial Relations commenced a review of part 6 of the *Shops and Industries Act 1962* (formerly known as the *Factories, Shops and Industries Act 1962),* which regulates hairdressers. Provisions of the Act dealing with hairdressers aim to protect consumers of hairdressing services by establishing a licensing scheme which ensures that all hairdressers are appropriately qualified to practise in the trade. The Act also prescribes TAFE to be the sole provider of hairdressing training in New South Wales. The New South Wales Government advised the Council that the review has been finalised and considered by Government. It also advised that legislation will be progressed in the 2003 spring session of Parliament. As New South Wales has not completed its review and reform process it has not complied with its CPA obligations in relation to hairdressers.

Queensland

The main recommendation of Queensland's NCP review of hairdressers was to replace the licensing of premises with the licensing of businesses undertaking higher risk (that is, skin-penetrating) procedures. Licensing of other activities, including hairdressing, will be discontinued.

The Government authorised preparation of the Public Health (Infection Control for Personal Appearances) Bill in June 2000. The Bill will implement the review's recommendations by replacing the licensing of premises with the licensing of businesses undertaking higher risk procedures. Consequently, this will remove licensing requirements for hairdressers. The Government is expected to introduce the Bill to Parliament in 2003 ready for it to commence on 1 July 2004. While the proposed reforms are consistent with the CPA

guiding principle, Queensland has not met CPA obligations in relation to the regulation of hairdressers because it did not complete its review and reform process. The Council also considers that, even when passed, a public interest case for transitional implementation to July 2004 has not been made. That said, the impacts of delays to this reform are not significant.

Western Australia

Western Australia's *Hairdressers Registration Act 1946* applies to hairdressers working in the Perth metropolitan area, in the South West Land Division or within an 8-kilometre radius of the Kalgoorlie general post office only. The aims of Act are to set minimum quality and health and safety standards in the hairdressing industry. To be registered as a hairdresser the person must have satisfied the Hairdressers Registration Board that they are of good character, and have completed an appropriate course of training and passed appropriate examinations. An unregistered person can not take or use the title hairdresser or use any name, title or description implying that such qualifications are held. The Act also places restrictions on the operation of hairdressing businesses and the type of hairdressing duties a registered hairdresser can undertake.

The Legislative Assembly passed a Hairdressers Repeal Bill in 1996. The Bill did not proceed beyond the second reading stage in the Legislative Council, however. Another repeal Bill was introduced into the Legislative Council in 1996 and referred to the Standing Committee on Public Administration. The committee recommended replacing the registration system with a requirement for hairdressers to hold certain qualifications, but again the Bill did not proceed.

A legislation review of the Hairdressers Registration Act was conducted by consultants from Environmental Resources Management Australia guided by a reference group with representatives from the Hairdressers Registration Board, health, occupational health and safety and community interests and the Department of Training and Employment. The review recommended that the hairdressers' registration scheme be retained and the provisions be extended to apply to the whole State. It found that the public interest is best served by requiring that hairdressers are qualified to ensure hygiene and sanitation are maintained, to reduce the risk of physical harm to customers and to provide higher quality services. Registration as a hairdresser requires the completion of an appropriate course of training and the passing of examinations. In addition, the review recommended that the Hairdressers Registration Board be given discretionary power to create different classes of registration.

The Council considers that the review did not meet the requirements of the CPA as the review's recommendations to retain restrictions on competition were not supported by evidence demonstrating that the benefits of the restriction to the community as a whole outweigh the costs. In addition, the review did not adequately consider less restrictive alternatives to the current registration system.

On the issue of enhancing quality, for example, the review found that the number of complaints was small. The review reported that there were 42 complaints related to quality issues made over the period 1998–2000 (Department of Training and Employment 2001, p. 5.8). The review suggested that the level of quality complaints may be higher because consumers do not always report incidents of poor quality and specific claims against hairdressers may be channelled through local courts or the Small Claims Tribunal, for which no data was available. Based on these figures the review suggested that registration requirements have ensured that a higher level of quality is provided in the market. The review, however, did not provide any evidence to demonstrate that the quality of service is of a different standard in parts of Western Australia where registration is required compared with other parts of Western Australia or other jurisdictions where training and/or quality is not regulated. Rather the review relied on anecdotal evidence from the peak industry bodies across the states and territories obtained during consultation. This casts doubt on the review's conclusion that registration, by enhancing quality — the main purpose of the scheme — provides a significant public benefit or, indeed, that there is a benefit from extending registration to cover the whole state.

The review found that the restrictions on the type of hairdressing duties that a hairdresser can undertake once registered restricts access to hairdressing services for consumers, but the review could find no evidence to suggest that the gender-based restriction provided offsetting quality benefits. The review concluded, therefore, that the Hairdressers Registration Board should be given discretionary power to create different classes of registration that permits more flexibility and is more consistent with the objectives of the legislation. In coming to this conclusion, the review did not consider alternative means of developing *minimum quality standards* and did not provide any evidence to demonstrate that the provision of discretionary power to the board would provide a net benefit to the community. Consequently, it is not clear that this recommendation is consistent with the CPA guiding principle.

Moreover, the review did not consider a range of feasible alternative approaches to registration. Negative licensing, for example, is an alternative that is potentially less restrictive and less costly than the current registration system. While negative licensing provides a lower level of consumer protection than traditional registration it may be appropriate where the potential for serious harm is not great. Under such a scheme all hairdressers meeting minimum quality standards would be permitted to practise unless they were placed on a register of persons ineligible to practise (such as for serious occupational health and safety breaches). Negative licensing was not considered by the review.

In February 2003, the Government endorsed the recommendation to retain the hairdressers' registration scheme. Western Australia has not complied with its CPA obligations in relation to the review and reform of hairdresser registration as it has not completed the reform process.

South Australia

South Australia's *Hairdressers Act 1988* regulates entry to the occupation of hairdressing by prescribing the required qualifications. The Office of Consumer and Business Affairs completed a review of the Act in December 1999, finding the entry restrictions to be justified for now, given the health and safety risks, the substandard work risks and the transaction costs facing consumers seeking to enforce their rights — but probably not in the longer term. It recommended reducing the scope of work reserved for hairdressers and further reviewing the Act in three years, with a view to its repeal.

The 2001 NCP assessment reported that South Australia had met its CPA obligations in relation to legislation regulating hairdressers, because the then Government had endorsed the review recommendations and passed the recommended legislative amendments. To ensure it remains compliant, the current Government should implement the review's recommendation by scheduling a further review soon.

Table 5.10: Review and reform of legislation regulating hairdressers

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Shops and Industries Act 1962 (*formerly the *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 commenced in 2000 and completed in 2003.	The New South Wales Government advised that legislation will be progressed in the 2003 Spring session of Parliament.	Review and reform incomplete
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. It recommended discontinuing the licensing.	The Government endorsed the recommendations and expects to finalise its implementation by 1 July 2004.	Review and reform incomplete
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 has been finalised. The review recommended that the hairdressers' registration scheme be retained and the provisions be extended to apply to the whole State and that the Hairdressing Registration Board be given discretionary power to create different classes of registration.	In February 2003, the Government endorsed the recommendation to retain the hairdressers' registration scheme. It has not yet implemented any reforms.	Review and reform incomplete

(continued)

Table 5.10 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
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 justified given potential health and safety risks, the risk of substandard work and the potential costs to consumers of enforcing their legal rights. These risks are not significant, so it recommended reducing the scope of work reserved for hairdressers and further 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 (hairdresser, master, principal), entry requirements, business conduct (premises 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 present as being ready to sell goods carried on their person, on an animal or from a vehicle (Office of Fair Trading 2000; The Allen Consulting Group 2000a). The activities of hawkers are governed by State and Territory fair trading Acts (see chapter 8, volume 2). In addition, 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. By the time of the NCP 2002 assessment, however, the ACT was the only jurisdiction with specific hawker legislation still in place.

The ACT's *Hawkers Act 1936* establishes a licensing scheme for hawkers. The Department of Urban Services engaged the Allen Consulting Group to review the Act in combination with the *Collections Act 1959*. The review found that the Hawkers Act's objectives are to protect consumers from fraudulent commercial behaviour and ensure 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 traffic, but the ACT has only a single level of government so must legislate to address these issues (The Allen Consulting Group 2000a).

The review recommended continuing positive licensing for hawkers operating from a single location and adopting negative licensing for mobile hawkers. It proposed removing the character and minimum age requirement for licensees, permitting businesses to hold licences, and removing restrictions on the number of people whom a hawker can employ and the number of vehicles that a mobile hawker can operate. It also recommended replacing the ban on hawking within 180 metres of shops with alternative location controls similar to those used for moveable signs.

The *Hawkers Act 2003*, which repeals the previous Act, will commence in September 2003. It implements the major review recommendations, except the recommendation to replace the exclusion zone with alternative controls. The Government rejected the proposed approach as being more prescriptive and increasing administration costs while achieving largely the same outcome (Government of the ACT 2002). As discussed in the 2002 NCP assessment, the Council accepts that some location restrictions are justified on public safety and traffic management grounds. In principle, the review's proposal offers a more direct (and less restrictive) means of addressing these issues than offered by the arbitrary exclusion zone retained in the Hawkers Act 2003, but given that both approaches appear to result in broadly similar outcomes, the lower administration costs justify retaining the exclusion zone. The Council considers, therefore, that the ACT has met its CPA obligations in relation to the review and reform of its legislation regulating hawkers.

Table 5.11: 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 completed.	Act was 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 pm and 7 am). 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, was 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)	The Allen Consulting Group reviewed the Act, 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 the number of vehicles a hawker can operate, and the 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.	Act was repealed and replaced by the *Hawkers Act 2003*, which implemented the major review recommendations except the recommendation to remove the 180-metre exclusion zone.	Meets CPA obligations (June 2003)
Northern Territory	*Hawkers Act*	Licensing, business conduct	Stakeholder-focused review was completed in August 2000. It 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. It was, however, 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 the Act was passed in November 2000 (and brought into effect in April 2001).	Meets CPA obligations (June 2001)

Other licensed occupations

The Council's 2002 NCP assessment reported that:

- the Commonwealth had met its CPA obligations in relation to the review and reform of its legislation regulating migration agents;
- Victoria had met its CPA new legislation obligations in relation to the *Introduction Agents Act 1997* and its legislation review and reform obligations in relation to the *Professional Boxing and Martial Arts Act 1985* in 2001; and
- Western Australia had met its CPA obligations in relation to the review and reform of the *Boxing Control Act 1987* in 2001.

The following section discusses jurisdictions' review and reform activity since the 2002 NCP assessment.

New South Wales

New South Wales has licensing provisions in its *Boxing and Wrestling Control Act 1986*, *Entertainment Industry Act 1989* and *Wool, Hides and Skins Dealers Act 1935*.

The primary objectives of the Boxing and Wrestling Control Act are to promote safety and ensure integrity. The Act sets fees for registration and the requirements and conditions for events, competitors and industry participants, including compulsory medical checks, requirements for the competent supervision of fights, gender and age restrictions and a 'fit and proper' test (to address corruption issues). The Government considers that there is an inherent and broad public benefit in regulating participation in dangerous combat sports, even where medical opinion is divided. Accordingly, it does not propose to alter the regulatory framework at this time. New South Wales has complied with its CPA obligations in this area.

New South Wales is preparing the final report of the Entertainment Industry Act review. The draft review found no competition issues, but that compliance and enforcement could be improved. New South Wales has complied with its CPA obligations on this matter.

The issues paper for the review of the Wool, Hides and Skins Dealers Act recommended repealing the Act. The final report (completed in June 2002), however, recommended keeping the licensing requirement because it did not impose a significant cost on industry and provided an effective crime deterrent regime with secondary benefits in disease control. The review also recommended narrowing the Act to cover only sheep and cattle, removing the nominal licence fee (A$10) and renewing licences on a three-year (rather than annual) basis. These changes would help to reduce the cost of regulation.

These recommendations are supported by the Pastoral and Agricultural Crime Working Party review, which found that stock stealing continues to be

a major crime in New South Wales and has increased in recent years in response to the rise in the value of cattle and the exhaustion of wool stockpiles. It also found that wool, hides and skins can easily be stolen and on-sold because they lack identifiers. The working party recommended retaining the licensing regime as the most effective means of tracking and investigating trade, but modifying it based on the pawnbroker licensing provisions, given the similar risk relating to trade in stolen property.

The Government has accepted the review recommendations and expects to introduce amending legislation to Parliament in 2003. While the proposed reforms are consistent with the CPA guiding principle, New South Wales has not complied with its CPA obligations in this area because it has not completed its review and reform.

The ACT

The ACT's *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 the New South Wales Boxing and Wrestling Control Act. References to the New South Wales Act in the ACT's legislation have prevented the ACT from starting its review before New South Wales completed its review (see above for details). New South Wales recently announced that it does not intend to alter its regulatory framework because there are public benefits from regulating participation in dangerous combat sports. Consequently, the ACT's legislative restrictions on competition in boxing also comply with CPA obligations.

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 Act in conjunction with the Hawkers Act. 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 raised 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 supported the major recommendations of the review. The *Charitable Collections Act 2003*, which replaces the Collections Act, will commence in September 2003. Consequently, the ACT has met its CPA obligations in relation to review and reform of its legislation regulating collection organisations.

Table 5.12: 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 a review of the *Migration Agents Registration (Application) Levy Act 1992* and the *Migration Agents Registration (Renewal) Levy Act 1992*. Review concluded that voluntary self-regulation was not immediately achievable due to consumer protection concerns, and that 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, 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.	Meets CPA obligations (June 2003)
	Entertainment Industry Act 1989	Licensing (entertainment industry agents, managers, venue consultants), maximum fees (entertainment industry agents)	Review is under way. Issues paper was released in September 2001. Final report is being prepared. The draft review found no competition issues, but that compliance and enforcement could be improved.	The Government anticipated making a decision on the final report soon, but based on the draft report, does not need to make legislative changes to meet its CPA obligations.	Meets CPA obligations (June 2003)
	Wool, Hides and Skins Dealers Act 1935	Restrictions on the buying and selling of wool, hides and skins	Issues paper in 1998 recommended the repeal of the Act. Pastoral and Agricultural Crime Working Party recommended retention as a deterrent to crime. Final review report supported this view.	The Government accepted the review findings and anticipates introducing amending the legislation in 2003.	Review and reform incomplete

(*continued*)

Table 5.12 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, 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 associations 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 2001*).	Meets CPA obligations (June 2002)

(*continued*)

Table 5.12 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Boxing Control Act 1987*	Registration (boxers, trainers, promoters, judges)	Departmental review completed in 1997. It found that restrictions limiting who can practise as a boxer, promoter or manager of boxers, and rules to ensure the health of boxers is satisfactory, improve boxer welfare, reduce serious injuries and boxer health care costs, reduce litigation over claims of fraud and personal injury, and reduce 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 (professional boxers, officials, promoters (defined in NSW Boxing and Wrestling Control Act)	The ACT review could not be done independently of the NSW Boxing and Wrestling Control Act Review. NSW completed its review in 2002.	Act will be amended to reflect relevant changes in NSW.	Meets CPA obligations (June 2003)
	Collections Act 1959	Licensing (fit and proper person, cause in the public interest, costs/remuneration not likely to be excessive, funds raised to be applied in ACT unless no ACT body supports that cause), business conduct (reporting of funds raised and costs).	Review by The Allen Consulting Group, in conjunction with review of the *Hawkers Act 1936* 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. The *Charitable Collections Act 2003*, which replaces the Collections Act, will commence in September 2003.	Meets CPA obligations (June 2003)

6 Finance, insurance and superannuation services

Banks and other finance companies provide services that are vital to the ability of individuals and companies to accumulate savings and expand their assets and businesses. Insurance companies offer individuals and companies coverage against the cost of possible adverse events, and superannuation funds contribute to the capacity of individuals to provide for retirement. Governments should ensure that the regulation of these important services markets is consistent with the Competition Principles Agreement (CPA) clause 5 guiding principle — that is, that restrictions on competition should arise only if the benefits to the community exceed the costs, and that the objectives of the legislation can only be achieved by restricting competition. This chapter details the complex issues that governments have had to consider in weighing the costs and benefits of regulation in finance, insurance and superannuation markets.

The finance sector

Regulation of the finance sector endeavours to balance the interests of consumers of financial services and the efficient functioning of capital markets. Given the complexity of financial products and the inherent information imbalance between financial service providers and consumers, a degree of government intervention is warranted. Regulation takes several forms, including:

- licensing of individuals and businesses that restricts market entry;
- conduct and disclosure requirements that raise compliance costs in order to reduce information barriers; and
- financial reserve requirements that constrain the financial freedom of businesses to protect consumers from insolvency.

The Commonwealth Government is responsible for much of Australia's financial regulation, particularly the regulation of trade, banking, insurance, bills of exchange, insolvency and foreign corporations. States and Territories regulate trustees and apply credit controls.

The Wallis inquiry into the financial system was established in June 1996 to make recommendations to the Commonwealth Government on 'the nature of regulatory arrangements that will best ensure an efficient, responsive,

competitive and flexible financial system to underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness' (Wallis report, Foreword). The inquiry's final report sought 'an appropriate balance between achieving competitive outcomes and ensuring financial safety and market integrity' (Wallis report, p. 2).

The Wallis report used a premise similar to the guiding principle in CPA clause 5, stating that:

> *Regulation is necessary only to the extent that markets may fail, and then only where it can be demonstrated that the benefits of intervention outweigh the costs.* (Wallis report, p. 15)

It found that Australia's regulatory system was unnecessarily costly and complex. It made 115 recommendations for reform of Commonwealth and State and Territory legislation in several areas, including:

- the conduct of, and disclosure by, financial institutions;
- the establishment of a single prudential regulator;
- the regulation of mergers and acquisitions in the financial sector; and
- foreign investment, the choice of funds for superannuation members, modernisation and uniform national application of trustee company regulation, and the regulation of electronic commerce.

The Commonwealth Government made its formal response to the report on 2 September 1997. The key elements of the Government's reform package involved:

- promoting efficiency and greater competition, including by rationalising the regulatory framework;
- balancing prudential and competition goals — that is, maintaining financial system safety while allowing financial institutions to respond with greater flexibility to market developments and encouraging competitive equivalence in regulatory mechanisms across newly emerging market structures;
- maintaining the protection of depositors;
- promoting efficiency, competition and confidence in the payments system; and
- promoting more effective financial company disclosure and consumer protection (Costello 1997).

In response to the Wallis report, each State and Territory enacted legislation in 1999 to transfer powers of regulation and supervision of certain financial institutions to the new Commonwealth regulators:

- the Australian Prudential Regulation Authority (APRA), 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 (ASIC), 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 consequential amendments contain substantial Commonwealth reforms to the financial sector. This legislation represented another major segment of the Commonwealth's legislative response to the Wallis report. In introducing the Financial Services Reform Bill 2001, the then Minister for Financial Services and Regulation stated that the legislation would enable financial service providers to reap the efficiencies and cost savings identified in the Wallis report. The Financial Services Reform Act 2001 introduced a harmonised regulatory regime for market integrity and consumer protection for all financial service providers, replacing the multiplicity of 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;

- a streamlined regulatory regime for financial markets and clearing and settlement facilities; and

- the removal of regulatory barriers to the introduction of technological innovations.

The Commonwealth Government continues to reform this sector. The Financial Services Reform Act commenced on 11 March 2002, although in recognition of the scope of the changes, existing participants will have two years to opt into the new regime. The Government is facilitating the transition to the new financial services regime by 11 March 2004 through guidance by the Australian Securities and Investments Commission and legislative amendments to clarify the operation of the law. The *Financial Services Reform (Consequential Provisions) Act 2002* included amendments to correct errors in the Financial Services Reform Act 2001. The *Financial Sector Legislation Amendment Act (No. 1) 2002* continued legislative amendments arising from the Wallis report, involving minor amendments to legislation relating to life and general insurance, APRA, the Reserve Bank and the superannuation industry. The Financial Sector Legislation Amendment Bill (No. 2) 2002, still to be passed as at mid-2003, involves largely minor amendments that aim to improve APRA's ability to monitor the financial industry and the capacity of the Superannuation Complaints

Tribunal to fulfil its functions. The Financial Services Amendment Bill 2003 was referred to the Senate Economics Legislation Committee, which is due to report by 19 August 2003. This Bill aims mainly to improve the capacity of the Australian Securities and Investment Commission to undertake its tasks.

State and Territory governments are yet to complete all facets of financial sector reform. While some jurisdictions have removed minor restrictions in trustee legislation in recent years, a national NCP review of legislation relating to trustee corporations is under way, with New South Wales acting as the lead jurisdiction. The Standing Committee of Attorneys-General released a consultation paper and a draft uniform Bill in May 2001. The draft Bill was premised on the assumption that APRA would be responsible for the supervision of trustee companies, but the Commonwealth Government decided in early 2003 that it would not give the authority this role. This decision could have major implications for the national review and the draft Bill. (The national review is discussed in chapter 14, volume 2.)

Assessment

The thrust of the Wallis report is consistent with the objectives of improving competition in the financial services sector and ensuring regulation is aimed at rectifying market failure. Accordingly, governments' review and reform activity in response to the Wallis report has generally been consistent with NCP principles. The Council notes, however, that the national review and reform of trustee corporation legislation has not been completed.

Insurance services

There is a wide range of insurance products. Information relating to premium revenue indicates the relative importance of the various classes of insurance business. In 2000-01, domestic motor vehicle insurance accounted for 22 per cent of total premium revenue reported to APRA. Householder insurance accounted for 14 per cent, followed 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 (5 per cent), other accident insurance (4 per cent) and professional indemnity insurance (3 per cent)[1] (ACCC 2002a, p. 39).

[1] The other 23 per cent of premium revenue was generated in the fields of inward treaty, marine, aviation, mortgage, travel, consumer credit and other insurance.

Legislative restrictions on competition

This section focuses on four key legislative restrictions on competition that are prevalent in the areas of CTP, workers compensation and legal professional indemnity insurance. These are:

- mandatory cover;
- monopoly provision;
- premium controls; and
- licensing of insurers.

Mandatory insurance

In all States and Territories, CTP insurance is mandatory and applies to the vehicle. In establishing CTP schemes, governments were motivated to ensure all road accident injury victims, as well as relatives of those killed in traffic accidents, are compensated regardless of fault. Some jurisdictions allow unlimited access to the common law, while others allow limited access. Some States also allow access to statutory no fault benefits. This coverage includes parties injured in road accidents who are not required to take out insurance (for example, pedestrians and cyclists).

Workers compensation insurance too is compulsory. 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 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.

NCP reviews have noted that the mandatory nature of these forms of insurance ensures parties responsible for accidents cannot avoid contributing to the benefits available for affected parties. The reviews have thus argued that there is a net community benefit from the CTP and workers compensation insurance being mandatory. The National Competition Council accepts this argument.

All States and Territories require lawyers practising as solicitors to take out professional indemnity insurance.

Monopoly provision

In many insurance markets, government legislation allows for competitive provision, and competing private insurers are the principal underwriters. For CTP and workers compensation insurance, however, several governments

have legislated for monopoly underwriting by a government-owned entity of at least one of these forms of insurance. This arrangement is the principal restriction with NCP implications.

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 (table 6.1). This arrangement occurs despite the two types of insurance being similar — both are concerned with accident insurance and both are mandatory.

Table 6.1: 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 – but only one licensed insurer (Insurance Australia Group)	Multiple private insurers
Northern Territory	Monopoly insurer (Territory Insurance Office)	Multiple private insurers

In all instances (except workers compensation insurance in Tasmania, the ACT and the Northern Territory), premiums are set, regulated or subject to oversight.

Governments also have legislated for the monopoly provision of indemnity insurance for some professions. Most jurisdictions require (generally by legislation) that legal practitioners insure through a monopoly provider. In New South Wales, professional indemnity insurance for solicitors is mandatory and must be arranged through the New South Wales 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 must take out professional indemnity insurance 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. This chapter and chapter 4 of volume 2 discuss review and reform activity in the area of solicitors' professional indemnity insurance.

Under the National Cooperative Scheme for the Regulation of Travel Agents, the States and the ACT Government legislated for the Travel Compensation Fund's monopoly provision of travel agents' indemnity insurance. This fund compensates 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 (see chapter 14, volume 2).

Premium controls

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 driving behaviour by their cohorts. Younger and inexperienced drivers typically face the same CTP premiums paid by more experienced drivers, despite incurring higher premiums for comprehensive motor vehicle 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.

Governments argue that this 'community rating' aspect of CTP and workers compensation insurance contributes to the high proportion of drivers and employers taking out insurance. Community rating, however, 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.

Licensing of insurers

Licensing of CTP and workers compensation insurance providers allows governments to account for their financial viability and history, and also provides a form of agreement on certain aspects of each licensee's operations. 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 roles do 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). For such reasons, and 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 clause 5.

Review and reform activity

Compulsory third party and workers compensation insurance

All governments completed reviews of their statutory monopoly insurers by early 2001. 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 commissioned a further review by McKinsey and Co., which has been asked to make recommendations on the optimal underwriting/insurance arrangements that will deliver workers compensation scheme objectives and achieve better scheme outcomes in terms of: price, service, efficiency, injury and claims management, risk management, funds management and premium collection. This review, which has a reporting deadline of the second half of 2003, will account for the guiding principle in the CPA clause 5.

In Victoria, second reviews of CTP and workers compensation insurance were finalised in 1999 and 2000 respectively, reversing the first reviews' recommendations for multiple provision. In its 2003 NCP annual report, the Victorian Government informed the Council that in 2003 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 and the Victorian WorkCover Authority. The Government considered for some time the mechanism for third party reviews of the Transport Accident Commission and Victorian WorkCover Authority premiums, which was a recommendation of the 2000 NCP reviews. In March 2003, the Government requested the Essential Services Commission to provide advice on whether the expected premium revenue associated with the Transport Accident Commission's proposed premium for 2003-04 is consistent with the solvency of the transport accident compensation scheme (the Essential Services Commission reported in April 2003 that it is so consistent). Victoria informed the Council that it is likely that the Essential Services Commission will review the 2004-05 premiums of the Transport Accident Commission and the Victorian WorkCover Authority.

In Queensland, the review of workers compensation insurance was completed in December 2000, leading the Government to legislate minor changes in 2002. These legislative changes will be completed during 2003. The monopoly insurance arrangements continue.

In Western Australia, the previous Government endorsed the legislation review of CTP insurance in 2000, which recommended multiple provision. Amending legislation was withdrawn in 2001 by the current Government and it has since taken no further action. Western Australia's 2003 NCP annual report noted that the current Government is accounting for recent crises in other parts of the insurance sector in its consideration of the review's recommendation for multiple provision. The Government is not considering changing the multiple provider arrangements in workers compensation insurance. Following the completion of the NCP review of workers compensation in early 2002, the Government expects to introduce minor legislative amendments to Parliament in spring 2003.

South Australia conducted a second review of CTP insurance in 1999, reversing the 1998 review's recommendation that multiple provision be introduced. The Government confirmed in September 2001 that the Motor Accident Commission would remain the sole provider of CTP insurance in South Australia. South Australia's 2003 NCP annual report reiterated the State's public interest case for retaining the single statutory provider of CTP insurance — that is, that its statutory monopoly scheme allows cheaper premiums and that only such arrangements can achieve objectives such as universal coverage, affordability and fair claims settlements. Some minor legislative amendments came into force in October 2002.

In the case of workers compensation insurance in South Australia, an interagency steering committee completed an NCP review in mid-2002 that identified restrictions to competition but recommended only minor changes to the *Workers Rehabilitation and Compensation Act 1996*. The review argued that statutory monopoly provision has net public benefits. The Government is considering the review in the context of two separate investigation reports provided to the Government in late 2002 and early 2003 — one relating to governance arrangements in the WorkCover Corporation and one relating to workers compensation and occupational health and safety systems.

The Tasmanian Government stated in its 2001 and 2002 NCP annual reports that it was examining the Victorian review of the Transport Accident Commission before making decisions about its Motor Accident Insurance Board. The 2003 NCP annual report stated that the Government had completed this examination and decided to make no changes to the legislation.

The ACT allows for multiple providers of both CTP and workers compensation insurance.

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 clarifying legislative objectives and replacing references in legislation to the Territory Insurance Office with 'the designated insurer'. The Government stated in its 2003 NCP annual report that this recommendation will be considered as part of a wider review examining options for future

ownership and management of the motor accidents scheme. This review will be completed in the second half of 2003. The Northern Territory Government also considered a review of workers compensation insurance, which is provided by multiple insurers. It introduced legislative amendments relating to benefits and compensation. The Council considers that the Northern Territory has met its CPA obligations in relation to the review and reform of the regulation of workers compensation insurance.

Commonwealth employees are covered by the monopoly compensation insurer, Comcare. The review of this arrangement was completed in 1997, but no reforms have been introduced.

Tables 6.2 and 6.3 summarise jurisdictions' progress in their legislative review and reform activity in the areas of CTP and workers compensation insurance.

Legal professional indemnity insurance

Most governments reviewed the professional indemnity provisions of their legal practitioner legislation. New South Wales completed a review of its *Legal Profession Act 1987* 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, in 2002, proposed to establish a new mutual fund to cover all solicitors (except those with exemptions). It anticipated that an insurer selected by an independent board would administer the fund. The Government envisaged that commercial insurers would re-insure all or part of the fund's liabilities. APRA advised, however, that the entity managing such a mutual arrangement would require a licence under the Commonwealth Government's *Insurance Act 1973* and would be required to meet APRA's capital adequacy requirements. New South Wales is also awaiting the outcomes of the consideration by the Standing Committee of Attorneys-General of a national scheme.

Victoria 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 legislating the objectives to be achieved by the professional indemnity insurance cover (for example, that the

policy must include appropriate run-off cover), 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. Consideration of the issue has been overtaken by the approval by the Standing Committee of Attorneys-General of the drafting of national model laws for legal profession regulation, including the regulation of professional indemnity insurance.

Western Australia released the review report on the *Legal Practitioners Act 1893* in June 2002. The 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 have 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 to regulate the legal profession.

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, from its experience as the agent of insurers entering the market in the ACT, that competition leads to broader cover, cheaper premiums and a higher level of service. The ACT subsequently ceased its NCP review, given the development of uniform national laws to regulate the legal profession. The ACT is working with other jurisdictions on the Standing Committee of Attorneys-General to develop these national laws.

The Northern Territory delayed its NCP review of the *Legal Practitioners Act* provisions that relate to professional indemnity insurance because the Government is considering recent insurance market developments and capacity to deliver such insurance. The Government expects to receive the review report during 2003 but any legislative reform would follow the completion of the new national laws under the Standing Committee of Attorneys-General.

Chapter 4 of volume 2 provides tables that summarise jurisdictions' legislative review and reform activity in the area of solicitors' professional indemnity insurance.

The Council's approach for the 2003 NCP assessment

The Council cannot complete its assessment of the two key restrictions in legislation relating to compulsory insurance — monopoly provision and premium controls. There are several reasons for this decision.

First, jurisdictions are continuing to adjust their legislation relating to public liability and professional indemnity insurance following the sharp rise in insurance premiums in recent years. The adjustments relate particularly to limiting benefits. On 4 April 2003, Commonwealth, State and Territory Ministers meeting at the fifth insurance 'summit' agreed to legislate caps on professionals' liability and to introduce proportionate liability for professionals. At the sixth insurance summit on 6 August 2003, jurisdictions agreed to develop nationally consistent professional standards linked to caps on professional liability. Some States had already introduced proportionate liability legislation before the April summit, although Queensland is considering alternative approaches. These changes may have implications for CTP, workers compensation and legal professional indemnity insurance.

Second, the Commonwealth Government asked the Productivity Commission in mid-March 2003 to assess possible models for establishing national frameworks for the provision of workers compensation and occupational health and safety. The report (due 13 March 2004) is likely to include recommendations that have implications for jurisdictions' workers compensation insurance arrangements. Given the similarities between these arrangements and CTP schemes, which are also mandatory and concerned with personal injury, it would be premature for the Council to finalise its assessment at this juncture. Similarly, workers compensation insurance presents issues that are closely related to those affecting legal professional indemnity insurance, which is also the focus of a potential national approach via the Standing Committee of Attorneys-General.

Some of these developments have occurred since the 2002 NCP assessment, although most were anticipated at that time. The Council highlighted issues about which it sought more information from jurisdictions to help it

understand the advantages and disadvantages of monopoly provision and premium controls. The Council wrote to jurisdictions in November 2002, seeking information on:

- whether private insurers in deregulated markets would seek not to offer insurance to high risk drivers and employers, despite the mandatory nature of these insurance types;

- for 'long tail' insurance claims, whether jurisdictions believe that competing insurance companies are less motivated than monopoly providers to make careful actuarial assessments of the likelihood of serious accidents;

- whether competing private insurers contribute less to accident reduction and rehabilitation; and

- for legal professional indemnity insurance, whether private companies would be attracted to participating in this market, whether the failure of a monopoly insurance provider would be more disruptive to solicitors than the failure of a private provider, whether data indicate that monopoly providers are more cost-effective in this market and whether private insurers would neglect run-off cover for retired solicitors.

Some jurisdictions responded to these matters in their 2003 NCP annual reports. These responses helped the Council's consideration of the key NCP issues of monopoly provision and premium controls. The following section provides a discussion of economic and policy considerations surrounding the arguments for and against monopoly provision of compulsory insurance.

The nature of insurance markets

Insurance markets have key characteristics, some of which may help to identify why governments view CTP, workers compensation and legal professional indemnity insurance as being different from other insurance markets and thus requiring different policy responses.

Cover for adverse events

Companies and individuals enter insurance contracts to provide them with compensation for losses arising from adverse events. Most areas of insurance are voluntary, reflecting that people can often determine a trade-off between the perceived risk of adverse events and the cost of insurance. Those opting to insure usually have a choice of insurance companies and can shop for the premium and benefits package that suit them best. By contrast, CTP, workers compensation and legal professional indemnity insurance are mandatory and often available only through a monopoly established by legislation.

Different risk profiles

In any insurance market, different policyholders have varying degrees of risk of experiencing an adverse event. Younger drivers are much more likely than experienced older drivers to have motor accidents, and older people are more likely than young people to experience health concerns. Typically, there is a relationship between the perceived risk and the magnitude of insurance premiums.

Insurance companies undertake actuarial assessments of potential policyholders to estimate the probability of them experiencing adverse events. Insurance companies usually know less than the party seeking insurance about that party. Known as 'information asymmetry', this is a source of market failure in insurance (see below). In many instances, insurance companies do not assess individuals or companies in detail but according to the risk profile of the cohort to which they belong. All young drivers, for example, are deemed to present above-average risks and thus face higher comprehensive insurance premiums than paid by other drivers.

Multiple product offerings

Private insurance companies typically offer a range of insurance products, bringing to one product the expertise, experience and resources that they apply across their range. The resulting cost reductions and, often, innovative product service provision are defined in the literature as 'economies of scope'. In competitive markets, insurance customers are likely to enjoy at least some of the benefits of these economies.

Government-owned insurance monopolies are usually charged with providing just one insurance product, restricting their capacity to directly reap economies of scope. Nevertheless, if monopoly insurers outsource certain functions (for example, premium collection or claims management) after a competitive bidding process, then they may be able to harness some economies of scope enjoyed by the bid winners.

Long tail liabilities

Long tail liabilities are cases of severe injury leading to a requirement of income and rehabilitation support over a long period. The phrase is also used to refer to claims not made for several years after the event that led to injury or illness. Asbestos-related illnesses, for example, may not arise for some years after exposure to asbestos, and back injuries may become debilitating only some years after an accident. Long tail liabilities have always been a feature of workers compensation and CTP motor vehicle insurance.

Regulating in the public interest

Where markets cannot operate efficiently, reflecting sources of 'market failure', government intervention may be needed to improve the working of the market or provide a product that the market fails to provide. Such government intervention is not automatic, however, because the costs of the intervention need to be tested against the costs of the market failure that it seeks to overcome. Potential sources of market failure include the existence of public good/externality factors, information asymmetry and a natural monopoly.

Public goods/externalities

When an insurance company expends on measures that reduce the riskiness of its policyholders (for example, advising customers on ways in which to reduce the risk of burglaries, fire or accidents), the insurance company runs the risk of competing insurers 'free-riding' on its achievements in reducing these risks.

In its 2003 NCP annual report, Queensland argued that competing companies offering workers compensation insurance may focus on employers with good claims performance and leave poorer performing employers exposed to increased difficulty and cost in obtaining insurance cover. A contrary view, however, would be that such an outcome would send appropriate signals to those employers with a poor safety record.

There may be a disincentive for insurance companies to individually devote resources to accident prevention, given the fear that competitors will enjoy the benefits at no cost and thus compete more vigorously on premiums. As a result, there is a strong case for the government sector to be responsible for the provision of accident prevention services, either by government bodies directly or by contracted private entities. The issues are similar in the cases of accident research and occupational health and safety research, which are both means of improving accident prevention.

The rehabilitation of accident victims is costly, especially for people who require treatment and support over a long period. The insurance industry as a whole benefits from research into, and application of, new rehabilitation techniques that reduce rehabilitation timelines and costs. The individual insurance company, however, does not have an incentive to spend significantly on such research, because its competitors would free ride on the benefits in terms of reduced claims costs.

Competing insurance companies may be prepared, however, to establish rehabilitation programs for accident victims, because successful rehabilitation allows their injured policyholders to stop making claims. Western Australia's 2003 NCP annual report stated that private insurers participating in the workers compensation scheme in that State (where there are 11 insurance providers) often pay more than the prescribed amount for rehabilitation to bring forward employees' return to work. Perhaps not all insurance

companies would provide rehabilitation services, however; many are likely to rely on the capacities of hospitals and specialist rehabilitation centres. Despite the efforts of regulatory authorities, rehabilitation facilities run by some insurance companies might seek to discharge patients before rehabilitation was complete to reduce claims costs. Further, the running of rehabilitation centres and rehabilitation research are inextricably mixed, which supports the view that the government sector should provide rehabilitation services and research as public goods.

Provision by monopoly insurers, however, may not be the optimal approach for government to provide these public goods. A conflict of interest may exist between the insurance objective of minimising claims and the social objective of ensuring accident victims obtain optimal rehabilitation. The conflict would be compounded if the monopoly insurer were also the regulator of rehabilitation standards, because regulatory practice may favour reducing claims costs at the expense of patients' welfare.

An alternative approach could involve a government regulator, separate from the insurance providers, determining the appropriate rehabilitation standards. Rehabilitation services and research would thus be provided by entities that are separate from the insurance industry. These entities could be government owned or commissioned by the government, and funded transparently from the Budget or by a levy on CTP and workers compensation premiums. New South Wales uses this funding method for CTP insurance: the competing insurance companies collect the levy to be used on accident prevention, rehabilitation and research, and pass it on to the Government. Alternatively, the government could establish an ongoing industry pool for funding accident prevention, rehabilitation and research. (If insurers left the market, then their funds would remain in the pool.)

Information asymmetry

Because insurance companies usually do not have the detailed information about potential policyholders that the policyholders have ('information asymmetry'), they tend to price premiums at a higher level than they would otherwise. This pricing approach tends to cause 'adverse selection', whereby some lower risk parties reassess the trade-off between the price of the premium and the likelihood of a costly event that would be covered by insurance. Potential policyholders who present a lower risk than is normal for members of their cohort (for example, safe young drivers or businesses that undertake strong fire prevention measures) may be required nonetheless to pay a premium that is the average for their cohort, leading some to choose not to take out insurance. As these parties drop out of the insurance market, insurance companies are left with a smaller number of higher risk customers, leading over time to higher than expected claims and further rises in premiums.

Where governments regulate insurance markets, including CTP and workers compensation insurance, they tend to restrict benefits progressively to maintain the financial viability of insurance companies, rather than allow

premium flexibility. Compared with three to four decades ago, accident victims' statutory access to common law has become more restricted.[2] In some instances, governments' desire to keep premiums steady has prevented insurance companies from responding to changed market circumstances, thereby contributing to the exit of insurance companies from the market.

The phenomenon of insurance premiums generally being more expensive than if insurance companies had full information about customers is an issue for both monopoly providers and competing providers. Monopoly providers of CTP insurance (for example) may have some advantage in having a more comprehensive database of insured parties, which might allow those monopoly providers to better understand the average risk profile of certain cohorts, such as drivers under 25 years or drivers domiciled in certain metropolitan areas. On the other hand, monopoly providers of CTP insurance will not have information about the risks that individual policyholders present in nondriving activities. Private insurers can often, therefore, develop a good 'picture' of a client when they sell more than one insurance product to that client.

When governments set premiums for compulsory insurance products at uniform or nearly uniform levels across the community, there is little or no variation in premiums to reflect the different risks of different cohorts, and low risk parties do not have the option of not taking out insurance. The result is that all low risk parties are required to subsidise high risk parties. When multiple insurers are allowed to compete on price, their competition tends to mitigate the upward pressure on premium levels arising from the information asymmetry.

Governments sometimes express concern that fraud prevention may be another case of market failure. They argue that an individual insurance company's efforts to detect fraudulent practices would result in fewer claims generally and benefits for free-riding competing insurers. The experience with CTP insurance in New South Wales suggests, however, that competing insurance companies have a mutual advantage in sharing information on fraudulent customers (with government having a facilitation role). Such customers may move between insurers and seek insurance cover from any of them. If insurers share information, then they maximise the pool of available data and thus the awareness of potential customers with a history of fraud. The Motor Accident Authority in New South Wales facilitates the collection of data relevant to the detection of fraud. It contracts a private company to collect data from insurers and maintain a fraud database; all insurers bear the costs of maintaining the database. The Motor Accident Insurance Commission in Queensland maintains a database of all CTP claims which assists insurance companies to detect fraud.

[2] Payouts awarded under common law are paid by the insurance company (public or private) of the party found to be at fault.

Natural monopoly

Natural monopoly occurs where cost conditions allow a single company to produce the particular output(s) at a lower cost than that of any other market arrangement. As a result, only one company operates in the market.

The fixed costs of establishing an insurance business, however, are not great. Capital costs are essentially buildings and office equipment, together with the minimum capital requirements imposed by APRA. Historical evidence indicates the relative ease of entry to the industry, especially given that most new entrants into a particular insurance market made their underlying capital investments to establish in other insurance markets — that is, they are existing insurance companies.

A large provider in a particular insurance market may enjoy savings by being able to spread risk over a larger pool of funds. Multiple providers would probably reduce risks by participating in a number of insurance markets.

The participation of several companies in those compulsory insurance markets in which competition is allowed indicates that economies of scale are achieved at quite low output sizes. There are six licensed providers of CTP insurance in Queensland, and 11 and nine licensed providers of workers compensation insurance in Western Australia and Tasmania respectively. While the differences in scheme design (especially benefit arrangements) make comparison difficult, and while benefit limits may contribute to the financial stability of industry participants, the viability of multiple providers in small markets suggests that economies of scale are not a significant issue in insurance markets.

Some governments consider, nonetheless, that a regulated monopoly may be appropriate. Queensland argued that insurers with a large market share and thus large size have better opportunities for minimising administrative costs and maintaining affordable premiums. Queensland further concluded that the existence of a number of insurance providers could increase premiums as a result of insurance companies' losses in other markets.

Financial position of statutory monopolists

Victoria contended in its 2003 NCP annual report that statutory monopoly schemes tend to provide greater prudential certainty because:

- they price according to risk and have superior risk information than that of competing private insurers;
- they are single-purpose operations that are not vulnerable to the range of risks confronting private companies; and
- their operations are more transparent.

An insurance company experiences financial difficulties if it does not generate sufficient premium revenue and investment income to cover underwriting and other liabilities. Some of the 'strengths' of a statutory provider (as described by Victoria) could become weaknesses — for example, if the managers of statutory scheme are incompetent and respond inappropriately to risk information, or if the lack of diversity in a statutory scheme inhibits natural 'hedges' against adverse developments. Both government and private insurers in Australia have experienced financial difficulties. In some cases, this problem has been due to mismanagement; in others, it has been due to government regulation of premiums to keep them 'affordable' (a judgement that inevitably involves a degree of subjectivity) and stable over time.

Universal coverage

Achieving the objective of universal coverage in CTP and workers compensation insurance does not require the provision of insurance by government-owned monopolies. This objective can be (and is) achieved by mandating insurance, making the payment of annual CTP premiums a condition for renewing vehicle registration, and monitoring employers for compliance with the workers compensation insurance mandate.

In the case of legal professional indemnity insurance, some governments argue that monopoly provision is necessary to ensure coverage of all practitioners. They are concerned that practitioners in high risk areas of the law may be unable to find insurance under competitive arrangements and therefore, may no longer offer services (undermining social goals).

In its 2003 NCP annual report, Victoria argued that several factors in a competitive insurance market would be likely to undermine the coverage of all legal practitioners for professional indemnity insurance.

- An insurer considering entry to the market would need to ensure it would have a large premium pool, because the number of legal practitioners in a jurisdiction is not great and thus there is a risk that one practitioner could incur large claims. Victoria referred to the recent difficulties experienced in various insurance markets where premium pools are small and volatility is substantial.

- Advice provided to Victoria by a large international insurance broking company in 2001 suggested that Victorian solicitors, including competent solicitors, would be unlikely to obtain insurance in a competitive market. It was argued that competent lawyers and those in rural areas would not be covered because insurance companies estimate their risk not as individuals but according to cohorts and arbitrary risk factors.

- Victoria argued that competing insurers would not have complete information about underlying risk and that some insurers would be likely to underprice and underprovide on a sustained basis, leading to their failure (as happened recently with HIH and UMP) and the consequent lack of cover for many insured parties. A monopoly provider of legal

professional indemnity insurance is much less likely to fail, because it can increase premiums when claims or other costs increase; further, in some jurisdictions, it may have the power to levy practitioners if concerned that funds are insufficient to meet liabilities.

Western Australia commented in its 2003 NCP annual report that only two insurance companies are willing to provide quotes to the Law Society, which coordinates the provision of legal professional indemnity insurance in that State through a competitive tendering process. This limited number of providers willing to quote points to a lack of depth and competition in the indemnity insurance market.

These concerns about multiple providers of legal professional indemnity insurance need to be considered against the observed behaviour in competitive markets. In competitive insurance markets, some companies seek to expand by finding new customers, and some would probably consider the legal profession overall to be a 'good risk'. The Legal Practice Board told the 1998 review in Victoria that nearly all practitioners would obtain cover in a competitive market. Moreover, it would be constructive for those high risk legal practitioners to receive a signal through higher premiums (or difficulty in obtaining insurance) to encourage improved practices or, in extreme cases, to leave the industry. This market signalling may enhance the overall quality of services by solicitors and their risk management practices. Some jurisdictions, including Victoria, argued in their 2003 NCP annual reports that circumstances have changed in recent years, however, and that many insurers now would be unwilling to enter a competitive market for legal indemnity insurance. Victoria also pointed out that its monopoly legal insurance provider rates practitioners according to risk and past experience.

Long tail liabilities

Some governments argued that:

- only publicly owned monopoly insurers are capable of looking after (or willing to look after) the particular rehabilitation requirements and costs of those injured people who require lengthy and intensive treatment; and

- private insurance companies may not make appropriate actuarial assessments that account for the probability of claims being made a long time after an accident that causes injury.

Injuries that require long-term rehabilitation are a subset of all injuries that require rehabilitation. Long tail liabilities do not provide a compelling case for monopoly provision. There would seem to be no barrier to a government regulator, separate from insurers, commissioning rehabilitation services from government or private providers.

To ensure all long tail liabilities are covered if insurers leave the market, governments could require insurers to direct a small proportion of premium revenue (sufficient to cover expected long tail liabilities) to the regulator to

finance its commissioning of long tail rehabilitation services. This proportion could be transparently shown on premium notices, calculated by the regulator in consultation with insurers. In this context, regulation rather than ownership could provide an appropriate remedy.

Run-off cover

Some claims against legal practitioners are made after they cease to practise (and no longer pay premiums to professional indemnity insurance schemes). The issue of run-off cover in legal professional indemnity insurance is similar to that of delayed liabilities in CTP and workers compensation insurance. Some governments have argued that private insurance companies may be unwilling to provide run-off cover to sole practitioners or small legal partnerships. Information provided by the Victorian Government suggests that run-off claims comprise around 8 per cent of all claims against lawyers. Some insurance companies are likely to undertake actuarial assessments and provide insurance for such claims, but generally there appears to be a risk of underprovision. Victoria comments in its 2003 NCP annual report that the premium pool is likely to be small and volatile, thus diminishing the attractiveness to commercial insurers of providing run-off cover. The experience of Victorian barristers is that private insurers are unlikely to provide run-off insurance to retired practitioners whom they did not previously insure. Western Australia commented in its 2003 NCP annual report that the large law firms' difficulty in obtaining 'top-up' insurance cover suggests that the availability of run-off cover to large and small solicitors would not be good.

These concerns, while substantial, do not constitute an automatic case for government monopoly provision. An alternative approach which is worth exploring would involve the government establishing a pool in which a levy of all solicitors' insurance premiums would be paid. The pool of funds would meet run-off claims, while allowing a choice of insurer for cover. Such arrangements would require careful design because an insurance company might seek to withdraw cover from a small legal firm or sole practitioner that it believes is facing large claims, in a bid to force the firm or practitioner into retirement and thus transfer the claim to the run-off insurance fund. The incentive for such strategic behaviour could be reduced or eliminated by regulation that allows the run-off fund to legally challenge any insurance company withdrawing cover in such circumstances.

Cost of reinsurance

Insurance companies reduce their risks by taking out their own insurance policies with reinsurance companies, which are typically large companies based overseas. It is sometimes argued that the cost of reinsurance may be greater when multiple insurers provide compulsory insurance products, because a monopoly provider is aware of the full range of risks, thus diminishing risks to the reinsurer. This argument is not strong, however, because private insurers in multiple provider markets usually have access to

other risk-related information about insured parties. Further, many private insurance companies are major players in the insurance market, with a long history of dealing with reinsurers. These factors may even give private insurers an advantage (compared with monopolies) in dealing with reinsurers.

Outsourcing

Some governments have argued that monopoly providers of insurance can capture some of the cost reductions that private insurance companies achieve through their access to economies of scope. Government-owned monopoly providers of CTP and workers compensation insurance, for example, outsource certain activities (such as premium collections, information technology, accident investigations and investment management), via a competitive bidding process. It is important to consider, however, the extent to which such cost savings are passed on to insurance consumers. While competitive pressures among multiple private consumers, and the constant threat of entry, would be likely to lead competing private insurers to pass on the benefits of economies of scope (through lower premiums and other pricing mechanisms such as premium discounts and bonuses for policyholders with good records), the absence of competition for monopoly providers could mean that they are less likely to pass on savings.

Not-for-profit insurers

In the case of legal professional indemnity insurance, some governments argue that some monopoly insurance bodies associated with law societies have cost advantages arising from their not-for-profit status and their inclusion of some voluntary staff among their employees. Governments also note that the bodies' monopoly and mutual status means that they do not have to advertise or pay brokerage and commissions. Victoria has actuarial evidence that its monopoly fund's premiums are 30 per cent lower over the long term than those that would be offered by competing private providers. Victoria argued that monopoly mutual insurance funds can also offer greater premium stability than that of insurers in a competitive market, because they predict their premium pool quite accurately.

Some jurisdictions argued that professional associations or legal practice boards can use their bargaining strength to negotiate attractive premiums with insurers or ensure insurance is available to all when some insurers are vacating the market. In Victoria, the Legal Practice Board appointed the Victorian Bar Council to conduct a competitive tender in autumn 2003 for the provision of professional indemnity insurance for Victoria's barristers. While barristers had expressed concern about losing their freedom to choose their own insurer, the board considered that the tender was necessary to ensure barristers obtained insurance in the current difficult market for indemnity insurance. Following the tender, a company was selected in early May 2003 to provide a master professional indemnity insurance policy to all barristers.

These perceived benefits need to be examined in light of whether:

- such monopolies might become inefficient over time;
- voluntary staff (to the extent they are used) offer the best possible expertise;
- advertising (accompanied by choice of fund) could provide more information and facilitate better service to policyholders; and
- private insurance companies can offer competitive professional indemnity premiums arising from their experience and economies of scope.

Table 6.2: 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. It recommended changing the scheme design and requiring insurers to 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. It recommended removing the statutory monopoly in favour of competitive provision. Second review was completed in December 2000, recommending the retention of 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. The Government is considering the scope for market testing (outsourcing) and the Essential Services Commission reviewed the Transport Accident Commission's proposed premium for 2003-04.	Review and reform incomplete
Queensland	*Motor Accident Insurance Act 1994*	Mandatory insurance, licensing of insurers, file within bands set by the regulator	Review was completed in 1999. It recommended retaining the licensing of insurers, but removing restrictions on market re-entry and on motorists changing insurers. It also recommended introducing greater competition in premium setting by filing within bands set by the regulator.	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 the review recommendations.	Review and reform incomplete

(*continued*)

Table 6.2 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. It recommended removing the monopoly and controls on premiums. Second review was completed in 1999, rebutting the previous review's recommendations. The Government issued both reviews for public consultation in early 2001.	The Government announced the retention of mandatory insurance, the sole provision of insurance by the Motor Accident Commission and community rating. Minor legislative amendments were passed in October 2002.	Review and reform incomplete
Tasmania	*Motor Accidents (Liabilities and Compensation) Act 1973*	Mandatory insurance, monopoly insurer, centralised premium setting	Review was completed in 1997. It recommended retaining the monopoly provision of insurance. Following the 1999 NCP assessment, the Government agreed to re-examine the issue.	The Government completed its examination of the Victorian review of the Transport Accident Commission and has decided not to alter the legislation.	Review and reform incomplete
ACT	*Road Transport (General) Act 1999*	Mandatory insurance, licensing of insurers	Act was 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 was completed in 2000. Review of the Motor Accidents (Compensation) Act was completed in December 2000 and is being considered by the Government. Review recommended that the legislation be amended to allow an insurer other than the Territory Insurance Office to operate or underwrite the motor accident compensation scheme (on a monopoly basis).	The review recommendation is being considered as part of a wider review. The Motor Accidents (Compensation) Act continues to enforce the monopoly.	Review and reform incomplete

Table 6.3: 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 was completed in 1997. It recommended introducing competition to Comcare.	The Government has not responded to the review.	Review and reform incomplete
New South Wales	*Workers Compensation Act 1987*	Mandatory insurance, monopoly insurer, centralised premium setting	Review was completed in 1997-98. It recommended removing the monopoly insurer in favour of competitive underwriting. Further examination of the scheme in 2000-01 resulted in proposals for changing the scheme design. A further review is being conducted, with the report to be completed in the 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.	Review and reform incomplete
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 the maintenance of the monopoly and centralised premium setting, 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. The Government is considering the scope for market testing (outsourcing) and Essential Services Commission reviews of premiums.	Review and reform incomplete
Queensland	*Workcover Queensland Act 1996*	Mandatory insurance, monopoly insurer, centralised premium setting	Review was completed in December 2000. It recommended retaining mandatory insurance and public monopoly insurer, and creating Q-COMP as a separate regulatory entity.	The Government legislated in 2003 to establish Q-COMP as a separate entity from 1 July 2003.	Review and reform incomplete

(*continued*)

Table 6.3 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	The review was completed in early 2002.	Minor legislative amendments are scheduled for spring 2003.	Review and reform incomplete
South Australia	*Workers Rehabilitation and Compensation Act 1986*	Mandatory insurance, monopoly insurer, centralised premium setting	Interagency review was completed in mid 2002, recommending minor changes.	The Government is considering the review in the context of two other reviews that are considering WorkCover governance and the workers compensation and OH&S systems.	Review and reform incomplete
Tasmania	*Workers Rehabilitation and Compensation Act 1988*	Mandatory insurance, licensed insurers	Review by the Parliamentary Joint Select Committee of Inquiry was completed in 1997, recommending minor amendments.	Legislation was amended in March 2001 in line with review 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 and a greater capacity to self-insure.	The *Workers Compensation (Amendment) Act 2001* was passed in August 2001 (effective from 1 July 2002). It retains no premium setting and allows a 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.	Amendments have been introduced relating to benefits and compensation. Multiple insurers remain.	Meets CPA obligations (June 2003)

Superannuation services

The principal CPA clause 5 issue pertaining to the regulation of superannuation services is the legislative requirement in several jurisdictions that public sector employees contribute to a government monopoly superannuation fund. Such restrictive legislation can have adverse implications, including:

- making it difficult for new (or diversifying) service providers to enter the superannuation market;
- reducing the pressure on incumbents to compete with other funds, which may deny consumers access to improved services and better tailored or more innovative superannuation products; and
- imposing costs on those contributors who move from the government to the private sector (or vice versa) or who work in both sectors, because such employees may be forced to fragment their contributions across separate funds.

Proscribing a lack of consumer choice in superannuation legislation is anticompetitive, but the overall impact of such restrictions can be difficult to gauge. Government funded defined benefit schemes tend to be more generous to contributors than are private sector funds. Moreover, some government funds provide limited options for investment strategies, which moderates somewhat the negative impact on contributors of a lack of choice (but not on alternative service providers). There is also a view that disclosure rules and financial standards may not be sufficient to allow contributors to make informed choices if they had the option, potentially resulting in contributors directing their contributions to poorly run funds.

Table 6.4 summarises jurisdictions' legislative review and reform activity in the area of public sector superannuation.

Review and reform activity

Public sector employees in New South Wales, Victoria, Tasmania and the Northern Territory are entitled to choose their superannuation fund. The Council assesses, therefore, that these jurisdictions' review and reform of superannuation legislation complies with CPA clause 5 obligations. The following section considers the review and reform activity of the Commonwealth Government, Queensland, Western Australia, South Australia and the ACT.

The Commonwealth

Based on a review of Commonwealth superannuation legislation in 1997, the Government introduced legislation to allow a choice of fund for certain Commonwealth employees in 2001, but this legislation was defeated in the Senate and has not been reintroduced. The Government also introduced choice-of-fund legislation for the wider community in 1997, 1998 and 2002. The legislation was defeated in the Senate in 2001. Subsequently, the Superannuation Amendment (Choice of Superannuation Funds) Bill 2002 was introduced in June 2002, but has not yet been passed.

The Commonwealth Government does not intend to introduce a 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 Commonwealth contends that:

- military personnel are exposed to greater risks of invalidity and death than is faced by the broader community;
- relatively generous in-service death and invalidity benefits are necessary to attract and retain defence force personnel; and
- the schemes are unfunded defined benefit schemes and allowing choice of fund may concentrate fiscal impacts in a particular period.

The superannuation scheme operated under the *Parliamentary Contributory Superannuation Act 1948* is very small. The review of this scheme concluded that the administration costs were trivial. Further, the generosity of this unfunded defined benefit scheme is well ahead of community expectations, so there appear to be minimal, if any, consequences arising from the lack of competition.

In February 2001, the Commonwealth Government requested that the Productivity Commission inquire and report on other superannuation acts and associated legislation, including the *Superannuation Industry (Supervision) Act 1993* and the *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987*. The inquiry terms of reference noted that the Productivity Commission review fulfils a Commonwealth commitment to undertake NCP reviews of these Acts. The Government asked the Productivity Commission to focus on those parts of the legislation that restrict competition, and referred it to requirements for regulation assessment (including those set out in the CPA).

The Productivity Commission finalised its report in December 2001 and made more than 20 recommendations about the prudential supervision and regulation of the superannuation industry. Among the recommendations were that:

- the Government should strengthen the net tangible assets requirement for trustees of superannuation funds;

- all trustees of funds regulated by APRA should be required to prepare a risk management strategy; and

- the legislation should be simplified and amended to increase competition among providers of services to superannuation funds.

The Government released its interim response to the Productivity Commission report on 17 April 2002, agreeing to certain recommendations and delaying its final decisions on other recommendations until the report of the Superannuation Working Group, chaired by Mr Don Mercer, was finalised. The completion of the Mercer Report enabled the Government to issue its final response to the Productivity Commission report on 20 June 2003. In this response, the Minister for Revenue and Assistant Treasurer noted that the Government had begun to implement some of the inquiry recommendations. Exposure draft legislation has been circulated to the superannuation industry, covering the licensing of all trustees of superannuation funds and the requirement for trustees to submit a risk management plan to APRA. In the final response, the Government agreed to many of the Productivity Commission's recommendations, and noted most of the others. In these cases, the Government generally undertook action broadly equivalent to the recommendation, including reviews of specific matters.

Assessment

The Commonwealth Government has been unable to gain sufficient support in the Senate to implement choice-of-fund legislation. It currently has legislation before Parliament. The Council thus assesses that the review and reform of the Superannuation Acts 1976 and 1990 and the Superannuation Guarantee (Administration) Act is incomplete.

The Council accepts the Commonwealth Government's public interest arguments in relation to the Defence Forces Retirement Benefits Act and the Military Superannuation and Benefits Act. It also accepts that the restriction on competition arising from the Parliamentary Contributory Superannuation Act is trivial, but it does not consider that the Commonwealth has provided a robust public interest case for retaining the status quo.

The Council notes that the Commonwealth Government's review and reform activity following the Productivity Commission's NCP review of other superannuation legislation is well advanced but not yet complete. The Government's responses have been largely consistent with the Productivity Commission's recommendations.

Queensland

Queensland's public sector employees are required to hold a superannuation account with the government-owned superannuation provider, QSuper.

Contributors can choose between an accumulation account, which is a fully funded superannuation account, and a defined benefit account, which offers a fixed retirement income. The *Superannuation (State Public Sector) Act 1990* allows QSuper to use multiple investment fund managers. To date, QSuper has chosen to use just one manager — the Queensland Investment Corporation — which in turn outsources some funds management to private funds.

Queensland reported to the Council that the Government Superannuation Office examined the effects on competition of the Superannuation (State Public Sector) Act and associated Regulations. The review was conducted in accordance with Queensland Treasury's public benefit test guidelines, whereby existing arrangements are compared with less restrictive alternatives. The review accounted for:

- Queensland's view that the Senate's refusal to pass the Commonwealth Government's choice-of-fund legislation demonstrates the complexity of the choice issue;

- a 2001 review of Queensland's local government superannuation scheme, which is similar to the QSuper arrangements, concluded that the monopoly arrangements are necessary to achieve the scheme's objectives; and

- a major review of Queensland public sector superannuation in recent years resulted in public servants being given the choice of the defined benefits scheme or an accumulation account with investment choice.

The Government Superannuation Office's review described the overriding objective of the current legislation as being to ensure equitable access of public sector employees to a superannuation scheme that maximises benefits to members. It considered two alternative models for the government to meet its objectives.

- One model would allow individual Government agencies to remain with QSuper as the superannuation provider for their employees, or make alternative superannuation arrangements. Queensland believes that few, if any, agencies would move away from QSuper.

- The second model would be a variation on the first, but allow private sector employees to join QSuper. The review argued that this would add to QSuper's marketing and distribution costs.

The public benefit test found that QSuper can offer higher than average benefits to members because it is a not-for-profit body, has small marketing requirements and enjoys economies of scale as a result of its large guaranteed membership (which also allows QSuper to take a long-term investment approach). Queensland argued that the first alternative model would lead to:

- employers and contributors who leave QSuper incurring transitional costs and increased fees;

- QSuper losing some economies of scale as some members leave the scheme; and
- the potential for the Queensland public sector to experience difficulty in attracting staff if they believe that QSuper is weakened.

It contended that the second alternative model would add to QSuper's costs.

The review concluded that the benefits of QSuper's monopoly provision of superannuation for public servants outweigh the costs, especially for public sector employees who are the primary stakeholders. The review considered that the effect of the current restriction on competition and the economy generally is negligible. Queensland noted that QSuper accounts for a small proportion of superannuation funds under management in Australia, and that employees leaving the public sector can transfer their superannuation funds to another superannuation provider, and vice versa.

Assessment

The fact that Queensland public servants do not have a choice of superannuation provider is a restriction on competition. Queensland's reviews appear to focus on the cost–benefit calculus for QSuper and its members, rather than on the broader market impact for the provision of superannuation services. The Council therefore questions the extent to which the review considered the interests of other parties and the community as a whole. The public benefit test indicates, however, that the restriction on competition identified by Queensland offers benefits for QSuper and its members. Further, the overall impact of the restriction is difficult to determine and the capacity of QSuper to use multiple investment fund managers means that the legislation contains potential for some contestability. Nevertheless, the Council assesses Queensland as not complying with CPA clause 5 in its regulation of public sector superannuation arrangements.

Western Australia

In February 2003, the Western Australian Government endorsed the recommendations of a review of the *State Superannuation Act 2000*. The review confirmed that the main restriction on competition in the Act is the requirement that employer contributions for public servants' superannuation be paid solely to the Government Employees Superannuation Board. The review recommended that the board's status as sole superannuation provider should be maintained on public interest grounds. Western Australia did not provide details of its public interest arguments, but indicated in its 2003 NCP annual report to the Council that the introduction of superannuation choice would have an adverse financial impact on the State Government.

The Government introduced, from 1 July 2001, a choice of investment type for members of West State Super (the main public sector superannuation fund) for both employer and voluntary contributions; members can choose from a portfolio of products offered by the Government Employees Superannuation Board. The board, in turn, outsources the management of the assets in its superannuation fund. The board selects specialist fund managers in a competitive process and regularly reviews their performance.

Western Australia submitted that it intends to further examine the implications of introducing choice for members of defined benefit schemes. A review that is under way is considering choice of funds for the three superannuation schemes administered by the Government Employees Superannuation Board. The review is restricted to examining how choice of fund could affect the financial rights and obligations of the State.

Assessment

Western Australia did not demonstrate a public interest case for not having a choice of superannuation provider. The Council acknowledges that the net impact of the lack of choice is difficult to estimate, that Western Australia introduced choice of investment type for members of the Government Employees Superannuation Fund, and that a further review is under way. Western Australia has not complied with its CPA clause 5 obligations in this area, however, because it has not completed its review and reform activity.

South Australia

The *Southern State Superannuation Act 1994* establishes the public sector superannuation arrangements in South Australia. Under the Act, public sector employees cannot choose their superannuation provider for employer contributions under the Commonwealth's superannuation guarantee legislation. The Superannuation Funds Management Corporation of South Australia (which uses the business name Funds SA) invests and manages public sector superannuation funds on behalf of Super SA. Funds SA uses external funds managers that it considers offer expertise in investment decisions. Members of the public sector superannuation scheme can choose between different investment strategies: balanced, growth, conservative or cash.

Contributors' benefits are portable. Employees transferring to the South Australian public sector can roll over funds into the Southern State Superannuation Fund, and employees leaving the sector can transfer accumulated funds to other schemes. This portability avoids a constraint in some other restricted public sector superannuation schemes — that is, the inability to consolidate superannuation funds. The main outcomes of the restricted choice of fund provider are that contributors cannot take advantage of higher returns that they believe other superannuation funds could provide, and the market presence of alternative service providers is constrained.

South Australia's Crown Solicitor advised the Government in 1999 that the anticompetitive effect of the restriction on fund provider is negligible because Funds SA allows competition for funds management. South Australia has since commented that Super SA/Funds SA offer advantages in the areas of insurance cover, low administration fees, death and invalidity benefits and choice of investment strategy. It considers that the outsourcing of funds generates benefits from the competition between funds managers to obtain good returns, and referred to the recent above-average returns of the Southern State Superannuation Fund.

Assessment

South Australia has not established that the benefits of the restriction on choice of superannuation fund for providers and members exceed the costs, or that the competition restriction is necessary to achieve its objectives for government sector superannuation. Nevertheless, the Government does not intend to change the arrangements. While South Australia has not complied with its CPA clause 5 obligations, the Council notes the complexity of gauging the impact of the restriction and acknowledges that the current arrangements generate certain benefits.

The ACT

ACT Government policy requires its permanent employees to be members of the Commonwealth's superannuation scheme. They are treated as 'eligible employees' under the Commonwealth Government's *Superannuation Act 1976*. The ACT's *Public Sector Management Act 1994* allows appointees to the senior executive service of the ACT Public Service to join any approved superannuation fund within the meaning of the Commonwealth Government's *Superannuation (Productivity Benefit) Act 1988*, unless they are already members of the Commonwealth scheme. The ACT Government has not reviewed its public sector superannuation arrangements.

Assessment

The ACT is constrained in its capacity to consider offering a choice of superannuation provider to its permanent public servants until the position of the Commonwealth's superannuation legislation becomes clearer. Review and any subsequent reform is unlikely to commence until the Commonwealth legislation is settled.

Table 6.4: 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*	Limits on choice of funds	Review was completed in 1997.	Following the 1997 review, legislation was introduced to Parliament to allow a choice of fund for Commonwealth employees. Amending legislation was defeated in the Senate in 2001 and has not been reintroduced. The Government has since restated its commitment to a choice of fund other than for Commonwealth employees. Choice-of-fund legislation (for Commonwealth and other employees) was reintroduced to Parliament on 27 June 2002. This legislation has not yet been passed.	Review and reform incomplete
	Defence Forces Retirement Benefits Act 1948 *Military Superannuation and Benefits Act 1991*	Limits on choice of funds	The Government does not intend to provide a choice of fund for military personnel. 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.	Military personnel are exposed to greater risk than are other members of the community, and the Commonwealth argues that attractive in-service death and invalidity benefits are required to attract and retain Defence Force personnel. The Government does not propose to alter defence sector superannuation arrangements.	Meets CPA obligations (June 2003)

(*continued*)

Table 6.4: continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Parliamentary Contributory Superannuation Act 1948*	Limits on choice of funds	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 — an unfunded defined benefit scheme — is small (with minimal consequences arising from lack of competition).	Choice of fund will not apply to parliamentarians.	Does not meet CPA obligations (June 2003)

(*continued*)

Table 6.4 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*	Provision for prudential regulation and supervision of the superannuation industry, and the imposition of levies on superannuation funds and approved deposit funds	Productivity Commission undertook an 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 Commonwealth Government released its interim response to the Productivity Commission report on 17 April 2002. The Government agreed to various recommendations, including one relating to simplifying compliance requirements and enhancing capital adequacy requirements. The Government subsequently released its response to another report of the Superannuation Working Group chaired by Mr Don Mercer. This paved the way for the Government to issue its final response to the Productivity Commission report on 20 June 2003. The Government began to implement recommendations that all superannuation fund trustees be licensed and required to submit a risk management plan to APRA. It also agreed to implement most of the Productivity Commission's other recommendations (or to take action that is largely consistent with those recommendations).	Review and reform incomplete

(*continued*)

Table 6.4 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 (State Public Sector) Act 1990*	Limits on choice of funds	Following a 2000 review, a second review completed in 2003 argued that current arrangements are superior to alternatives in maximising benefits for public sector members.	The Government has not changed QSuper's position as the sole provider of superannuation to public servants.	Does not meet CPA obligations (June 2003)
Western Australia	*State Superannuation Act 2000*	Limits on choice of funds	Review recommended retaining the restrictions on fund choice for public benefit reasons. The Government endorsed the review recommendations in February 2003.	The Government introduced choice of investment type for West State Super members on 1 July 2001. Another review of choice of fund has commenced, but it is limited to financial impacts on the State.	Review and reform incomplete
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	Does not meet CPA obligations (June 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 the existing public scheme.	Meets CPA obligations (June 2001)

(*continued*)

Table 6.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Public Sector Management Act 1994* (Commonwealth's *Superannuation Act 1976)*	Requirement that permanent ACT government employees join the Commonwealth Superannuation Scheme as 'eligible employees' under the Commonwealth's Superannuation Act. (The Public Sector Management Act allows appointees to the ACT Senior Executive Service to join any approved superannuation fund, unless already members of the Commonwealth scheme.)		Introduction of choice for permanent appointees depends on Commonwealth reforms.	Review and reform incomplete
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)

7 Retail trading

Legislation significantly restricts competition in three areas of retailing. 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 their location, size or product sold. Liquor licensing laws frequently preclude entry by responsible sellers and favour some sellers at the expense of others, while legislation governing petrol retailing restricts entry and reduces the ability of sellers to change prices.

Shop trading hours

Historically, governments have restricted shop trading hours for reasons include observing the Sabbath, protecting small businesses from competition from larger competitors and reducing 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, including retail business owners and consumer groups. Changing social and work patterns — such as increasing numbers of dual-income households and more flexible and longer working hours — are a significant driver of reform. 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 frequently occurred between retail outlets according to their size or the product they sold. Restrictions prevent consumers from shopping at convenient times, and they prevent businesses that might benefit from extended trading hours (including major retailers, national specialty chains, franchisees and many small businesses) from opening. Many of these restrictions have been removed following reviews that found they did not provide a net public benefit.

In previous NCP assessments, the National Competition Council concluded that New South Wales, Victoria, Tasmania and the ACT had met their NCP obligations regarding the regulation of trading hours. No assessment was required for the Northern Territory. Queensland, South Australia and Western Australia retained significant legislative restrictions on competition following the 2002 NCP assessment.

Review and reform activity

Table 7.1 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 also identified several examples of trading-related legislation, which are summarised in table 7.2 — in these instances all jurisdictions completed appropriate review and reform activity by 30 June 2003 and therefore comply with their Competition Principles Agreement (CPA) clause 5 obligations in this area.

Queensland

The Queensland Industrial Relations Commission, using its powers under the *Trading (Allowable Hours) Act 1990*, restricts:

- Monday to Saturday trading hours for 'nonexempt' stores;[1] which may open between 8 am and 9 pm on Monday to Friday and between 8 am and 5 pm on Saturday.

- Sunday trading by nonexempt stores which may open between 9 am and 6 pm in the south-east Queensland region and designated tourist areas. Regardless of location, hardware stores are permitted to trade on Sundays between prescribed hours.

Queensland has not undertaken an NCP review of its legislation. Instead, the Queensland Industrial Relations Commission addresses questions about trading hours by determining applications for extended trading hours. Further extensions of trading hours are thus occurring on an application basis. The Act requires the commission to consider a range of criteria (including the public interest) when determining an application for extended trading hours. In addition, the Queensland Government made submissions to

[1] Exempt shops are retailers that sell particular categories of good nominated in the Act. The categories include 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.

the commission, drawing the commission's attention to the NCP public interest criteria to consider in its decisions. The Council previously indicated that the commission's process for assessing applications is sufficiently public, independent and transparent.

The commission's decisions on trading hours liberalised trading hours arrangements. In December 2001, the commission granted an application for Sunday trading in the local government area of the City of Brisbane. To rationalise inconsistent trading hours zones in south-east Queensland, the Government legislated uniform Sunday trading hours (from 9 am to 6 pm) for the whole south-east Queensland region, to take effect from 1 August 2002. Also, the word 'regulate' in the objects of the Act was replaced with the word 'decide'. This clarified that an object of the Act is to decide allowable trading hours of shops as opposed to regulating hours (which had been interpreted as requiring the restriction of hours).

Assessment

Queensland retained legislative restrictions on shop trading hours that apply to only large, nonspecialist shops, and it did not provide a public benefit case for the discriminatory treatment of these retailers. On the other hand, Queensland has extended Sunday trading to a considerable area of the State and established an appropriate process for considering proposals to remove the remaining restrictions. The Council assesses Queensland as having met its CPA obligations in relation to trading hours legislation.

Western Australia

At June 2003, Western Australia's *Retail Trading Hours Act 1987*:

- restricted Monday to Saturday trading hours for all shop categories to prescribed opening and closing times. 'Small' retail shops and 'special' retail shops had longer opening hours than those of 'general' retail shops;[2]
- prohibited Sunday trading for 'general' retail shops outside tourism precincts; and
- did 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 but the review report has not been made public. No further developments were noted in Western Australia's 2001 and 2002 NCP annual reports.

[2] The Act distinguished between 'general', 'small' and 'special' retail shops according to their size or types of good sold. General retail shops are larger, nonspecialist retailers such as department stores and larger supermarkets.

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 appreciated the need for reform of retail trading arrangements and would take steps to progress this reform during 2002-03. The Government subsequently established a Ministerial taskforce to review of the retail trading hours issue in the context of the changing economic and social climate in Western Australia and the experiences of other jurisdictions. The taskforce published a public consultation paper outlining reform options and received submissions.

On 24 June 2003, the Government announced that:

- retail trading hours in the Perth metropolitan area would remain unchanged until after the next State election in early 2005;
- from mid-2005, weeknight trading hours would be extended to 9 pm; and
- a review of trading hours would take place three years after the passage of legislation giving effect to the above changes.

The Government wrote to the Council on 14 July 2003 explaining its decision and providing, for the first time, a confidential draft copy of the 1999 review report. The review recommended:

1. extending general trading hours to 9 pm;
2. redefining a small retail shop as one with up to 20 rather than 10 employees; and
3. developing new legislation to replace the Retail Trading Hours Act five years after the extension of weeknight trading.

Although the Government rejects recommendations two and three, it considers that its reforms are largely consistent with the recommendations of the 1999 review. It also considers that the staged implementation of change provides certainty by removing some legally questionable aspects of existing arrangements and through improved protection for small retailers.

The Government considers that extended Sunday trading is not in the public interest because of its unfavourable effect on the recreational activities of retail sector workers and small retail owner-operators, and on the competitiveness of small retail businesses.

Assessment

Significant remaining restrictions apply to trading hours in Western Australia. The Government has not publicly released a review report. The Government's letter does not provide a sufficiently robust public interest case to support the retention of restrictions that have been largely removed in all other jurisdictions without adverse social or economic impacts. The Council

does not consider that the changes announced by the Western Australian Government, involving the retention of restrictions until 2005, constitute an appropriate transitional reform measure underpinned by a public interest case. Accordingly, the Council retains its assessment of June 2002 that Western Australia has not met its CPA clause 5 obligations in relation to shop trading hours.

South Australia

South Australia's *Shop Trading Hours Act 1977* governs trading hours in the Adelaide metropolitan area.[3] The legislation discriminates between exempt and nonexempt shops based on size and product sold. Exempt shops are specialist retailers and smaller general shops and benefit from unrestricted trading. The Act restricts trading hours for nonexempt shops, defined as larger general retailers (including department stores), variety stores and larger supermarkets. A review of the Act in 1998 led to new trading hours arrangements, which came into effect in June 1999. The new arrangements provided some extension to trading hours for nonexempt shops but retained the following restrictions:

- Monday to Friday trading by nonexempt shops was allowed until 9 pm in the central business district, but only until 7 pm in the suburbs (except for Thursday, when trading was allowed until 9 pm); and

- Sunday trading by nonexempt shops was permitted between prescribed hours in the central business district but only on six Sundays a year in the suburbs.

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 NCP assessment, South Australia undertook to explore options for reform. In August 2002, the South Australian Government introduced a Bill to extend shop trading hours, but the Legislative Council rejected the reforms, partly as a result of concerns about their industrial relations implications.

In May 2003, the Government introduced legislation to substantially reform trading hours. Passed by Parliament on 5 June 2003 and proclaimed on 19 June 2003, the new Act:

[3] Local governments determine trading hours in South Australia's regional areas

- extends Sunday trading to suburban areas between 11 am and 5 pm, commencing with the start of summer daylight saving on 26 October 2003; and

- allows shopping until 9 pm in all areas on weekdays, from 7 July 2003.

Assessment

South Australia implemented significant reforms, although some discrimination against larger general retailers remains. Unlike their smaller, specialist competitors, these retailers cannot open after 9 pm on weekdays, 6 pm on Saturdays and 5 pm on Sundays, and no public interest case supports these restrictions. Unlike Queensland, South Australia has no standing mechanism to bring about further liberalisation of trading hours.

The Council assesses South Australia as not complying with its CPA clause 5 obligations in this area, but recognises that the Government's recent reforms mean that the cost of the remaining restrictions is relatively small.

Tasmania

At the time of the 2002 NCP assessment, Tasmania had passed legislation to remove restrictions and allow unrestricted trading except on Good Friday, on Christmas Day and before noon on Anzac Day. The legislation did not initially come into operation because Tasmania wished to allow any local referendums on shopping hours to be conducted in conjunction with the 2002 local government elections. No local referendums were sought and the legislation commenced operation on 1 December 2002.

The Council has not revisited its 2002 NCP assessment that Tasmania has met its CPA obligations in relation to trading hours reform.

Table 7.1: 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–Saturday trading hours; restrictions on Sunday trading and public holiday trading (but exemptions are readily granted)	Review of part 4 was completed. New South Wales advised that a comprehensive public benefit test is in place to assess 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 trading on Christmas Day, Good Friday and Anzac Day. Easter Sunday restrictions were introduced in 2003.	Meets CPA obligations (June 1999)
Queensland	*Trading (Allowable Hours) Act 1990* and Regulations	Restrictions on Monday–Saturday trading hours for nonexempt shops (shops not predominantly selling nominated products); prohibition on Sunday trading by nonexempt stores outside major cities and tourist areas; exemption from restrictions for '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. This process includes a consideration of the public interest and has been assessed by the Council as being sufficiently public, independent and transparent.	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 from August 2002.	Meets CPA obligations (June 2003)

(*continued*)

Table 7.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Retail Trading Hours Act 1987* and Regulations	Restrictions on Monday–Saturday trading; prohibition on Sunday trading outside tourism precincts, where it is restricted; no restrictions above the 26th parallel.	Initial review was completed in 1999.The review report was not published. The current Government established a Ministerial taskforce to conduct a review of retail trading hours. The taskforce released a discussion paper but did not publish a report.	In June 2003, the Government announced that it would not change trading hours until 2005.	Does not meet CPA obligations (June 2003)
South Australia	*Shop Trading Hours Act 1977*	Controls on the hours during which shops may open; variation in allowed opening hours based on the day of the week; variation in permitted opening hours depending on shop location, shop size and products sold; restrictions on Monday–Saturday trading hours; prohibition on most Sunday trading 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 June 2003, Parliament legislated to extend Sunday trading to the suburbs between restricted hours and allow trading by larger stores to 9 pm on weeknights.	Does not meet CPA obligations (June 2003)

(*continued*)

Table 7.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Shop Trading Hours Act 1984*	Prohibition on major retailers (shops employing more than 250 people) trading during prescribed periods (Sundays, public holidays and weekdays after 6 pm other than Thursday and Friday).	Reviews were completed in 2000 and 2002, both recommending removal of restrictions.	Restrictions were removed with effect from 1 December 2002.	Meets CPA obligations (June 2002)
ACT	No specific shop trading hours legislation	After a period of liberal trading arrangements, reintroduction of restrictions for larger shopping centres in 1996.		*Trading Hours Act 1962* was repealed in 1997 due to a lack of community support for trading hours restrictions.	Meets CPA obligations (June 1999)

Table 7.2: 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 pm and 7 am.	A reduced NCP review was completed.	Act was 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.	Act was repealed.	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, type and trading hours of licensed premises.

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. On the other hand, licensing laws that prevent responsible sellers from entering the industry, that discriminate between 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.[4] Australia's more recent experience suggests that misuse of alcohol is 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 competition restrictions. First, some restrictions limit entry by potential sellers. Tasmania, for example, prohibits supermarkets from holding a liquor licence. Legislation in New South Wales, Western Australia, South Australia and the Northern Territory contains a public needs test that requires licence applicants to demonstrate a public need for an additional liquor outlet in a particular area. Such a provision protects incumbent sellers because potential new entrants must show that existing outlets do not already adequately serve the area. In almost any other market, legislation would not facilitate an objection to the establishment of a new business on the basis that consumers' needs are already satisfied.

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 former '9 litre rule' prevented nonhotel sellers of packaged liquor from selling less than 9 litres of liquor in any one sale, whereas hotel bottle shops could sell

[4] 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 an increased number of liquor outlets (Roche 1999, p. 39).

liquor in any quantity. In Western Australia, only holders of a hotel licence are automatically entitled to sell packaged liquor to the public on Sundays.

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 be no more than 150 square metres, and drive-in facilities are prohibited. In several jurisdictions, a condition of a packaged liquor licence is that the licensed premises must be devoted entirely to the sale of liquor and must be separate from premises used for other commercial premises.

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 A$7 billion (ABS 2000). Legislation that prevents entry, discriminates against some types of competition and restricts competitive behaviour can have a significant economic impact in an industry of this size.

Review and reform activity

In the 2002 NCP assessment, the Council assessed Victoria and the ACT as having met their CPA obligations in this area. Progress in the remaining States and Territories is discussed below. Table 7.3 summarises governments' progress in reviewing and reforming liquor licensing legislation.

New South Wales

New South Wales has completed its review of the *Liquor Act 1982* and the *Registered Clubs Act 1976*, but the Government has not responded to the review or published the review report. The Act contains a needs test that allows any person 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 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' (Department of Gaming and Racing, 2002 p. 19) and that the hearing of objections imposes significant legal costs on applicants and objectors. The discussion paper concludes that most of the benefits from the current needs test arrangements flow to existing operators of liquor businesses, because restrictions on the number of licensed premises in a given local area help to protect the market share held by existing licensees.

The needs test is relevant 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 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, might have agreed to certain restrictions (proposed by that competitor) on their future trading activities. The investigation alleges that the competitor in these cases agreed to withdraw the objection in return for the applicant's agreement to restrict its future trading activities. In some cases, the Court may have included these restrictions as conditions on the applicant's liquor licence.

The ACCC expressed concern that consumers might have faced less choice, less convenience and higher prices for packaged liquor in many local areas (including rural and regional areas) as a result of these alleged agreements. On this matter, one party 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.

In addition to the needs test, licence fees also constitute a significant deterrent to new sellers. The licensing authority sets new licence fees based on factors such as the size and location of the business and the fees paid by other licence holders in the area. The fees vary considerably. In 1998-99, the fee for a new hotel licence varied from A$25 000 (in regional New South Wales) to A$175 000 (in Sydney). The fee for a new off-licence also ranged from A$2500 (in regional New South Wales) to A$60 000 (in Sydney). Existing licences change hands at similar prices. Licences therefore have an investment component. No annual or periodic licence fee or charge is imposed. The discussion paper noted that the licence fee system requires an overhaul, but recognised that removing the needs test would reduce the value of hotel and off-licences because the entry restriction that arises from the needs test underpins their value (Department of Gaming and Racing, 2002, p. 38).

New South Wales will hold a Summit on Alcohol Abuse in August 2003, replacing the first sitting week of the spring session of Parliament. All members of Parliament have been invited to attend, along with over 100 other delegates. Submissions will be invited from the public. The Government has delayed the consideration of the review until the summit's completion. The review report makes recommendations to refocus the regulatory and licensing regime in line with harm minimisation criteria. The Summit's main focus will be on harm minimisation, so it provides an opportunity to gain an insight into the issues that will reshape liquor regulation in New South Wales.

Assessment

Despite having reported to the Council that it had commenced a review of its liquor licensing legislation in 1998, New South Wales is yet to consider the review report. Its legislation retains significant restrictions on competition for which it has not provided a public benefit justification. The Council thus assesses New South Wales as not having met its CPA obligations in relation to liquor licensing.

Queensland

Queensland regulates the retail liquor industry via the *Liquor Act 1992*. The Act has the key objectives of (1) facilitating the development of the liquor industry given the welfare, needs and interests of the community and the economic implications of change, and (2) regulating the industry to minimise harm from alcohol misuse. Queensland reviewed the Act in 1999. At the time of the review, the legislation contained several restrictions on competition, the most significant being:

- a public needs test, whereby the licensing authority reviewed the services provided by existing sellers, among other considerations, 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 that had to be located within a 5 kilometre radius of the main licence, could not be drive-in facilities and could not have more than 100 square metres of display area.

The review recommended:

- retaining the public needs test to control liquor availability and ensure responsible service;

- retaining the requirement for sellers of packaged liquor to hold a general licence, meaning that they must provide bar, food and other facilities at their main premises;

- relaxing the location and size constraints relating to bottle shops, but not so as to enable 'volume marketing by large liquor barns' in regional areas, which the review considered might create social and economic dislocation; and

- relaxing 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:

- replaced 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;

- relaxed the size and location constraints applying to packaged liquor outlets such that the bottle shop location radius from the main premises is 10 kilometres and the maximum permitted floor area for bottle shops is 150 square metres, in line with review recommendations;

- removed quantity limits on club sales of packaged liquor to members and permitted diners at licensed restaurants to purchase a single bottle of wine for consumption off the restaurant premises.

Queensland retained the requirements 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 provide bar facilities at the site of the hotel licence. Queensland's rationale for retaining these requirements has two main 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 to the detriment of the important social role that hotels play in rural areas.

Assessment

The Council indicated in the 2002 NCP assessment that 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. It considered, however, that the following significant anticompetitive effects arise from Queensland's decision to retain the requirement that only hotel licence holders can operate bottle shops and the associated restrictions on bottle shop location and numbers:

- The hotel licence requirement prevents entry by nonhotel packaged liquor sellers such as specialist packaged liquor bottle barns and prepared food outlets who may wish to sell packaged liquor with meals for home consumption.

- The restrictions have the effect of increasing the demand for hotels relative to the supply, and appear to create a market in hotels/licences similar to that which has developed for taxi plates.

- The decision to allow increased packaged liquor sales by licensed clubs and restaurants appears to be a marginal change at best.

- There is no evidence that nonhotel sellers of packaged liquor are any less responsible than hotel sellers, and there is little evidence that misuse of alcohol is a more significant problem than in Queensland. The Council noted that other jurisdictions typically seek to ensure the responsible selling of alcohol by specifying the qualifications required of licensees (rather than imposing a hotel licence requirement).

- Imposing a State-wide requirement that sellers of packaged liquor hold a hotel licence appears unnecessarily restrictive (particularly in urban

areas) if the objective is to support rural communities by safeguarding the profitability of rural hotels.

- Queensland's hotel licence requirement directs around A$500 million annually of packaged liquor sales to Queensland hotels which may otherwise might have gone to nonhotel outlets (based on New South Wales evidence cited in Queensland's review).

In its 2003 NCP annual report to the Council, Queensland has responded to the Council's concerns as follows:

- The size restriction might have had a slight effect on the style of detached bottle shops provided (for example, liquor barns), but generally the style reflects planning requirements as well as the market and location that each shop is designed to serve. Although businesses selling prepared food for home consumption are not allowed to sell take-away liquor, the growth in bottle shop numbers is such that most outlets of this nature in urban areas have bottle shops located nearby, often in the same local shopping centre.

- While the restrictions might have had some impact on hotel prices, the analogy with taxi licences is not valid. Queensland has no control on the number and location of hotels other than public interest and planning considerations. Existing hotel licensees and those purchasing existing hotels do not enjoy any advantages over licensees of new hotels in terms of bottle shop licences.

- Not just rural communities that depend on the viability of their hotels; many communities on the outskirts of urban centres also rely on local hotels for much of their social interaction and could be adversely affected by the reform of packaged liquor sales.

- The New South Wales evidence of increasing penetration into the take-away liquor market by nonhotel outlets at the expense of hotel outlets is of limited relevance, because it refers to the type of establishment from which liquor is purchased, not to who owns and operates the outlet(s). Although figures on individual outlet sales are no longer available it is obvious the trend towards increased purchases of packaged liquor from nonhotel outlets applies to Queensland and is not constrained by any lack of access to appropriately located outlets.

While the Council previously accepted Queensland's view that its arrangements help maintain the viability of rural hotels, it notes that the argument is based principally on anecdotal evidence presented to the review. Queensland did not provide any evidence to support its contention that the profitability of urban fringe hotels also depends on their packaged liquor sales. The Council also notes that urban fringe (and rural) hotels are present in jurisdictions that do not restrict the sale of packaged liquor by competitors and that the recent take-up of gaming machines by Queensland hotels could be expected to enhance hotel profitability.

Neither the review nor Queensland's subsequent reporting to the Council established a public interest case for Queensland's restrictions on the size of bottle shops. Other jurisdictions do not limit bottle shop size and do not prohibit drive-in facilities; further, their reviews did not contemplate the introduction of such restrictions. The Council notes that following Victoria's removal of the 8 per cent rule, no jurisdiction other than Queensland has any limit on the number of bottle shops that a licence holder may own.

The Council considers that Queensland's packaged liquor restrictions are significant. They raise the costs of entry into the packaged liquor market for prospective entrants, divert packaged liquor sales to hotels and thereby raise hotel prices, and constrain competition among bottle shops. There is no evidence that the restrictions contribute to harm minimisation. The Council thus assesses Queensland as not complying with its CPA obligations in relation to liquor licensing.

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, given the number and condition of licensed premises existing in the affected area, their distribution, and the extent and quality of their services. Objection to the granting of a licence may be made on the grounds that the licence 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 while hotels may open from 10 am to 10 pm 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 relevant to a matter such as propensity for harm, but that the authority should not consider the impact of competition on individual competitors.

- Sunday trading hours for hotels and liquor stores should be the same with both types of outlet permitted to trade on Sundays between 10 am and 10 pm.

The Western Australian Government released the review report as a draft for public comment. Following the 2002 NCP assessment, the Premier advised the Council that the Government appreciates the need for reform and would take steps to progress this reform during 2002-03 via a further review of liquor licensing arrangements.

In September 2003, the Government agreed to a package of reform measures to take effect from 1 July 2005, including:

- the replacement of the public needs test with a public interest test;
- a simplification of licence types; and
- provision for outlets engaged in similar activities to open during the same hours. This will enable liquor stores to trade at the same times as hotels, including Sundays.

Assessment

Western Australia's proposed reforms are based on its NCP review recommendations and focus on harm minimisation while enabling consumers to benefit from competition. The measures also address the current regulatory discrimination between different types of on-premises and packaged liquor outlet in Western Australia's legislation. However, Western Australia has not provided a public benefit justification for deferring the reforms until 2005. The Council thus retains its assessment of June 2002, that Western Australia has not met its CPA clause 5 obligations in relation to liquor licensing, stands.

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 can be sold only from premises exclusively devoted to the sale of liquor. The review recommended retaining these provisions and conducting a further review after three or four years, when evidence of outcomes in less regulated jurisdictions would be available.

The Council 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 entry by new sellers rather than to directly address harm minimisation. 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 needs criterion in late 2000 or early 2001. The Council considered that this undertaking satisfied 1999 NCP obligations but the Government did not conduct the review within the indicated time.

The Council raised the matter of a further review with the current South Australian Government during the 2002 NCP assessment. The Government subsequently wrote to the Council to confirm that it would 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 conducting review against terms of reference that reflect the CPA clause 5. It published an issues paper in November 2002, invited submissions and published a draft report in April 2003.

The draft report found that the requirement that packaged liquor be sold only from premises exclusively devoted to the sale of liquor has been interpreted by the licensing authority as a requirement of dedicated premises which may be under the same roof as a larger retailing business, such as a supermarket. The restriction is therefore similar to that applying in several other jurisdictions. The draft report found that such a restriction would impose only minor costs and has some harm minimisation benefits, such as ensuring alcohol is not accessible to minors and is differentiated from other products. It recommended that the provision be retained. The draft report described the needs test arrangements as a serious competition restriction that cannot be justified by public benefits and should be abolished.

Assessment

The Council supports the findings of the draft review report on both the outstanding issues. However, because South Australia has not completed its review and reform activity, it has not complied with its CPA clause 5 obligations in relation to liquor licensing.

Tasmania

At the completion of the 2002 NCP assessment, Tasmania's legislation contained two significant restrictions on competition:

- the '9 litre rule' which prevented 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 the grant of a liquor licence in connection with the activities of a supermarket, meaning that although supermarket operators can hold licences, they cannot sell packaged liquor from their supermarket premises.

In March 2001, the review group released an issues paper that identified these two provisions as significant competition restrictions. The final report of the review was completed in December 2002 after lengthy consultation and recommended removal of the 9 litre minimum purchase requirement for off-

licences which the review considered did not contribute to achieving the Act's harm minimisation objective.

In relation to the restriction on supermarkets, the Review Group, which was independent and undertook a rigorous investigation, found that there was effectively no net benefit in permitting supermarkets to sell packaged liquor. The review found that the adverse economic impacts (including a loss of employment) would be matched by the anticipated customer convenience and price benefits. However, consistent with the guiding principle in Clause 5 of the CPA, the Review Group recommended that the restriction be removed.

The Government considered the final review report and introduced amending legislation in the Budget sittings of 2003. Several amendments relate to regulatory design or enhance harm minimisation measures in the Act. The Government also removed a number of competition restrictions that it considered to have no net public benefit, including the 9 litre rule.

The Government rejected, however, the review recommendation to remove the restriction on supermarket sales. The Government's reasons for this decision are set out in a separate report to the Council (Government of Tasmania 2003b). The Government considered that the review might have underestimated the costs and overestimated the benefits of allowing supermarket sales of packaged liquor.

The Government noted that Tasmania already has the second largest number of packaged liquor outlets per head in Australia and that additional supermarket outlets would place Tasmania ahead of other jurisdictions. It also noted that three significant church and welfare agencies did not make a submission to the review. When the Government wrote to these organisations, seeking their views on the reforms proposed by the review, they expressed concern about increased access to alcohol, maintaining that it would have a major adverse impact on community welfare. The Government accepted the views of these organisations and concluded that permitting supermarkets to sell liquor would create the potential for significant economic, health and social costs.

The Government also concluded that the convenience benefit from removing the restriction on supermarket sales would be unlikely to be as significant as estimated by the review, because most shopping centres have bottle shops in close proximity.

Assessment

The Government's position is based on a perceived strong positive relationship between the number of liquor outlets, the consumption of alcohol and alcohol-related harm. The review, however, cited persuasive evidence that supermarket sales of liquor present no greater threat to safety than posed by sales from other licensed outlets (Liquor and Accommodation Review Group 2002, p. 10). The question is whether requiring supermarket sales to be made from separate premises is in the public interest.

The requirement raises the costs of liquor retailing for supermarket operators who must acquire separate premises and results in a small loss of consumer convenience. However, evidence provided to the review suggests that very little price benefit would occur if the restriction were removed. For example, the largest supermarket chain in Tasmania already owns a chain of liquor outlets and competes aggressively with other liquor retailers. Further, the removal of the nine-litre limit is likely to increase competition in the packaged liquor market. The costs to consumers of the restriction therefore appear relatively low.

On the other hand, the separate premises requirement may have some minor harm minimisation benefits, such as differentiating alcohol from other supermarket products and making its purchase by minors more difficult.

The Council therefore assesses Tasmania as complying with its CPA clause 5 obligations in relation to liquor licensing.

The Northern Territory

The Northern Territory's *Liquor Act* and Liquor Regulations contain 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. In addition, there is discrimination between hotels and liquor stores, whereby liquor stores are prohibited from trading on Sundays while hotels may open from 10 am to 10 pm on Sundays.

In April 2003, the Government announced the development of a broad alcohol framework to address antisocial behaviour associated with liquor. The issue of 'Sunday take-away trading' is to be specifically considered in this broader exercise.

The review report of the Liquor Act has been finalised and the Government is expected to consider the report in 2003.

Assessment

An issue of particular significance for the Northern Territory is the restriction of liquor sales in locations where alcohol has created stresses in the community. The Council considers that 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 that does not discriminate between sellers of similar products, would be consistent with NCP principles.

The Council assesses the Northern Territory as not having complied with its CPA obligations in relation to liquor licensing because it has not completed its review and reform activity.

Table 7.3: 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 which allows objections to the granting of a new licence on the grounds that existing facilities are meeting the public need; high fees for a new licence or the transfer of an existing licence, which restrict entry by new sellers	Review is complete and the Government will consider its response following the completion of the alcohol summit in August 2003.		Review and reform incomplete
Victoria	*Liquor Control Act 1987* *Liquor Control Reform Act 1998*	Needs test and the 8 per cent rule, under which no liquor licensee could 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 (including removal of the needs test) were completed in response to the initial review via the Liquor Control Reform Act. The Government commenced a gradual phase-out of the 8 per cent cap and introduced a package of measures to assist the competitiveness of independent liquor stores. The cap is being raised progressively and will be removed from the start of 2006	Meets CPA obligations (June 2001)

(*continued*)

Table 7.3 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); provision for only hotel licensees to sell packaged liquor to the public; 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* replaced the public needs test with a public interest test that examines the social, health, and community impacts of licensing proposals. The Act also retains the hotel monopoly on the sale of packaged liquor to the public and the 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.	Does not meet CPA obligations (June 2003)

(*continued*)

Table 7.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Liquor Licensing Act 1988* and Regulations	Public needs test, which allows licensing authorities to consider the capacity of existing facilities in determining the public need for a new licence; prohibition on liquor stores, unlike hotels, 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 a consideration of the competitive impact of a new licence on existing competitors; and • introducing identical Sunday trading hours for hotels and liquor stores. Western Australia released the review report as a draft for public comment.	Western Australia introduced a package of measures (to take effect from 1 July 2005) that will implement the major review recommendations. Western Australia is replacing the public needs test with a public interest test and permitting the same opening hours for outlets engaged in similar activities. No public benefit case has been made to support the deferral of reform.	Does not meet CPA obligations (June 2003)

(*continued*)

Table 7.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Liquor Licensing Act 1997* (retaining certain restrictions from the earlier *Liquor Licensing Act 1985*)	Proof-of-need test requiring licence applicants to demonstrate that a consumer need exists for the grant of a licence; the requirement that only hotels and retail liquor stores devoted to the sale of liquor exclusively may sell liquor.	Review was completed in 1996 and changes were implemented in 1997. A further review of remaining restrictions is nearing completion. A draft review report was published for public comment in April 2003.		Review and reform incomplete
Tasmania	*Liquor and Accommodation Act 1990*	The 9 litre rule which prevents nonhotel sellers of packaged liquor from selling liquor (except for Tasmanian wine) in quantities less than 9 litres in any one sale; prohibition on supermarkets selling packaged liquor from their supermarket premises	Review was completed in December 2003. It recommended removing the nine litre rule and the prohibition on sales of packaged liquor from supermarket premises, and reforming other minor restrictions.	The Government has implemented reforms, including removing the 9 litre rule but retained the ban on supermarket sales. It considered that the review's cost-benefit analysis underestimated the costs of reform and overestimated its benefits.	Meets CPA obligations (June 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 which allows licensing authorities to consider the capacity of existing facilities in determining the public need for a new licence	A draft final review report was prepared. The Government is still considering the report.		Review and reform incomplete

Petrol retailing

Review and reform activity

In the 2002 NCP assessment, the Council assessed the ACT as having complied with its CPA obligations in relation to its legislation that allows the Minister to regulate retail fuel prices. Western Australia and South Australia also have legislation that restricts competition in petrol retailing, and their review and reform progress is outlined below. Table 7.4 summarises jurisdictions' progress in reviewing and reforming legislation that regulates petrol retailing.

Western Australia

In recent years, Western Australia has introduced fuel pricing measures, primarily through the *Petroleum Products Pricing Amendment Act 2000* and the *Petroleum Legislation Amendment Act 2001*, including:

- a requirement that retailers fix their prices for at least 24 hours and notify these prices to the Department of Consumer and Employment protection for publication on its FuelWatch web site (the 24 hour rule);
- maximum wholesale price arrangements;
- the right of a retailer to purchase 50 per cent of petroleum products from a supplier other than the primary supplier (50/50 legislation); and
- mandatory price boards to be displayed in all regional centres.

Both Acts were subject to an NCP review by the Western Australian Department of Consumer and Employment Protection. 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.

In addition, Western Australia introduced higher fuel standards from January 2001 via the Environmental Protection (Diesel and Petrol) Regulations 1999. The specifications for unleaded petrol are not matched by any other State or Territory, although national unleaded petrol standards will align with the Western Australian specifications in 2006. The Regulations have the potential to reduce competition by making it more difficult to import fuel into Western Australia, leaving the only refinery in Western Australia as a virtual monopolist at the wholesale level. The regulations do not appear to have been the subject of a regulatory impact statement.

In its 2002 NCP assessment, the Council noted an ACCC report on fuel price variability (ACCC 2001b). 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.

A subsequent report on Western Australia's fuel price arrangements contained the following findings (ACCC 2002b).

- The 24 hour rule is likely to have reduced rather than increased competition because it adversely affects independent operators who tend to use price as their main tool for achieving competitive advantage. The 24 hour rule diminishes the ability of independents to respond quickly to competitors.

- The maximum wholesale price arrangements have not been working as intended, with only one sale recorded at the time of the report's publication. The ACCC found it likely that the arrangements had had a negative effect on competition at the wholesale level by reducing supply available to the spot market.

- Perth fuel prices had increased relative to three benchmarks, (Sydney and Melbourne prices, the ACCC's import parity indicator and Western Australian maximum wholesale prices). The average Perth price exceeded average Melbourne and Sydney prices by approximately 3.5 cents per litre. While the ACCC conceded that a significant part of this increase could be attributable to the higher fuel standards, it considered that some of the increase might have been due to the impact of the 24 hour rule and the reduction in import competition accompanying the higher fuel standards.

- A comparison of the characteristics of price cycles in periods before and after the introduction of the new arrangements suggested the 24 hour rule has a minimal effect on the variation and duration of price cycles in Perth.

- The city–country price differential had increased rather than decreased according to a comparison of the 21 months after the introduction of the new arrangements with the 21 months before to January 2001.

The ACCC considered that it was hard to conclude that the Western Australian fuel pricing arrangements have been successful to date and that a number of the measures might have been introduced quickly, without full consideration of their implications or the necessary administrative details for their successful implementation. It noted that the combination of fuel price regulations and tighter fuel standards is likely to exert an adverse influence on oil company investment in Western Australia.

In its 2003 NCP annual report, Western Australia has responded to the ACCC's comments as follows.

- Data for the periods following the ACCC's data period (July–September 2002) show Perth prices have been far more competitive. The average Perth price is now around 1 cent per litre more than the average Sydney price and approximately 2.5 cents per litre more than the average Melbourne price. The 'Cheapest 100' sites in Perth now consistently offer lower prices than the Melbourne or Sydney averages, notwithstanding the fact that Western Australian motorists pay a premium of around 1.6 cents per litre for fuel that meets the State's higher fuel standards.

- In response to the ACCC finding that previous terminal gate pricing arrangements in Western Australia had not worked as intended, the Western Australian Government introduced new terminal gate pricing arrangements, which commenced on 19 December 2002. These are less prescriptive than the previous arrangements and apply to all seaboard terminals across Western Australia. Closely modelled on the Victorian Terminal Gate Pricing arrangements. The arrangements were introduced to increase price transparency in the wholesale fuel market and provide access to petroleum products directly from the terminal at competitive maximum wholesale price for eligible distributors and retailers. These objectives are identical to those of the Victorian model. The ACCC commented in its report that the Victorian arrangements had increased price transparency because terminal gate prices were available on oil company web sites. Western Australia noted that the ACCC made no such comment on Western Australia's arrangements, although terminal gate prices had been available on the FuelWatch website for over 18 months,

- The fuel specifications in Western Australian may not be as restrictive as originally thought. A refiner/marketer has imported several cargoes of unleaded petrol from one of its Australian refineries and has imported fuel from an aligned Asian refinery over the past 12 months at very competitive prices. The refiner/marketer is understood to be providing most of its own unleaded petrol needs, as well as supplying some product to other refiner/marketers, via importation.

- In a recent survey undertaken by the Royal Automobile Club, the majority of respondents (both members and nonmembers) indicated they were willing to pay up to an extra 2 cents per litre for "cleaner" fuel. Given that the rest of Australia will align with Western Australia in just over two years, a significantly higher quality fuel, at a cost Western Australian motorists have indicated that they are willing to pay is considered to be in the public interest.

Assessment

The Council is confronted with conflicting views concerning the public benefits resulting from restrictions contained in Western Australia's fuel pricing legislation. The review of this legislation found that the restrictions were in the public interest. Reports by the ACCC disputed the price benefits resulting from the restrictions and drew attention to their adverse impacts on competition. Further research undertaken by the Western Australian

Government, using more recent data, concluded that its fuel pricing arrangements were reducing prices and promoting competition. The Council considers that the extent of the price and other benefits flowing from the restrictions is ambiguous, with price outcomes appearing to depend on the measurement time period. The Council is also concerned about the absence of support for the restrictions by industry stakeholders. Because Western Australia has retained its fuel price restrictions without being able to clearly demonstrate that they provide a public benefit, the Council assesses the state as not having met its CPA clause 5 obligations in relation to this legislation.

The ACCC considered that Western Australia's fuel standards have the potential to reduce competition for the State's only refinery. Western Australia did not supply a public benefit argument to support its standards. While the Royal Automobile Club survey indicated that motorists are willing in theory to pay the premium, the restriction deprives them of any choice (at least until 2006). The Council assesses Western Australia as not having complied with its CPA clause 5 obligations in relation to fuel standards.

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 Act in 2001, finding that the Act created a barrier to entry and protected industry participants without providing a net public benefit.

The Government accepted the findings of the review and is drafting legislation giving effect to the recommendations. The Government intends to phase out the current restrictions by June 2004. The phasing of reform provides industry participants with time to adjust their business plans for the removal of the entry restriction, which will occur at a time already of rapid change in the industry.

Assessment

The Council accepts the need for a phased reform, but notes that South Australia had not passed legislation to effect the commencement of the foreshadowed reforms. The Council thus assesses South Australia as not having complied with its CPA Clause 5 obligations in relation to petrol retailing.

Table 7.4: 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*	Requirement that retailers fix their prices for at least 24 hours and notify these prices for publication on its FuelWatch web site; maximum wholesale price arrangements; the right of a retailer to purchase 50 per cent of petroleum products from a supplier other than the primary supplier; mandatory price boards to be displayed in all regional centres	Review of this Act and the *Petroleum Legislation Amendment Act 2001*was completed in 2001. Restrictions were found to be in the public interest. ACCC reports found, however, that the restrictions might have reduced competition, increased the rural/urban price differential and raised prices.		Does not meet CPA obligations (June 2003)
	Petroleum Legislation Amendment Act 2001	Requirement that retailers fix their prices for at least 24 hours and notify these prices for publication on its FuelWatch web site; maximum wholesale price arrangements; the right of a retailer to purchase 50 per cent of petroleum products from a supplier other than the primary supplier; mandatory price boards to be displayed in all regional centres	Review of this Act and the *Petroleum Legislation Amendment Act 2001*was completed in 2001. Restrictions were found to be in the public interest. ACCC reports found, however, that the restrictions might have reduced competition, increased the rural/urban price differential and raised prices.		Does not meet CPA obligations (June 2003)
	Environmental Protection (Diesel and Petrol Regulations) 1999.	Setting of fuel standards above national standards, thus protecting the local refinery			Does not meet CPA obligations (June 2003)

(*continued*)

Table 7.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Petrol Products Regulation Act 1995*	Retail petroleum licences may be withheld if they provide 'unfair and unreasonable competition' to sellers in the area immediately surrounding the proposed new outlet	Review was completed in mid-2001. It found that the Act created a barrier to entry that protected industry participants without providing a net public benefit.	The Government is drafting legislation to phase out the current restrictions by June 2004. The phasing of reform provides an adjustment time for industry participants.	Review and reform incomplete
ACT	*Fair Trading (Fuel Prices) Act 1993*	Provision for the Government to impose price controls on fuels in certain circumstances	Intradepartmental review recommended retaining restrictions on public interest grounds. It argued that provisions would be exercised only at times of widespread anticompetitive behaviour.	Restrictive provisions were retained.	Meets CPA obligations (June 2001)
	Fair Trading (Petroleum Retail Marketing) Act 1995		Review was completed.	Act was repealed.	Meets CPA obligations (June 2001)

8 Fair trading 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. Progress in review and reform of this legislation is discussed in chapters 4 and 5 of volume 2.

Legislative restrictions on competition

Fair trading and consumer protection legislation regulates 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 related legislation also impose other 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 of 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;
- the 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 specifies the method of sale of certain goods, including:

- labelling and licensing requirements;
- the units of measurement in which certain goods may be sold;
- 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 by, for example, promoting consumer confidence and improving consumers' ability to choose suppliers based on improved understanding of the product they offer. It may also impose some costs. In particular, legislative restrictions on market entry and competitive conduct may increase 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, proportionate to the market failure's potential detriment, and 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).

The Council considers that fair trading Acts do not require NCP review where they mirror part V of the *Trade Practices Act 1974* (TPA), because the TPA's consumer protection provisions 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 as the model for the uniform scheme was the consumer protection provisions (Part V) of the TPA, which include 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

The Council has previously assessed Victoria, Tasmania, the Northern Territory and the ACT as having met their CPA clause 5 obligations in relation to their fair trading Acts.[1] Table 8.1 outlines the progress of jurisdictions' review and reform of these Acts.

New South Wales

The review of the *Fair Trading Act 1987* and *Door to Door Sales Act 1967* was completed in March 2002. The Government accepted the review's recommendations in August 2002 and released the review report in September 2002.

The review found that the legislation was pro-competitive and that the regulatory arrangements for consumer protection have net public benefits. It recommended legislative amendments, however, to remove or reduce the effect of restrictions where these were not justified on public benefit grounds, including the removal of mandatory codes of practice for traders.

The review also recommended repealing the Door to Door Sales Act, and amending the Fair Trading Act to streamline the existing disciplinary

[1] The Council's assessment of Tasmania covered all fair trading provisions except those applying to motor vehicle dealers, which are discussed in chapter 5.

scheme, add consumer protections in relation to direct selling practices and change the existing consumer protection provisions to mirror those of the TPA. The Fair Trading Amendment Bill 2003 was introduced into Parliament on 21 May 2003 to effect these changes. The Bill was passed by Parliament on 3 July 2003.

The Council assesses New South Wales as having met its CPA clause 5 obligations.

Queensland

The *Fair Trading Act 1989* regulates mock auctions and door-to-door selling and provides for information and safety standards. A targeted public review of the Act was completed in August 2002. The review found that a number of the Act's restrictive provisions were in the public interest and recommended their retention. These provisions included:

- the prohibition on the conduct of mock auctions;
- the prohibition on the use of obscene material in relation to unsolicited goods;
- the regulation of door-to-door trading;
- requirements relating to information and safety standards;
- the empowerment of the Minister to restrict or prohibit the sale of unsafe goods; and
- specific standards for folding laundry trolleys, leather goods, shoes, furniture, fibre content and projectile toys.

The Queensland Government accepted the recommendations of the review, implementing the required minor amendments via the *Fair Trading and Another Act Amendment Act 2002* in December 2002. The amendments involved:

- increasing the threshold at which the door-to-door provisions apply to contracts from $A50 to $A75 (with the amount to be subject to a regular review); and
- reducing coverage of contracts for emergency repairs that satisfy the requirements of a door-to-door contract and are not regulated by the *Domestic Building Contracts Act 2000*.

The Council assesses Queensland as having met its CPA clause 5 obligations.

Western Australia

Western Australia reviewed the *Fair Trading Act 1987* and the *Consumer Affairs Act 1971* as part of the State's consumer justice strategy which is scheduled for completion in December 2003. The strategy emphasises the

investigation of complaints and the imposition of sanctions on those who contravene acceptable standards. The NCP review of the Acts has been completed and endorsed by Cabinet on 4 August 2003.

The report recommended that the following restrictions are in the public interest and should be retained:

- product safety regulations and product safety recall orders;
- product information standards;
- product quality standards;
- packaging standards; and
- product safety orders or regulations.

The report recommended that as part of a general review of both the Acts, consideration should be given to combining the product safety provisions into a single Act and removing unnecessary duplication.

The Council assesses Western Australia as having met its CPA clause 5 obligations.

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 requested that the relevant agency ensure the Act's provisions (beyond those that duplicate parts of the TPA) are reviewed according to CPA principles.

South Australia completed a NCP review during 2002. The review report recommended retaining all provisions of the Act for their net public benefit, but highlighted some trivial restrictions on competition for consideration in a forthcoming general review of the Act:

- increasing the door-to-door sales threshold from $A50 to $A100;
- reviewing the need to retain fair reporting provisions when sufficient time has elapsed, to ascertain the adequacy of the Commonwealth Privacy Act;
- considering the repeal of the s. 40 requirements on the clarity of the price information on ticketed prices; and
- repealing, or increasing the level of certainty in, third party trading scheme provisions.

The Council assesses South Australia as having met its CPA clause 5 obligations in this area.

Table 8.1: 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 of this Act and the *Door to Door Sales Act 1967* was completed in March 2002. The Government accepted the review's recommendations in August 2002 and released the review report in September 2002. The review found that the legislation was pro-competitive and that the regulatory arrangements for consumer protection had net public benefits. The review recommended various legislative amendments, however, to remove or reduce the effect of restrictions that were not justified on public benefit grounds.	The Fair Trading Amendment Bill 2003 was passed by Parliament on 3 July 2003 to effect the review recommendations.	Meets CPA obligations (June 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	A targeted public review against NCP principles was completed in August 2002. The review found that a number of the Act's restrictive provisions were in the public interest and recommended their retention.	The Queensland Government accepted the recommendations of the review, retaining restrictive provisions and making the required minor amendments via the *Fair Trading and Another Act Amendment Act 2002* in December 2002.	Meets CPA obligations (June 2003)

(continued)

Table 8.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Fair Trading Act 1987*	Regulation of the supply, advertising and distribution of goods and services	A major general review is now being undertaken, as part of the Consumer Justice Strategy, which is scheduled for completion in December 2003. An NCP review of the Act has been completed and was endorsed by Cabinet on 4 August 2003.	The report recommended that certain restrictions should be retained and that the product safety provisions of this Act and the *Consumer Affairs Act 1971* be combined into a single Act to remove unnecessary duplication.	Meets CPA obligations (June 2003)
South Australia	*Fair Trading Act 1987*	Regulation of the supply, advertising and distribution of goods and services	Act was not included in the legislation review schedule. South Australia undertook a review in 2002.	The review report recommends the retention of all provisions, which are justified on the basis of a net public benefit. A further review of trivial restrictions of competition is forthcoming.	Meets CPA obligations (June 2003)
Tasmania	*Fair Trading Act 1990* Fair Trading (Code of Practice for Motor Vehicle Traders) Regulations 1996	Code of practice requirement that manufacturers 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.

(continued)

Table 8.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Fair Trading Act 1992*	Regulation of the supply, advertising and distribution of goods and services	Intradepartmental review was completed in 2001, covering the *Fair Trading Act 1992*, 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), a 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.	Review found that the benefits of the fair reporting provisions have not been demonstrated and that the provisions should be repealed. It recommended, however, that their repeal be deferred pending resolution of new national issues relating to residential tenancy databases.	Amendments introduced into Parliament in July 2002 that implement the review recommendations. The Government accepted the recommendation to defer repealing the fair reporting provisions and stated that it would further consider the issue. Motor vehicle dealer provisions are discussed in chapter 5.	Meets CPA obligations (June 2002)

Other fair trading legislation

In the 2002 NCP assessment, the Council assessed governments as having met their CPA clause 5 obligations in relation to the following legislation:

- New South Wales — *Prices Regulation Act 1948* and *Retirement Villages Act 1999*;
- Queensland — *Retirement Villages Act 1988*, *Sale of Goods Act 1896* and the *Sale of Goods (Vienna Convention) Act 1986*;
- Tasmania — *Door to Door Trading Act 1986*; and
- Northern Territory — *Retirement Villages Act*.

The Council also previously assessed jurisdictions as having met their CPA clause 5 obligations in relation to other fair trading legislation (table 8.2). The following sections discuss governments' progress in reviewing and reforming further miscellaneous fair trading legislation.

New South Wales

The review of the *Funeral Funds Act 1979* was completed in November 2001. It found that the impact of the legislation on competition was not significant. The review established a net public benefit case for retaining key consumer protections such as ensuring industry participants are of fit character and clarifying consumer rights in pre-paid contracts. Proposed new legislation would remove restrictions on funeral directors where these are not justified on public benefit grounds. These restrictions cover:

- the minimum and maximum numbers of fund directors and trustees;
- the nomenclature of funeral funds; and
- a cap on management fees and benefits paid.

The New South Wales Government accepted the review's recommendations in February 2002 and prepared an Exposure Bill to facilitate public consultation. The review report was publicly released in April 2002. New South Wales has since been discussing with the Commonwealth Government whether funeral funds are regulated as a financial product under the *Corporations Act 2001* (Cwlth), in which case there may be further opportunities for reform. New South Wales advised the Council that its position was unclear, given changes introduced under the Commonwealth financial services reforms in 2001. In March 2003, the Commonwealth made a Regulation exempting particular funeral expense policies from the Corporations Act.

As a result, New South Wales advised the Council that it would prepare a draft Bill to implement the review recommendations. Subsequently, New South Wales advised the Council that the Commonwealth had decided not to regulate funeral funds, and as a result New South Wales would be considering whether new legislation is required to implement the review recommendations. The Council assesses New South Wales as not having met its CPA clause 5 obligations because it has not completed the reform process.

Queensland

The *Profiteering Prevention Act 1948* introduced powers to control prices in the context of severe shortages of goods and services following World War II. A reduced NCP review recommended repeal of the legislation because the Act lacked contemporary relevance (and the last order under the Act was issued in 1967). The Act was subsequently repealed by the *Tourism, Racing and Fair Trading (National Competition Policy) Amendment Act 2002*, which received assent in September 2002. The Council assesses Queensland as having met its CPA clause 5 obligations in relation to this Act.

The *Funeral Benefit Business Act 1982* regulates the operation of funeral benefit businesses. A targeted public review (completed in October 2000) recommended against changing the rights and responsibilities of parties under existing contracts. For any new contracts entered into, or new business conducted, however, the review recommended the following:

- the introduction of a cooling-off period for all new contracts;
- the provision of a short 'client care' statement in plain English on parties' rights and responsibilities when entering into the contract;
- the provision of choice for consumers to deposit pre-payment monies with either a funeral director or an authorised investment manager;
- the removal of the restriction that only companies may operate funeral benefit businesses;
- the extension of the Act to apply to any person who sells a funeral benefit to a consumer in Queensland;
- the removal of the cap on the value of funeral benefits;
- the removal of the requirement that the public officer/company secretary reside, or the registered office be located, in Queensland;
- the removal of the provisions requiring Office of Fair Trading approval of all advertising; and
- the removal of the registration requirement.

The Queensland Government responded to the review in April 2003, and accepted all recommendations. It advised the Council that the *Second-Hand Dealers and Pawnbrokers Bill 2003*, which incorporates the amendments to the Funeral Benefit Business Act to give effect to the recommendations, was released for consultation on 19 May 2003, with submissions closing on 6 June 2003. The Bill was introduced to Parliament on 19 August 2003. The Council assesses Queensland as not having met its CPA clause 5 obligations in relation to the *Funeral Benefit Business Act 1982* because it did not complete the reform process.

Western Australia

The Government endorsed a review of the *Retirement Villages Act 1992* in May 2002. The review recommendations included:

- amending restrictions on the use of retirement village land. The review concluded that the advantages of the Act's protection of tenure, and of residents' investments in a retirement village, clearly outweigh the disadvantages of restricting the use of the land for retirement village purposes. The Government could, however, lessen such restrictions by simplifying the processes for terminating a village scheme and removing a memorial from the village land;

- incorporating the Act and the Code of Fair Practice for Retirement Villages into a single Act, to remove unnecessary regulatory duplication and ease the process of effecting fundamental change; and

- amending restrictions on the marketing and price determination rights of residents. Residents will have the right to be involved in the marketing of their unit, receive monthly marketing reports, and influence the determination of unit price.

The review recommended retaining the Act's remaining restriction on competition which relates to parties' representation in proceedings before the Retirement Villages Disputes Tribunal. The restriction requires parties to any proceedings before the tribunal to present their own case at the hearing, unless (1) the party is unable to appear personally or conduct proceedings properly, (2) all parties agree to the representation by legal practitioners or (3) an order is sought for a monetary amount in excess of $A10 000. The review concluded that this restriction provides residents and administering bodies with access to a relatively quick, informal and inexpensive dispute resolution forum, unencumbered by the expense and complexity that legal practitioners might bring to a hearing.

Western Australia advised the Council that it is drafting amendments to enact these reforms. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it has not completed the reform process.

The Northern Territory

The *Prices Regulation Act* provides for the setting and enforcement of maximum prices for declared goods and services. Under the Act, the Minister may appoint a Controller of Prices who has the power to declare and set maximum prices for controlled goods or services. The Controller of Prices would have a range of powers to enforce the maximum prices, including:

- the power to require the production of balance sheets and other financial records;
- powers to enter premises and inspect records; and
- powers to summon witnesses and require disclosure of information.

Other provisions of the Act are aimed at preventing suppliers from circumventing controls, such as prohibiting suppliers from:

- bundling declared goods or services with undeclared goods or services and charging a total price that embodies a price higher than the current market value for the undeclared product;
- packaging smaller quantities of goods in containers than were ordinarily packed in such containers when the control was introduced; or
- reducing the quality of the declared goods from the quality at the time of introduction of the controls.

As with similar legislation in other jurisdictions, the Prices Regulation Act dates back to the period immediately following World War II. At that time, the Government was focussing on curbing rising inflation and addressing problems arising from shortages of goods. Since 1993, when the last general price control was lifted, the Act has been held in reserve to be used following states of emergency and other adverse events. The provisions were last used in the Katherine region following the 1998 Australia Day floods, when the Government controlled the prices of items such as foodstuffs and building products.

The Act underwent a NCP review by the Centre for International Economics in 2000. The review recommended restricting the exercise of powers to regulate prices to controlling incidents of price exploitation following natural disasters or similar events that have a severe impact on the operation of markets. Further, if there is a demonstrated need for more permanent regulation of monopoly or oligopoly companies then the Government should introduce separate case specific legislation to impose these controls. The review also recommended amending the Act to limit the length of time for which a price control can be in effect.

The Northern Territory Government accepted the report, together with the proposed legislation, and passed the *Prices Regulation Amendment Act 2002*. In keeping with a new purpose clause, and to better describe its functions, the

Act was renamed the *Price Exploitation Prevention Act*. The Council assesses the Northern Territory as having met its CPA clause 5 obligations in relation to this area.

Table 8.2: 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 accepted the review's recommendations in February 2002, as well as the preparation of an Exposure Bill to facilitate further public consultation. The review report was released in April 2002. New South Wales has been discussing with the Commonwealth Government whether funeral funds are also regulated as a financial product under the *Corporations Act 2001* (Cwlth). On 6 March 2003, the Commonwealth Government made a Regulation exempting particular funeral expense policies from regulation under the Corporations Act.	New South Wales originally advised that it would prepare a draft Bill to implement the review recommendations. Subsequently, New South Wales advised the Council that the Commonwealth had decided not to regulate funeral funds, and as a result it would be considering whether new legislation is required to implement the review recommendations.	Review and reform incomplete
	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)

(continued)

Table 8.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales (continued)	*Retirement Villages Act 1989*	Regulation of the termination of resident's occupation rights, the provision of jurisdiction over certain matters to the Residential Tenancies Tribunal	Review was completed in 2001.	Act was repealed by the *Retirement Villages Act 1999* which retained certain requirements for terminating resident's occupation rights.	Meets CPA obligations (June 2002)
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	A targeted public review was completed in October 2000. The Government has accepted the recommendations of the review. The *Second-Hand Dealers and Pawnbrokers Bill 2003*, which incorporates the amendments to the Act to give effect to the review recommendations, was released for consultation on 19 May 2003 with submissions closing on 6 June 2003.	The Bill was introduced to Parliament on 19 August 2003.	Review and reform incomplete
	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. The last order under the Act was issued in 1967.	The Act was repealed without review by the *Tourism, Racing and Fair Trading (National Competition Policy) Amendment Act 2002* which received assent in September 2002.	Meets CPA obligations (June 2003)

(continued)

Table 8.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*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)
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.	Review and reform incomplete
South Australia	*Prices Act 1948*	Price controls, restrictions on business conduct	Review recommended 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)

(continued)

Table 8.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
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)
	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 was repealed by the *Fair Trading Act 2002*, which duplicates more extensive provisions in the TPA.	Meets CPA obligations (June 2001)

(continued)

Table 8.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT (continued)	*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	*Price Exploitation Prevention Act* (formerly the *Prices Regulation Act*)	Price controls, restrictions on business conduct	Review was completed in 2000, recommending the exercise of restrictions only at times of natural disaster (and with time limits), the specification of objectives and the regulation of monopoly behaviour under separate legislation.	Government accepted the review recommendations and passed the *Prices Regulation Amendment Act,* on 1 October 2002. The Act was renamed the *Prices Exploitation Prevention Act.*	Meets CPA obligations (June 2003)
	Retirement Villages Act	Regulation of the operation of retirement villages, regulation of 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)

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 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 was enacted by template legislation, with Queensland being the lead legislator. All jurisdictions except Western Australia and Tasmania enacted legislation applying the Consumer Credit Code as in force in Queensland. Western Australia originally enacted alternative consistent legislation, which required constant amendment by the Western Australian Parliament to remain consistent when the code was amended in Queensland. However, on 30 June 2003, it adopted the template legislation system favoured by all other States and Territories (except Tasmania), by passing the *Consumer Credit (Western Australia) Amendment Act 2003*. The Act adopts the national Uniform Consumer Credit Code, as in force from time to time in Queensland, as a law of Western Australia instead of having to enact consistent legislation each time the Code is amended. Tasmania 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 8.3 outlines the progress of jurisdictions' review and reform of this legislation.

NCP review of the Consumer Credit Code

The 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 Council of Australian Governments (CoAG) Committee on Regulatory Reform. A post implementation review of the code preceded the national review, being completed in late 1999. 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 of representatives from each participating jurisdiction.

The Commonwealth Government's Office of Regulation Review reported in its latest annual report to the Council (see Volume 1, Chapter 6) that a CoAG regulatory impact statement was not prepared before the April 2002 introduction of mandatory comparison rate amendments to the uniform Consumer Credit Code.

The key recommendations of the draft review were:

- to maintain the code's current provisions 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.

The Ministerial Council on Consumer Affairs endorsed the final report in 2002 and referred it to the Uniform Consumer Credit Code Management Committee which formed a working party to progress implementation of the review recommendations. Queensland is preparing a consultation review document to release for consultation. The Uniform Consumer Credit Code Management Committee is facilitating the resolution of certain issues (for example, credit issues relating to solicitors, electronic commerce and general disclosure provisions), following which Queensland will enact updated template legislation. Automatic updating of relevant legislation will then occur in all other States and Territories except Western Australia and Tasmania, which enacted legislation that is consistent with the template legislation. Changes to the legislation are occurring on an iterative basis. The full range of changes to the Consumer Credit Code arising from the post-implementation review and the national review are unlikely to be completed until 2004.

The NCP review followed the post-implementation review, which recommended legislative changes, some of which may have an impact on competition. The Council understands that the NCP review addressed those recommendations and that the Ministerial Council on Consumer Affairs considered the two reports together.

NCP reviews of related legislation

The Council previously assessed Victoria, Tasmania, the ACT and the Northern Territory as meeting their CPA clause 5 obligations in this area. The following sections discuss the remaining governments' progress in reviewing and reforming outstanding miscellaneous consumer credit legislation (table 8.3).

Queensland

After completing reviews of the *Credit Act 1987* and the *Hire Purchase Act 1959*, Queensland previously indicated to the Council that it intended to repeal both Acts. In regard to the Credit Act, however, Queensland since advised that it cannot repeal the Act until litigation in a small number of existing cases is finalised. The litigation still before the courts stemmed from lenders who breached their obligations under the Act and had to apply to the Supreme Court for reinstatement of their legal right to charge interest under the loan contracts affected by the breaches. The possible outcomes of that litigation are the reimbursement of interest to affected consumers and/or fines payable by the lender to the Office of Fair Trading. Queensland advised the Council that one matter has been completed, but that the completion date for the second matter is uncertain. Given the introduction of the Consumer Credit Code the Act regulates only the few outstanding personal loans up to A$40 000 entered into before 1 November 1996.

The Council assesses Queensland as not having met its NCP obligations in relation to this Act because it has not completed the reform process.

The review of the Hire Purchase Act recommended repealing the Act and, at the same time, amending the *Credit (Rural Finance) Act 1996* to apply to hire purchase agreements and to provide for the accounting of surplus monies upon repossession (in a manner similar to that of the Consumer Credit Code). The Queensland Government subsequently amended the Credit (Rural Finance) Act to transfer certain protections for farmers. Legislative amendments to limit the Hire Purchase Act to existing contracts and insert a sunset clause became effective in January 2003. The Council assesses Queensland as having met its CPA clause 5 obligations in relation to this Act.

Queensland added the Credit (Rural Finance) Act to its legislation review program because the Act has a relationship with other scheduled Acts. 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. A minor review the Act reported in February 2002. Based on similar provisions examined as part of the national NCP review of the Consumer Credit Code, it was concluded that the provisions relating to default notices were minor restrictions that were justified in the public interest. Some amendments to the Act were made as a result of recommendations made in the review of the Hire-Purchase Act. The Council assesses Queensland as having met its CPA clause 5 obligations in relation to this Act.

Western Australia

Western Australia has 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 the safeguards housed in other consumer protection legislation, but that the Act's disciplinary provisions do

have a public benefit. The review 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 Western Australian Government advised the Council, however, that Parliamentary Counsel, in preparing the first draft of the amendments, raised complex legal issues that require detailed consideration. A particular concern was the emergence in the marketplace of payday lenders. Amendments to the *Consumer Credit (WA) Act 1996* (the Code) in 2001 resulted in payday lenders becoming regulated under the Code thus emerging as an additional category of licensed credit providers under the Credit (Administration) Act.

A public benefit argument for retaining the licensing requirement for payday lenders made it necessary to reassess the NCP review's recommendations, to determine whether the amendments needed minor modifications. The original NCP report was re-examined to account for the relevant market changes. The amended report was endorsed by Cabinet on 4 August 2003. The report recommended that the Act be amended to:

- replace the licensing requirement for credit providers with a system of registration coupled with negative licensing; and

- replace the prohibition against persons having a business as a credit provider when in partnership with an unlicensed person, with a provision prohibiting a registered person from having a business in a partnership with a person who has been prohibited from having such a business under the proposed negative licensing provisions.

Western Australia is still to implement the endorsed recommendations through amendment of the Act. The Council assesses Western Australia as not having met its CPA clause 5 obligations in this area because it has not completed the reform process.

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 Hire-Purchase Act is being amended so only these selected provisions of the Act continue to apply to new transactions. 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

endorsed the review's recommendations and is progressing legislative amendments through the Parliament as part of the *Acts Amendment and Repeal (Competition Policy) Bill 2002*. The Bill was referred to the Legislative Council's Standing Committee on Uniform Legislation and General Purposes for inquiry and report. The Standing Committee's report was tabled in the Legislative Assembly on 10 June 2003. The report recommends that the Bill be passed without amendment when Parliament resumes on 13 August 2003. The Council assesses Western Australia as not having met its CPA clause 5 obligations in this area because it has not completed the reform process.

Table 8.3: Review and reform of legislation regulating consumer credit

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
National	NCP 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. The Ministerial council endorsed the final report in 2002 and referred it to the Uniform Consumer Credit Code Management Committee for implementation.	The Uniform Consumer Credit Code Management Committee is facilitating the resolution of issues. Then Queensland will enact updated template legislation, leading to the automatic updating of relevant legislation in all other States and Territories except Tasmania, which enacted legislation that is consistent with the template legislation. Changes to the legislation are occurring on an iterative basis. The full range of changes to the Consumer Credit Code are unlikely be completed until 2004.	Review and reform incomplete
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 a benefit in using the restrictions to address hire-purchase problems in the rural sector until a more comprehensive policy is developed.	Restrictive provisions were retained.	Meets CPA obligations (June 2002)

(continued)

Table 8.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*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 a 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 related regulations was carried out at the same time as the national review of the Consumer Credit Code but under a separate process. Review recommended repeal of the Act. Due to the introduction of the Consumer Credit Code, the Act regulates only the few outstanding personal loans up to $40 000 entered into before 1 November 1996.	Queensland is waiting for litigation in a small number of existing cases to be finalised before repealing the Act. The litigation still before the courts has stemmed from lenders who breached their obligations under the Act and had to apply to the Supreme Court for reinstatement of their legal right to charge interest under the loan contracts affected by the breaches.	Review and reform incomplete
	Credit (Rural Finance) Act 1996	Restrictions on the enforcement of mortgages over essential farm equipment	Review report was released on March 2002. Based on similar provisions examined as part of the national NCP review of the Consumer Credit Code review, it concluded that the provisions related to default notices were minor restrictions only, which were justified in the public interest.	No reform is necessary.	Meets CPA obligations (June 2003)

(continued)

Table 8.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Hire Purchase Act 1959*	Restrictions on business conduct	Review was completed in 2001. 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 subject to a separate review of their public benefit.	Legislative amendments made to limit the Act to existing contracts and to insert a sunset clause became effective in January 2003.	Meets CPA obligations (June 2003)
Western Australia	*Credit (Administration) Act 1984*	Licensing requirements, restrictions on the conduct of credit providers	Departmental review recommended the repeal of licensing requirements and related provisions, but the retention of disciplinary provisions on public interest grounds. In preparing the amendments, Parliamentary Counsel raised complex legal issues, particularly the emergence of payday lenders. Amendments to the *Consumer Credit (WA) Act 1996* (the Code) in 2001 resulted in payday lenders becoming regulated under the code, and thus adding a category of licensed credit providers under the Credit (Administration) Act. A public benefit argument for retaining the licensing requirement for payday lenders made it necessary to reassess the NCP review's recommendations for whether the amendments needed minor modifications.	The original NCP report was been re-examined to account for the relevant market changes. The amended report was endorsed by Cabinet on 4 August 2003. The report recommended that the Act be amended to replace the licensing requirement for credit providers with a system of registration coupled with negative licensing.	Review and reform incomplete
	Hire Purchase Act 1959	Restrictions relating to surplus from sale of repossessed goods, equitable relief and farm goods purchases	Departmental review recommended the removal of a number of restrictions but the retention (on public interest grounds) of three provisions aimed at protecting farmers and small businesses.	Amendments are being progressed through the Parliament as part of the Acts Amendment and Repeal (Competition Policy) Bill 2002.	Review and reform incomplete

(continued)

Table 8.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
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)
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 the 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.	The Government agreed to the review recommendations.	Meets CPA obligations (June 2001)

Trade measurement legislation

Each State and Territory has legislation that regulates weighing and measuring instruments used in trade, with provisions for prepackaged and non-prepackaged 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 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 was undertaken, with Queensland as the lead agency. 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 NCP 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 concerned restrictions on the sale of non-prepacked meat. A draft report on such meat was circulated to jurisdictions during February 2002 and the review's working group has finalised the report. The working group consulted with meat sellers and associations, consumer associations, advocate groups and other stakeholders in early 2003, then reported to the Standing Committee of Officials on Consumer Affairs in mid-2003. The committee is expected to subsequently report to the Ministerial Council on Consumer Affairs on a proposed approach to the non-prepacked meat issue. Queensland advises that stakeholders were invited to make submissions by 21 March 2003. Results of the consultation have been collated, and the review committee has an amended draft report to consider. Queensland advised the Council that the Ministerial Council on Consumer Affairs is unlikely to receive the final report before August 2003. Following agreement on the proposed national approach to trade measurement, implementation of the agreed approach is expected to follow. This process is likely to be finalised in the second half of 2003 or early 2004.

Queensland advised that the Ministerial Council on Consumer Affairs has not considered and endorsed the final NCP reports by 30 June 2003. It also advised that it can commence the review of the definition of 'meat' once the Ministerial council finally endorses the NCP documents. This review process will also be subject to national protocols and approval processes.

Assessment

In its 2002 NCP assessment, the Council assessed that Queensland had met its CPA clause 5 obligation in this area because the outcome of the national review will have no impact on its *Trade Measurement (Administration) Act 1990*. The NCP review found the Act does not restrict competition and recommended retaining it with no amendments.

New South Wales, Victoria, Western Australia and South Australia advise that they are currently awaiting the national response before implementing reforms. The Council assesses these States as not having met their CPA clause 5 obligations because they have not completed their reform processes. Nevertheless, the Council accepts the benefits of implementing reforms based on the recommendations of a national review process, provided unreasonable delays do not result. If the States can implement reforms as soon as the Ministerial Council on Consumer Affairs endorses the national review, then the delay would not appear unreasonable.

Tasmania repealed its *Weights and Measures Act 1934* in 2000 and replaced it with the State-based uniform trade measurement legislation, the *Trade Measurement (Tasmania) Administration Act 1999*, which was assessed under its gatekeeping requirements. The restrictions in the 1999 legislation were assessed as being in the public benefit. The Council assesses Tasmania as having met its CPA clause 5 obligations in relation to this Act.

The Northern Territory and the ACT 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 as recommended by the national review. The Council assesses the Northern Territory and the ACT as having met their CPA clause 5 obligations in relation to this area.

Table 8.4 outlines the progress of jurisdictions' review and reform of their trade measurement legislation.

Table 8.4: 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.		Review and reform incomplete
New South Wales	*Trade Measurement Administration Act 1989*	Restrictions on the method of sale of certain goods	Review and reform are contingent on the outcome of the national review.		Review and reform incomplete
Victoria	*Trade Measurement (Administration) Act 1995*	Restrictions on the method of sale of certain goods	Review and reform are contingent on the outcome of the national review.		Review and reform incomplete
Queensland	*Trade Measurement (Administration) Act 1990*	Restrictions on the method of sale of certain goods	Internal 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 drafting new legislation to replace the Act. The new legislation will apply the uniform national legislation.	The Government has allocated a priority for the Bill to be introduced in spring 2003.	Review and reform incomplete
South Australia	*Trade Measurement Administration Act 1993*	Restrictions on the method of sale of certain goods	Review and reform are contingent on the outcome of the national review.		Review and reform incomplete
Tasmania	*Weights and Measures Act 1934*	Restrictions on the method of sale of certain goods	Act was repealed in 2000 and replaced by the *Trade Measurement (Tasmania) Administration Act 1999*, which was assessed under the new legislation gatekeeping provisions.		Meets CPA obligations (June 2003)
ACT	*Trade Measurement (Administration) Act 1991*	Restrictions on the method of sale of certain goods	Internal review found that the Act does not contain anticompetitive restrictions.		Meets CPA obligations (June 2003)
Northern Territory	*Trade Measurement (Administration) Act*	Restrictions on the method of sale of certain goods	Internal review found that the Act does not contain anticompetitive restrictions.		Meets CPA obligations (June 2003)

9 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, where State and Territory Government business activities are important service providers, as well as in the child care sector, where local governments are important service providers.

Education

All States and Territories have competition restrictions in their legislation governing the education sector. 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 legislation 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 that compete with private sector providers to earn revenue and profits. 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 protect 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 — namely, registration, accreditation and financial viability — create an entry barrier that may reduce the range of courses and subjects available, 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 9.1–9.3 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

The Council previously assessed New South Wales, Victoria, South Australia and Tasmania (except for the *Christ College Act 1926*) 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*, and the ACT's review and reform of the *Board of Senior Secondary Studies Act 1997* and the *Education Services for Overseas Students (Registration and Regulation of Providers) Act 1994* as meeting the CPA clause 5 obligations.

Table 9.1 summarises the progress of governments' review and reform of legislation that regulates general education. Each jurisdiction's progress is discussed in the following sections.

Queensland

The review of the *Education (General Provisions) Act 1989* recommended:

- changing the provision dealing with entry into the market for supplying education in overseas curriculum. The recommended changes included the preparation of guidelines for the criteria on which to base the approval of the Governor in Council; and

- retaining the power of the Director-General to prohibit the sale of an item or class of items in State school tuckshops.

The Government accepted the review recommendations, which were given effect by legislative amendments included in the *Education (Miscellaneous Amendments) Act 2002*, which commenced on 13 December 2002.

The review indicated that a separate review of restrictions on entry to the market for non-State school education — restrictions embodied in s. 2(2) of the Act — would be undertaken. The separate review would be part of the proposed new legislative arrangements for the approval and accreditation processes for the non-State school sector. The new legislation to regulate the accreditation of non-State schools, the *Education (Accreditation of Non-State*

Schools) Act 2001, commenced in January 2001. This Act was reviewed under Queensland's gatekeeping arrangements (see volume 2, chapter 13).

The Council assesses Queensland as having met its CPA clause 5 obligations in relation to this Act.

A review of the *Grammar Schools Act 1975* was completed in September 1997. A second review was completed in June 2002. It recommended removing the minimum financial requirement for the establishment of a grammar school. A third, and wider, review of the Act, to consider the impact of other legislation for the accreditation of non-State schools and the financial administration of grammar schools, was completed in March 2003. In that month, the Government authorised the preparation of a Bill to implement the recommendations of both the NCP and wider reviews (the latter of which have been examined under gatekeeping requirements). Queensland advised that the amending Bill was introduced to Parliament on August 2003 for debate in early September 2003.

The Council assesses Queensland as not having met its CPA clause 5 obligations because it has not completed the reform process in this area.

Western Australia

Western Australia is reviewing the *Education Service Providers (Full Fee Overseas Students) Registration Act 1992* under the NCP. Given that the review is still under way, the Council assesses Western Australia as not having met its CPA clause 5 obligations because it has not completed the reform process in this area.

Tasmania

The *Christ College Act 1926* was thought to provide a possible advantage to Christ College relative to other schools and thus was to be repealed. Tasmania advised the Council, however, that the Department of Education recently provided the Government with information why this Act does not contain any restrictions on competition. The Government agreed and has removed the Act from the review program. The Council assesses Tasmania as having met its CPA clause 5 obligations in relation to this Act.

The ACT

The ACT reviewed the *Education Act 1937*, the *Free Education Act 1906* (NSW), the *Public Instruction Act 1880* (NSW) and the *Schools Authority Act 1976*. The reviews involved extensive consultation and made 23 recommendations, including:

- establishing a single Act for schooling in the ACT;

- considering teacher registration for the professional enhancement of teachers in the ACT;
- retaining 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 ACT Government reported that the exposure draft of education legislation was introduced into the Legislative Assembly on 6 June 2002. A consultation period followed until 4 October 2002, to allow for public comment and submissions. The ACT Government received a substantial report from the Inquiry into Education Funding in the ACT. The inquiry report contained recommendations on the registration and accountability requirements for nongovernment schools. The ACT Government accepted the recommendations and is preparing amending legislation for introduction and passage in the spring 2003 sittings of the Legislative Assembly. The Council assesses the ACT as not having met its CPA clause 5 obligations because it has not completed the reform process in this area.

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 have a demonstrable community benefit. In response to the review, the Northern Territory foreshadowed passing Regulations to clarify the requirements for the registration of nongovernment schools and universities, and the accreditation of university courses.

The Government later advised that it decided, following further discussion about the proposal, and in consultation with the nongovernment school sector, to clarify the requirements through administrative arrangements instead of Regulations. It will develop administrative arrangements in consultation with the nongovernment school sector. The administrative arrangements will be flexible, to respond to changing circumstances, and will deal with only core requirements for registration that are in the public interest.

The Council considers that the action proposed by the Northern Territory will meet its CPA clause 5 obligations. Given that reform of the legislation is not required, the Council assesses the Northern Territory as having met its CPA clause 5 obligations in relation to general education provisions.

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

The Council previously assessed New South Wales, Victoria, Queensland, Western Australia, South Australia, the ACT and the Northern Territory as having met their CPA clause 5 obligations. These jurisdictions 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. Table 9.2 summarises the progress of governments' review and reform of legislation that regulates vocational education and training.

Tasmania

The *Vocational Education and Training Act 1994* restricts competition by establishing conditions for the registration of training providers and the accreditation of training courses. Tasmania completed a review of the Act in 2001, publishing a regulatory impact statement which involved extensive public consultation. Cabinet endorsed the review recommendations on 11 August 2003 and legislation is scheduled for introduction by 21 October 2003. The Council assesses Tasmania as not having met its CPA clause 5 obligations because it has not completed the reform process in this area.

Universities

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.

Review and reform activity

Table 9.3 summarises the progress of governments' review and reform of legislation that regulates universities.

Legislation that establishes universities

The Council previously assessed Queensland, Western Australia (in relation to the *University Colleges Act 1926*) and the ACT as having met their CPA clause 5 obligations in this area. New South Wales, Victoria, South Australia, Tasmania and the Northern Territory did not include this area of legislation in their review programs because the legislation of these jurisdictions does not contain significant restrictions on competition and thus does not require review under the NCP.

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 review recommended that university activities that are predominantly commercial in nature should be provided on a fee-for-service basis with direct outside competition. The review also recommended that universities should introduce full commercial pricing policies in most cases.

Review matters relating to local council rates, State taxes and land tenure were deferred to the competitive neutrality review of the universities, which the Government endorsed on its completion. The review of universities recommended the adoption of competitive neutrality by university business activities, proposing the establishment of a rigorous process for handling competitive neutrality complaints. It further recommended that this process involve the Department of Education Services.

As a result of the review, the Government is drafting legislation to clarify the powers of universities to engage in commercial activities in Western Australia and outside of Western Australia, including activities that do not directly relate to the universities' core functions of education and research. The State's Acts Repeal and Amendment (Competition Policy) Bill 2002 is progressing the necessary amendments to the *Edith Cowan University Act 1984*. One amendment will require that universities comply with guidelines approved by the Minister for Education on the advice of the Treasurer. The guidelines will govern the types of commercial activity in which a university could engage. Particularly important will be the arrangements that govern the financial monitoring of universities' commercial activities, such as the requirement that universities report to the Treasurer. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it has not completed the reform process in this area.

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 offered by providers that are not self-accrediting. Legislation relevant to these aspects of higher education should comply with the protocols developed by the Ministerial council and meet the CPA test.

In its 2001 NCP assessment, the Council assessed South Australia, Tasmania and the ACT as having met their CPA clause 5 obligations in this area. In its 2002 NCP assessment, the Council assessed New South Wales, Victoria and Queensland as having met their CPA clause 5 obligations in this area. These jurisdictions reviewed legislation requiring the registration of universities and the accreditation of university courses, and retained competition restrictions in the public interest.[2] Western Australia does not have this type of legislation.

The Northern Territory

The Northern Territory did not include its *Education Act* (which also regulates higher education) on its original NCP legislation review program. The Government did, however, review s. 73A of the Act to determine whether any changes were required to reflect the National Protocols for Higher Education Approval Processes. The review identified areas in which the Act should be amended. The Government discussed these with relevant stakeholders, but did not intend to consider the matter further before 30 June 2003. The Council assesses the Northern Territory as not having met its CPA clause 5 obligations in relation to the Act's higher education provisions because it has not completed the reform process in this area.

Teachers

When the NCP legislation review program commenced in 1996, both Queensland and South Australia required all teachers in government and nongovernment 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.

These governments conducted NCP reviews of their legislation requiring the registration of teachers. Each review found that registration was in the public

[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.

interest. The Governments argued that the regulation of teachers is generally beneficial because it ensures teachers have minimum qualifications and a minimum level of competence, and it prevents schools from employing persons who are not of good character. Tasmania also argued that registration is important in raising the status of the teaching profession. In its 2001 NCP assessment, which considers teacher registration 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 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 continue 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 stated in November 2000 that the 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 the business entity concerned with a transparent statement of competitive neutrality obligations. Jurisdictions' NCP annual reports indicate that governments are complying with the CoAG suggested approach.

All jurisdictions, except Western Australia, now apply competitive neutrality principles to the business activities of their TAFE institutions. Western Australia conducted a competitive neutrality review of TAFE colleges and Cabinet has endorsed the recommendations. Western Australia deferred NCP review matters relating to local council rates, State taxes and land tenure to a competitive neutrality review of the universities. The latter review recommended that university businesses adopt competitive neutrality principles. Western Australia is drafting legislation to clarify the powers of universities to engage in commercial activities, on which they will have to provide financial reports to the Treasurer when requested. The review also recommended the establishment of a rigorous process for dealing with competitive neutrality complaints involving universities.

Table 9.1: Review and reform of legislation regulating general education

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Education Act 1990*	Registration conditions for nongovernment schools, 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 nongovernment schooling is under way.		Meets CPA obligations (June 2002).
Victoria	*Education Act 1958*	Provision for the registration of nongovernment schools and the 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 on the provision of certain funding assistance to schools affiliated with two nominated capital assistance authorities, 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 addressed 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 9.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Education (General Provisions) Act 1989* and Regulations		This review recommended changing the provision dealing with entry into the market for supplying education in overseas curriculum. The changes included the preparation of guidelines for the criteria on which to base the approval of the Governor in Council. A further recommendation was to retain the power of the Director-General to prohibit the sale of an item or class of items in State school tuckshops.	The review was accepted and legislative amendments were made effective from 13 December 2002.	Meets CPA obligations (June 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).

(*continued*)

Table 9.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Grammar Schools Act 1975*	Regulates the establishment of new public grammar schools	Review was re-opened (the original report was completed in September 1997) and completed in June 2002. It recommended that the minimum financial requirement governing the establishment of a grammar school be removed. A wider review of the Act, to consider the impact of new processes in other legislation for the accreditation of nongovernment schools and the financial administration of Grammar schools, was also carried out in March 2003.	In March 2003, the Government authorised the preparation of a Bill to implement the recommendations of both the NCP and wider review. The Bill was introduced in August 2003 for debate in early September 2003.	Review and reform incomplete.
Western Australia	*Education Service Providers (Full Fee Overseas Students) Registration Act 1992*	Requirement of registration of providers of education to overseas students	Review is under way.		Review and reform incomplete.
South Australia	*Education Act 1972* and Regulations	Barriers to market entry, restriction on market conduct for teachers and nongovernment schools	Review was completed in July 2000. It found that restrictions on competition are justified in the public benefit.	The Act was retained without reform.	Meets CPA obligations (June 2001).

(*continued*)

Table 9.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Christ College Act 1926*	Possible advantage over other schools (an originally perceived restriction on that led the Government to intend to repeal the Act)	The Department of Education recently provided information why this Act does not contain any restrictions on competition. The Government agreed.	The Act has been removed from the review program.	Meets CPA obligations (June 2003).
	Education Act 1994	Requirement of registration of nongovernment schools	Review was completed in December 2000. It found that restrictions on competition are justified in the public benefit.	Act was retained without reform.	Meets CPA obligations (June 2001).
	Education Providers Registration (Overseas Students) Act 1991	Requirement of registration of providers of education to overseas students	As above.	Act was retained without reform.	Meets CPA obligations (June 2001).
	Hutchins School Act 1911	Provision of 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*	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 9.1 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*	Requirement of registration of schools	Review completed. Government received a substantial report from the Inquiry into Education Funding in the ACT. The Inquiry Report made recommendations on the registration and accountability requirements for nongovernment schools.	The Government accepted the recommendations and is preparing amending legislation for introduction and passage in the spring 2003 sittings of the Legislative Assembly.	Review and reform incomplete.
	Education Services for Overseas Students (Registration and Regulation of Providers) Act 1994	Requirement of registration of providers of education to overseas students		Act was repealed.	Meets CPA obligations (June 2002).
Northern Territory	*Education Act*	Requirement of registration of nongovernment schools	A departmental review found restrictions on the registration of nongovernment schools were in the public interest. After consultation the Northern Territory decided that the requirements would be clarified through administrative arrangements instead of Regulations.	The Government will develop administrative arrangements in consultation with the nongovernment school sector. The administrative arrangements will be flexible, to respond to changing circumstances, and will deal with only core requirements for registration that are in the public interest.	Meets CPA obligations (June 2003)

Table 9.2: 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*	Requirement of registration of training providers and accreditation of training courses	Review involved extensive consultations with external stakeholders, including private providers and the university sector.	The Act was amended	Meets CPA obligations (June 2002).
Victoria	*Vocational Education and Training Act 1990*	Requirement of registration of training providers and accreditation of training courses	Review was completed in 1998.	Act retains restrictions relating to accreditation, the registration of private providers and the Ministerial setting of fees as being in the public interest.	Meets CPA obligations (June 2001).
Queensland	*Vocational Education, Training and Employment Act 1991*	Requirement of registration of training providers and accreditation of training courses	Minor review was carried out in 1997 on the then proposed Vocational Education and Training Bill and Institute Bill to replace this Act. A further minor review was undertaken of the proposed Training and Employment Bill which replaced these Bills. This Bill was considered to impose fewer restrictions on providers than imposed by the 1991 Act that it replaced. It also delivered greater flexibility for employers, registered training bodies and trainees.	The Act implementing a national scheme of training received assent in June 2000.	Meets CPA obligations (June 2001).

(*continued*)

Table 9.2 continued

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Vocational Education and Training Act 1996*	Requirement of registration of training providers and accreditation of training courses	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*	Requirement of 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 the public benefits of restrictions outweigh the costs.	Act was retained without reform.	Meets CPA obligations (June 2001).
Tasmania	*Vocational Education and Training Act 1994*	Requirement of registration of training providers and accreditation of training courses	Review was completed in 2000. Cabinet endorsed its recommendations.	The required amendments arising from the review of the Act will be introduced by 21 October 2003.	Review and reform incomplete.
ACT	*Vocational Education and Training Act 1995*	Requirement of registration of training providers and accreditation of training courses	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*	Requirement of registration of training providers and accreditation of training courses	Act was not included in legislation review schedule. The Northern Territory advised the Council that its legislation is consistent with that of other jurisdictions in which reviews found that restrictions provide a net public benefit.		Meets CPA obligations (June 2002).

Table 9.3: Review and reform of legislation regulating universities

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Higher Education Act 1988*	Provision for the approval of courses of study as advanced education courses	Act was not included in the NCP legislation review program. New South Wales advised the Council that it recently amended the Act following a review that involved extensive consultations with external stakeholders.		Meets CPA obligations (June 2002).
Victoria	*Tertiary Education Act 1993*	Requirement of accreditation of courses	Review was completed in 1998. Accreditation procedures were found to be in the public interest. The review recommended removing the requirement that applicants, seeking approval to conduct courses leading to higher education awards, demonstrate the need in Victoria for the course of study.	In 2001 Victoria enacted the *Post Compulsory Education Acts (Amendment) Act 2001* for the principal purpose of amending the Tertiary Education Act to provide for the full implementation of the review recommendations.	Meets CPA obligations (June 2002).

(*continued*)

Table 9.3 continued

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*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* *University of the Sunshine Coast Act 1998*	Potential restrictions on the ability of each university to apply revenue, in that revenue must be applied solely for university purposes	Review was completed in 2001. It found that the restriction does not have a significant impact on competition.	Act was retained without reform.	Meets CPA obligations (June 2002).
	Higher Education (General Provisions) Act 1989	Accreditation and monitoring procedures for higher education providers that wish to establish in Queensland	Review was completed in 2001. It recognised the value of accreditation provisions being nationally uniform. It found that the restrictions were justified on public benefit grounds.	The Treasurer endorsed the review recommendations in August 2001. The existing regulatory regime was retained in the public interest	Meets CPA obligations (June 2002).

(*continued*)

Table 9.3 continued

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
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*	Provisions governing the investment of university funds (with variation across 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.	The Government endorsed the review recommendations. The amendments to the Edith Cowan University Act are being progressed through the Acts Amendment and Repeal (Competition Policy) Bill 2002 which is before Parliament.	Review and reform incomplete.
	University Colleges Act 1926	Restriction on access to university lands, controls on the use of land and provision for the transfer of 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).
South Australia	*University of Adelaide Act 1971* *Flinders University of South Australia Act 1966* *University of South Australia Act 1990*	No restrictions on competition	Review was not required.	Acts were retained without reform.	Meets CPA obligations (June 2002).
Tasmania	*Universities Registration Act 1995*	Requirement of registration of institutions wanting to operate as universities , provision for conditions to be imposed on universities 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).

(*continued*)

Table 9.3 continued

Jurisdiction	*Legislation*	*Major restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Canberra Institute of Technology Act 1987*	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	No restrictions on competition	Review was not required.	Act was retained without reform.	Meets CPA obligations (June 2001).
Northern Territory	*Education Act*	Provision of a framework for the operation of higher education institutions	Review identified areas in which the Act should be amended.	The Government discussed the reforms with relevant stakeholders, but did not intend to consider the matter further before 30 June 2003.	Review and reform incomplete.

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 nonregulated and includes care by family members, friends and paid babysitters.

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 health and safety considerations and the meeting of staff/child ratios, for example. 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' NCP legislation review program includes legislation regulating child care. In its 2001 NCP assessment, the Council assessed the ACT as having met its CPA clause 5 obligations in this area. In its 2002 NCP assessment, the Council assessed the Commonwealth, Victoria, South Australia (for the *Children's Services Act 1985*) and Tasmania as having met their CPA clause 5 obligations. Table 9.4 summarises the progress of governments' review and reform activity relating to the regulation of child care.

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*. The Regulation is proposed to replace the Centre Based and Mobile Child Care Services Regulation (No. 2) 1996 and the Family Day Care and Home Based Child Care Regulation 1996, which were made under the 1987 Act. The Regulation will include provisions for the licensing of children's services, information for parents, child numbers, staffing standards, facility standards and administrative procedures and policies.

In accordance with the requirements of the *Subordinate Legislation Act 1989*, a regulatory impact statement was prepared to assess the potential benefits and costs of the proposed regulatory model, as well as any options that may be capable of meeting the legislative objectives. The regulatory impact

statement indicates that the restrictions on competition (primarily licensing and standards setting) are in the public interest. The regulatory impact statement preferred the proposed regulations to alternative licensing schemes, because the net benefits outweighed the costs. New South Wales is awaiting public feedback on the regulatory impact statement before implementing new legislation.

Because New South Wales has not completed reform of its child care legislation, the Council assesses it as not having met its CPA clause 5 obligations in this area.

Queensland

A major review of Queensland's child care legislation and its NCP implications began in 1999 and was completed in May 2002. The review examined 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 also examined the impact of regulating different service types within the child care sector that have not been previously regulated.

The government endorsed the review in June 2002. The review recommended the adoption of the regulatory tiering framework proposed for the regulation of child care in Queensland. As a result, the *Child Care Act 2002* was passed on 1 November 2002 and the Child Care Regulation 2003 is being finalised. Both the Act and Regulation are expected to commence operation on 1 September 2003.

The Council notes that the Act, while passed, is not in operation. Queensland advised that the Act will not begin operation until the Regulation is passed. The Council thus assesses Queensland as not having met its CPA clause 5 obligations because it has not completed the reform process in this area. Nevertheless, the Council accepts the need for synchronising the operational dates of the Act and the Regulation, provided that unreasonable delays do not result. As long as Queensland is able to meet its proposed timetable for reform, the delay appears reasonable.

Western Australia

The State's NCP legislation review program did not include 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.

Nevertheless, the Department of Community Development carried out a NCP review of the existing child care legislation, which was completed in June 2002. The Expenditure Review Committee agreed to the review report on 5 February 2003, and Cabinet subsequently endorsed it on 10 February 2003.

The review recommended retaining the restrictions in the *Community Services Act 1972* and the Community Services (Child Care) Regulations 1988 because they are in the public interest, and expanding the current three-yearly review process of the Regulations to encompass day care outside of school hours. Another recommendation was to consider, via the three-yearly review process, changing prescriptive regulations to a more outcome-based system within the regulatory framework.

A Bill to replace this and other Acts is being developed and is expected to be considered in the spring 2003 sitting of Parliament. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it has not completed the reform process in this area.

South Australia

The review of the *Children's Protection Act 1993* found that restrictions in the Act are unjustified and may limit the ability to appoint an officer best suited to needs of the child. Cabinet approved drafting amendments in August 2000. The 2002-03 Child Protection Review recommended further amendments to the Act. Competition policy amendments will be progressed jointly with the child protection recommendations. Implementation of the recommendations is expected to occur in 2003-04, with amendments to the Act to be introduced into Parliament in the second half of 2004. The Council assesses South Australia as not having met its CPA clause 5 obligations because it has not completed the reform process in this area.

The Northern Territory

The Northern Territory review of the *Community Welfare Act* was completed in April 2000. The review concluded that there was a strong net community benefit in retaining the potentially anticompetitive elements of the Act, but recommended:

- either enforcing or removing the licensing requirements for children's homes;
- re-framing child care centre standards as outcomes rather than prescribed standards;
- clarifying the basis and status of standards for child care; and
- broadening the scope of child care activities that are brought within the licensing net to encompass all forms of purchasable child care service.

The Government considered that the public interest would be best served by not attempting to institute such reforms in isolation and with limited public consultation by June 2003. Rather, it decided to undertake the reforms as part of a broad early childhood strategy to be determined in 2003 following

extensive community consultation, with revised legislation to be implemented from July 2005.

As a result, the Northern Territory advised that the amendments to the Community Welfare Act will take place in two stages. The first stage will address the NCP requirements by amending part X of the Act (which deals with the licensing of children's homes, etc). The second stage will involve a complete review of the Act to replace it with more contemporary legislation.

The first stage in amending part X to address NCP requirements involves the preparation of a discussion paper for community input. Following approval of the paper, the Minister will endorse the broad policy approach to the amendments. The Northern Territory advised that amendments to part X of the Act will be introduced to the Legislative Assembly in November 2003. Passage of the amendments is expected in the February 2004 sittings. The Council assesses Northern Territory as not having met its CPA clause 5 obligations because it has not completed the reform process in this area.

Table 9.4: 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*	Payment of the Child Care Benefit to families using 'approved' child care services	The Commonwealth Government 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	New South Wales will replace *the Children (Care and Protection) Act 1987*, which regulates commercial child care services, with regulations in the *Children and Young Persons (Care and Protection) Act 1998,* which provides for the licensing of children's services, information for parents, child numbers, staffing standards, facility standards and administrative procedures and policies.	A regulatory impact statement was prepared, identifying the costs and benefits of the new Regulations, as well as the benefits and costs of alternative schemes of licensing. It found that the proposed method in the Regulations was best, because the net benefits outweighed the costs. The new Regulations are yet to be implemented.	Review and reform incomplete
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)

(*continued*)

Table 9.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Child Care Act 1991* Child Care (Child Care Centres) Regulation 1991 Child Care (Family Day Care) Regulation 1991	Licensing, operating requirements, standards setting	Review was completed in May 2002 and endorsed by the Government in June 2002. Its public benefit test recommended adopting the regulatory tiering framework proposed for the regulation of child care in Queensland.	The *Child Care Act 2002* was passed on 1 November 2002. The Child Care Regulation 2003 is being finalised, and both the Act and Regulation are expected to commence operation on 1 September 2003.	Review and reform incomplete
Western Australia	*Community Services Act 1972* and the Community Services (Child Care) Regulations 1988	Licensing, standards, operating procedures	NCP review was completed in June 2002 and endorsed 10 February 2003. The review recommended retaining the restrictions because they are in the public interest, and expanding the current three-yearly review process of the Regulations to encompass day care outside of school hours day. Another recommendation was to consider, via the three-yearly review process, changing prescriptive regulations to a more outcome-based system within the regulatory framework.	A Bill to replace this Act is being developed and is on the Parliament's legislative agenda for 2003. The Bill is expected to be considered in the spring sitting of Parliament.	Review and reform incomplete
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)

(*continued*)

Table 9.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia (continued)	*Children's Protection Act 1993*	Licensing, standards operating procedures	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. A Child Protection Review in 2002-03 recommended further amendments to the Act and South Australia advised that NCP amendments will be progressed jointly with the child protection recommendations.	Implementation of the recommendations will occur in 2003-04 and amendments to the Act will be introduced into Parliament in the second half of 2004.	Review and reform incomplete.
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*.	Anticompetitive elements were identified in the gatekeeping process. A regulatory impact statement was made available for public comment in September 2000.	Meets CPA obligations (June 2002)
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)

(*continued*)

Table 9.4 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Community Welfare Act*	Licensing, standards setting	Targeted review was completed in 2000. It recommended: either enforce or remove the licensing requirements for children's homes; re-frame child care centre standards as outcomes rather than prescribed standards; clarify the basis and status of standards for child care; and broaden the scope of child care activities that are brought within the licensing net to encompass all forms of purchasable child care service.	Part X of the Act dealing with the licensing of children's homes will be amended. A complete review of the Act will then commence, with a view to replacing it with more contemporary legislation. Amendments will be introduced in the November 2003 sittings of the Legislative Assembly. Passage is expected in the February 2004 sittings.	Review and reform incomplete

Gambling

Gambling has been part of Australian life since European settlement. The industry grew at an unprecedented rate in the past 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 A$1.8 billion in 1989-90 to over A$4.3 billion in 1999-2000 — an average annual growth in real terms of around 7 per cent (Tasmanian Gaming Commission 2001).

Gambling encompasses a wide range of activities, including:

- gaming machines and keno;
- casino games;
- totalisator agency boards (TABs) and other betting on horse racing, other racing and sporting events;
- lotteries;
- interactive gambling; and
- minor 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, ensuring 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;
- ownership structures;
- the monitoring of gaming machines;
- the operation of casinos, lotteries and 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 National Competition Council focused on the Competition Principles Agreement (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 importance of gambling revenue to governments, 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 the Council of Australian Government's (CoAG) 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. It 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 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. Several other 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 — are less likely to be compliant with the second element of the guiding principle. For these types of legislative restriction, governments must show that there is no less restrictive way in which to achieve the objective of the legislation.

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 ones that apply specifically 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.

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 to distinguish which of those tools are more effective.

The Council's approach

The Council published an analysis of its approach to considering review and reform of gambling legislation, taking account of the Productivity Commission findings (NCC 2000). The Council's approach to the main categories of competition restrictions is outlined below.

Consumer protection

Consumer protection measures may include the provision of more and better information concerning the nature of games, the treatment of problem gambling as a public health issue, instigating easy to use self-exclusion measures and redesigning poker machines. The Productivity Commission

findings justify such measures on the basis of harm minimisation and the Council thus considers that jurisdictions that employ these measures could rely on the Productivity Commission arguments to justify the restrictions under NCP.

Probity checks

Probity checking may include measures to prevent the involvement of criminal elements, to ensure that payout ratios are adhered to, to ensure that prizes are appropriately drawn in lotteries and that race meetings are properly conducted. As with consumer protection measures, the Council considers that the Productivity Commission's broad support for these measures provides a clear NCP public benefit justification for them.

Exclusivity

Exclusivity refers to the practice of legislating to grant exclusive rights to the supply certain activities such as casino gambling or lotteries, generally through the issue of exclusive licences. The Productivity Commission cast doubt on the arguments that are frequently raised by jurisdictions in support of exclusivity. It found, for example, that exclusivity arrangements generally do not reduce problem gambling. Exclusive casino licences were an exception, because they restrict access to a particular form of gambling, casino table games. The Productivity Commission noted, however, that table gaming is no longer the dominant gambling activity in most casinos. It considered that other measures — such as harm minimisation programs, including the 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 automatic teller machines (ATMs) at gambling venues — are likely to be more effective than exclusivity in reducing gambling-related harm.

The Productivity Commission found that TAB exclusivity did not appear to be necessary to ensure adequate funding for the racing industry and suggested alternative approaches. It also noted that exclusivity is not essential to ensure probity, pointing out that exclusivity is not the preferred option in other regulated industries with a high probity requirement such as insurance and banking. The Productivity Commission concluded that a better approach would be to institute probity procedures appropriate to the activity and venue. It doubted that regional development provided a sound rationale for gaming licence exclusivity, or that this approach would have any advantages over other policies which would also encourage regional development.

The Productivity Commission also rejected the case commonly put for exclusive lottery licences, that such arrangements allow bigger prize pools. It noted that in most States and Territories, larger pools are being offered through commercial arrangements in which lottery administrators pool their activities.

The Council has previously accepted that the cost of compensating licence holders, where exclusive licences are revoked, may justify a decision not to revoke these licences. However, given the Productivity Commission's view that exclusivity is generally inconsistent with NCP principles, the Council considers that NCP compliance implies that exclusive licences should not be renewed and new exclusive licences should not be agreed without a strong public benefit argument.

Restrictions on venue types

All jurisdictions place restrictions on the places where gambling may be offered. A rationale for these restrictions is to limit gambling to adults by linking gambling and liquor licences. An important restriction in all jurisdictions is different regulation of gaming machines for clubs and hotels. The Productivity Commission concluded that current venue restrictions are based on '…history and arrangements with particular interests, rather than strong policy rationales.' (PC 1999a, p. 14.32).

The Productivity Commission concluded that there may be benefit from adopting a broad risk management approach to limits across all venue types. That is, one criterion for granting gaming licences ought to be the harm associated with different venue types. It found little evidence that clubs provide a less risky environment than hotels, but noted that allowing hotels parity with clubs in the immediate future would greatly increase the number of gaming machines.

For NCP compliance, the Council considers that differences in the regulation of hotels, casinos and clubs should be supported by a public interest justification in terms of harm minimisation. In the absence of such a case, there should be equivalent treatment. The Council notes, however, that achieving equality of regulation in relation to gaming machines may be a gradual process, given many jurisdictions' reluctance to increase overall machine numbers.

Accessibility

Accessibility refers to the ease with which consumers can use gambling services. For example, it is relatively easy to buy a lottery ticket, with outlets spread widely throughout the community. On the other hand, table games are available only in casinos and the restrictions in the licences to operate casinos mean that opportunities to partake of these gambling activities are restricted to a few locations.

The Productivity Commission noted that restrictions on access often arise from policy objectives such as a desire to assist clubs or raise taxation revenues. It found that such rationales do not withstand scrutiny, arguing that the only rationale for regulating access should be to limit social harms and meet community expectations.

The Productivity Commission canvassed a number of measures currently used to limit access, such as caps on gaming machine numbers, including venue caps and linking of liquor licences to gaming machine licences as a way of denying access to gaming machines by those aged under 18. It suggested how these measures may be best used as well as suggesting other measures which would be more effective in reducing hazards associated with gambling. The Productivity Commission favoured harm minimisation strategies over quantitative restrictions. However, it noted that should these strategies not be put in place, there would be a case for some quantity restrictions where gaming machines are not yet widely available (as in Western Australia) or where existing venue caps are set at relatively low levels (as in Tasmania and South Australia). The Productivity Commission also considered that moves to lift the restrictions in place would need to proceed gradually to allow the impacts to be gauged.

The Council considers that measures aimed at reducing access to gambling that attempt to reduce the incidence of problem gambling will comply with NCP obligations. The Council looks to jurisdictions to demonstrate that access limitation is the only way of achieving this objective.

Review and reform activity

All States and Territories scheduled NCP reviews of their gambling legislation. A number of reviews are completed, although governments have yet to act on their review findings in many cases. Many governments also have new legislation that restricts gambling activity. Clause 5(5) of the CPA obliges them to have evidence that the new legislative restrictions are in the public interest.

In several areas, including racing and lotteries, the development of more competitive arrangements is being hindered by jurisdictions' apprehension that unilateral reform will lead to a loss of market to rivals based in other States. Greater interjurisdictional cooperation is needed to ensure the potential benefits from reform are realised.

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. The Productivity Commission inquiry questioned the arguments that governments raised to support exclusive casino licences, but noted that exclusivity arrangements provide a benefit by restricting accessibility to table games. As noted previously, the Productivity Commission considered that more direct measures 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 match 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 by reducing access to table games, exclusive licences can make a limited contribution to reducing problem gambling. The Council also accepts that the cost of compensating licence holders where exclusive licences are revoked may justify a decision not to revoke current 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, as occurred in the Northern Territory. Governments can also decide not to renew exclusive casino licences when they expire, as the ACT Government did.

Table 9.5 summarises jurisdictions' progress in reviewing and reforming their casino legislation.

New South Wales

In 1998, the New South Wales Treasury reviewed the *Casino Control Act 1992* that grants an exclusive casino licence for Star City Casino. 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 increased ease of monitoring for illegal activity, promoting and monitoring product integrity, and managing social problems if there is only one venue. The Government signalled its support for these conclusions, but asked the Treasury to consider further material in developing the review recommendations. A revised report was completed in March 2003.

The revised report reached broadly the same conclusions as those of the first report. It acknowledged that licence exclusivity may not be consistent with NCP principles. However, it found no feasible or less restrictive option for casino gambling at this time, given the nature of the exclusivity agreement with the single licence holder and the liability for substantial compensation for terminating the agreement. Additionally, the revised report found that the exclusive licence arrangement was a reasonable approach to the gradual liberalisation of the gaming market in an environment of community apprehension about the possible social costs.

The revised report drew attention to the competitive selection process for the single licence holder. While noting that the monopoly profits of the venture are shared with the New South Wales public via a progressive taxation regime, the revised report acknowledged that the establishment of exclusivity arrangements to maximise taxation revenue is not a sound basis for the restriction.

The revised report found that other restrictions in the legislative regime focus on consumer protection and probity matters, and are not unduly restrictive. It recommended that the Government consider the case for liberalising the casino gaming market as the 2007 exclusivity expiry date approaches. Specifically, it recommended that consideration be given to providing no new exclusive casino licences, not renewing existing exclusive licences on expiry and removing any legislative barriers to new entry into the casino gaming market. New South Wales anticipates making a final decision on the revised review recommendations in 2003.

Because New South Wales did not complete its reform activity, the Council assesses it as not having met its CPA obligations relating to casino regulation.

Victoria

In its 2002 NCP assessment, the Council assessed Victoria as having met its CPA obligations in relation to the *Casino Control Act 1991* and the *Casino (Management Agreement Act) 1993*. The Council accepted Victoria's position that the compensation required to remove the exclusive licence would outweigh any benefits from such an action.

Queensland

Queensland's review of its casino legislation also cited the costs of compensating casino operators as the reason for not revoking their exclusive licences. In its 2002 NCP assessment, the Council assessed Queensland as having met its CPA obligations for the four Acts that establish an exclusive licence for each Queensland casino.

Queensland's *Casino Control Act 1982* provides the Government with the power to grant licences for the operation of casinos in Queensland. This Act is being reviewed as part of Queensland's omnibus review of its gambling legislation. A draft review published in March 2003 supported the power of the Government to grant licences, citing (1) the licensees' contribution to the development of tourism facilities as a condition of their licence and (2) the need to control gambling opportunities. The Government is considering its response to the draft report.

The Council accepts the general principle of casino licensing, although the terms and conditions of licences have frequently created competition concerns. The Council assesses Queensland as complying with its CPA obligations relating to casino regulation.

Western Australia

Western Australia's *Gaming Commission Act 1987* requires a licence for the operation of a casino. The review of this Act recommended retaining this

requirement. The exclusivity period for the Burswood Casino licence has expired, but the legislation giving effect to the licence (the *Casino Control Act 1984* and the *Casino [Burswood Island] Agreement Act 1985*) 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 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. The Government reached agreement with Burswood Nominees Pty Ltd and Cabinet gave approval for drafting of the necessary legislative amendments to the Casino (Burswood Island) Agreement Act, which include:

- removing the 10 per cent individual shareholder limitation in September 2003; and

- accepting, in principle, a three-tier taxation system for a 10-year period, under which the rate varies according to whether the format is video gaming machines, table games or international business.

These amendments, however, do not address the remaining competition restrictions, although the key restriction — the exclusive licence period— expired. Given that Western Australia did not complete its reform activity, the Council assesses Western Australia as not having complied with its CPA obligations in relation to casino licensing.

South Australia

South Australia has reviewed its gambling legislation (including the *Casino Act 1997*, which stipulates that only one casino licence be issued) in the light of the 3 November 2000 CoAG meeting and the 1999 Productivity Commission inquiry. The review was finalised in March 2003. The Government agreed with the review finding that advantages of probity regulation and harm minimisation arise from having only one casino licence, and noted that financial losses would arise from revoking the exclusive licence. The Government undertook to review the case for exclusivity as its expiry nears, accounting for the financial benefit to the community from exclusivity and the regulatory options available to ensure a responsible gaming environment.

Although the Productivity Commission found that exclusive licences may contribute to harm minimisation via reduced access to table games, the inquiry cast doubt on the link between exclusive licences and enhanced probity. However, the Council accepts that South Australia would incur significant costs from revoking the exclusive casino licence before the expiry date. The Council assesses South Australia as having met its CPA clause 5 obligations relating to casino regulation.

Tasmania

In its 2001 NCP assessment, the Council assessed Tasmania as complying with its CPA obligations, following its repeal of 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 Act did not consider the Deed between the Government and Federal Hotels, which provides for an exclusive licence for Federal Hotels to operate casinos and gaming machines in Tasmania until 2008.

In correspondence dated 13 December 2001, Tasmania advised the Council that:

- a compensation claim would arise from revoking the exclusive licence; and
- it did not intend extending or renewing the licence with Federal Hotels beyond its expiry date.

In response, the Council indicated that it:

- accepted Tasmania's argument that the likely compensation claim from early termination of the exclusive licence may exceed any benefits from ending the licence before its expiry date; and
- sought a clear undertaking that Tasmania would not consider any exclusivity arrangements beyond 2008 with any potential operator.

On 6 May 2003, the Tasmanian Treasurer advised the Council that Tasmania would introduce legislation granting Federal Hotels an exclusive 15 year licence to conduct casino and gaming machine operations. The analysis presented in the regulatory impact statement accompanying the proposed legislation is largely concerned with gaming machines, stating that its arguments are appropriate to gaming machines in both casinos and other licensed venues. The Council's discussion of the regulatory impact statement can be found in the section on gaming machines later in this chapter.

Although the Council considers that an exclusive casino licence can provide a limited public benefit by restricting access to table games, the cost of the restriction is difficult to determine, depending on whether additional casinos would seek to operate in Tasmania in the absence of exclusivity. The Council has already indicated its acceptance of Tasmania's position that the likely compensation claim from termination of the exclusive licence before 2008 may exceed any benefits from ending the licence before this date. However, the Council would consider Tasmania as failing to meet its CPA obligations if the proposed extension to the exclusive licence proceeds. The Council considers that an extension of the exclusive licence would have the effect of entrenching a monopoly provider for a lengthy period without the support of a

compelling public interest case. The Council assesses Tasmania as not having met its CPA obligations in relation to casino legislation.

The ACT

The ACT's review of the *Casino Control Act 1998* found no public interest justification for the exclusive licence held by Casino Canberra. Like several other jurisdictions, however, it considered that compensation for early revocation would be prohibitive. The review recommended that the Government signal that it will not extend the licence. The Government since stated that it will not extend the exclusivity of the current Casino Canberra licence beyond the expiry date, so the Council considers that the ACT has met its CPA clause 5 obligations relating to casino regulation.

The Northern Territory

The Northern Territory is reviewing casino restrictions in its *Gaming Machine Act* and Regulations, and *Gaming Control Act*. A full public review of these Acts has been completed and is due to be considered by the Government in September/October 2003. Because the Northern Territory did not complete its review and reform activity, the Council assesses it as not having met its CPA obligations in relation to casino regulation. The Council notes, however, that the Northern Territory has multiple casino venues and previously encouraged casino operators to relinquish early their exclusive licences. The Council thus considers that the Northern Territory has demonstrated a commitment to reform.

Table 9.5: Review and reform of legislation regulating casinos

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Casino Control Act 1992*	Exclusive licence	Review was completed in 1998. An updated review was completed in 2002. It recommended that the Government consider liberalising the casino gaming market near the 2007 exclusivity expiry date.		Review and reform incomplete
Victoria	*Casino (Management Agreement) Act 1993* *Casino Control Act 1991*	Exclusive licence	NCP review did not proceed because preliminary investigations indicated that the compensation required to remove the exclusive licence would outweigh any benefits from revoking the licence.		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	Review was completed in 1998.	Provisions were retained.	Meets CPA obligations (June 2002)

(*continued*)

Table 9.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Casino Control Act 1982*	Licensing	Act was included in an omnibus public benefit test review of gambling legislation. A draft review report was released for public consultation in April 2003. The Government's response is expected later in 2003.		Meets CPA obligations (June 2003)
Western Australia	*Casino Control Act 1984* *Casino (Burswood Island) Agreement Act 1985* Casino Control (Burswood Island) (Licensing of Employees) Regulations 1985	Licensing, market conduct, operations	Review was completed in 1998.	Exclusive licence expired and was not renewed. Other barriers to entry that are not in the public interest were removed. The Government is negotiating remaining entry restrictions with the casino operator.	Review and reform incomplete
South Australia	*Casino Act 1997*	Exclusive licence	Omnibus review was completed in 2003. It found that removing exclusive licences would involve significant compensation costs and the potential cost of additional problem gambling.	Government accepted the review finding and undertook to review the case for exclusive licences towards the end of the exclusivity period.	Meets CPA obligations (June 2003)
Tasmania	*Casino Company Control Act 1973*	Ownership	Minor review was completed.	Act was repealed.	Meets CPA obligations (June 2001)

(*continued*)

Table 9.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania (continued)	*Gaming Control Act 1993*	Deed provision of an exclusive casino licence	No review of the 1993 deed. A proposed extension of the exclusive licence was accompanied by a regulatory impact statement which argued that the extension was in the public interest because it prevented an increase in gaming machine numbers in venues where more intensive machine use is likely.	Parliament is yet to pass a Bill to implement the extension of the exclusive licence.	Review and reform incomplete
ACT	*Casino Control Act 1988* *Games, Wagers and Betting-houses Act 1901* *Gaming and Betting Act 1906*	Licensing, conduct	Reviewed was completed in 1998 as part of a broader review of ACT gambling legislation. It recommended no change to the *Games, Wagers and Betting-houses Act 1901* and the *Gaming and Betting Act 1906*.	The Government decided not to extend the casino licence beyond its expiry date.	Meets CPA obligations (June 2003)
Northern Territory	*Gaming Control Act* and Regulations *Gaming Machine Act* and Regulations	Licensing, operations, conduct	Review was completed and is due to be considered by the Government shortly.		Review and reform incomplete

TABs

TAB legislation in every jurisdiction provides an exclusive licence to operate off-course totalisator betting.[3] All jurisdictions reviewed their TAB legislation, some in the context of TAB privatisation. Reviews generally found that the exclusive licence is required to safeguard the totalisator prize pool and, consequently, the funding provided to the racing industry.[4] The findings of the Productivity Commission inquiry cast some doubt on this claim. The Productivity Commission argued 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, it considered that the exclusive licence would offer little protection to a TAB (and therefore to racing industry funding) if alternative providers offered home gambling and sports betting services. The Productivity Commission found that while there is a case for government intervention in response to market failure in the racing industry,[5] TAB exclusivity is not necessary to ensure adequate funding for the industry.

While the Council noted earlier that exclusive casino licences can contribute to harm minimisation by restricting access to a particular form of gambling (table games), exclusive TAB licences do not limit access to totalisator gambling and cannot be justified on this basis.

Given the Productivity Commission findings, the Council stated in its 2002 assessment that governments that retain exclusive TAB licensing arrangements to ensure adequate funding of the racing industry have not addressed their obligations under the CPA clause 5. The Council conceded, however, that the cost of compensating some TABs for revoking their exclusive licence is likely to be high and may be a reason for retaining exclusive licences until their expiry.

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 its exclusive licence expires in 2012, indicate scope for removing exclusive TAB licences in those jurisdictions.

Governments' concern about shoring up prize pools, along with the cross-border questions (including revenue and taxation sharing arrangements)

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3 TABs also offer other gambling products, such as fixed-odds betting on sporting events.

4 In this context, the 'racing industry' refers to thoroughbred, harness and greyhound racing.

5 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.

raised by New South Wales and the ACT suggests that an interjurisdictional approach may be needed to consider the future of TAB licences. The ACT expressed its willingness to consider non-exclusive TAB licensing arrangements further and to participate in an interjurisdictional forum to examine the matter. The ACT was also instrumental in the establishment of a national task force to examine issues of cross-border betting by race and sports bookmakers, and it would prefer to defer any examination of TAB licensing issues until the task force findings are known.

While acknowledging that exclusive wagering 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 looked for governments to consider this issue further through an intergovernmental process such as the Cross-Border Betting Task Force or the Racing Ministers' Conference. Table 9.6 summarises jurisdictions progress in reviewing and reforming their TAB legislation.

New South Wales

The review of the *Totalizator Act 1997*[6] argued that the New South Wales TAB (TAB Limited) exclusive betting licence ensures at least two totalisators operate and compete in Australia, with TAB Limited acting as a counter to the large, privatised Victorian TAB. The New South Wales report noted, however, that both these totalisators face competition, not just from each other but also from interstate and international wagering operators. This appears to cast doubt on the validity of the argument for at least two totalisators. If the market is defined narrowly (as totalisator betting), then competition would be lessened by having only one service provider. If totalisator betting is part of a larger gambling services market in which close substitutes for totalisator betting exist, then the need to ensure the existence of at least two totalisators is less crucial.

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 it may consider introducing multiple wagering licences after the licence expires. 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.* (Government of New South Wales 2002, p. 31)

[6] The Act that repealed and replaced the *Totalizator Act 1916* and the *Totalizator (Off Course Betting) Act 1964*.

The Council accepts New South Wales position on the high cost of revoking TAB Limited's exclusive betting licence and assesses New South Wales as having complied with its CPA obligations in regard to the Totalizator Act.

Victoria

Victoria's privatised TAB, TABCORP, has an exclusive 18-year licence for off-course pari-mutuel betting under the *Gaming and Betting Act 1994*. 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 TAB Limited's exclusive licence: that is, 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 did 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. While it is likely that the costs of buying back the licence outweigh the benefits, Victoria's review did not consider the case for revoking the exclusive licence. However, in subsequent correspondence with the Council, Victoria has drawn attention to the substantial compensation that would be required if the TABCORP licence was revoked. The Council accepts that this compensation is likely to outweigh the benefits from revoking exclusivity and thus assesses Victoria as having met its CPA obligations in relation to the Gaming and Betting Act.

Queensland

In its 2001 NCP assessment, the Council assessed Queensland as complying with its CPA obligations in relation to the *Racing and Betting Act 1980*. Queensland replaced the TAB-related provisions in the Racing and Gaming Act with the *Wagering Act 1998*, including provisions for granting an exclusive licence to Queensland's TAB.

Queensland's omnibus review of gambling regulation included a review of the Wagering Act. The draft review report was released for public consultation in April 2003 and argued that the exclusive licence is necessary to ensure the

viability of the State's racing industry and that its removal would signal that the Government is encouraging a proliferation of gambling opportunities. The Government also faces significant compensation costs if the exclusivity were to be revoked.

Given that Queensland did not complete its review and reform activity, the Council assesses Queensland as not having complied with its CPA obligations in relation to the Wagering Act.

Western Australia

Western Australia's review of its TAB legislation (the *Betting Control Act 1954* and the *Totalisator Agency Board Betting Act 1960*) recommended that the legislation should allow the Minister to grant additional off-course totalisator licences. Western Australia considered this recommendation in the context of a review of the governance structure of its racing industry. It decided to retain an exclusive licence to conduct off-course totalisator betting for the newly formed racing industry governing body, Racing and Wagering Western Australia, to give the organisation time to establish and to consolidate its racing and wagering activities before possibly facing competition.

Western Australia's decision to reject its review recommendation and continue its ban on the licensing of additional off-course totalisators represents a missed opportunity for reform. Western Australia does not face the prospect of having to compensate the licence holder for revoking exclusivity. Western Australia's reasons for maintaining exclusivity do not constitute a sufficient public benefit argument to justify the State's indefinite continuation of exclusivity. The Council thus assesses Western Australia as not having met its CPA obligations in relation to TAB licensing.

South Australia

South Australia sold its TAB in August 2001. It considered the exclusive TAB licence, granted under the *Authorised Betting Operations Act 2000*, as part of its 2003 omnibus review of its gambling legislation. The Government agreed with the review findings that a financial loss to the community would arise from revoking the exclusive licence and that advantages of probity regulation and harm minimisation arise from having one provider. The Government undertook to review the case for exclusivity nearer to the licence's expiry, accounting for the financial benefit available to the community from granting exclusivity and the regulatory options available to ensure a responsible gaming environment. The Council is not convinced that probity regulation and harm minimisation are enhanced by the exclusive licence. However, the Council accepts that the cost of revoking the licence would be likely to outweigh the benefits, and thus assesses South Australia as having met its CPA obligations in relation to TAB licensing.

Tasmania

In Tasmania, the *Racing Regulation Act 1952* regulates the operation of totalisator betting and the relationship TOTE Tasmania (formerly the TAB) with the racing industry. The Tasmanian Government agreed to prepare legislation that will transfer the regulation of TOTE Tasmania from the Racing Regulation Act to the *Gaming Control Act 1993* and to assess the proposed new legislation under the State's gatekeeper provisions for new legislation (see chapter 13).

TOTE Tasmania has a monopoly in the provision of wagering services from approved locations (over-the counter) in Tasmania. Apart from totalisator wagering, this monopoly will end on 31 December 2003. From 2004, a Tasmanian gaming licence holder with fixed odds or sports betting endorsements will be able to provide services either over-the-counter or at an approved sporting event. However, the new legislation will retain TOTE Tasmania's monopoly on the provision of totalisator wagering services. A regulatory impact statement will be prepared before the legislation is introduced, which is expected to be in the spring 2003 session of Parliament. Because Tasmania did not complete its review and reform activity, the Council assesses it as not having complied with its CPA obligations with relation to totalisator licensing.

The ACT

The *Betting (ACTTAB Limited) Act 1964* and the *Betting (Corporatisation) (Consequential Provisions) Act 1996* govern the operations of the ACT's TAB and provide for an exclusive licence. The review of this legislation 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 the review recommendations, noting that care needs to be exercised in assessing the social impacts of opening up the totalisator market. Further, the Government noted that the 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 ACT expressed its willingness to consider further the issue of non-exclusive TAB licensing arrangements and to participate in an interjurisdictional forum on the matter. The ACT would prefer to defer any examination of TAB licensing issues until the findings of the National Cross-Border Betting Task Force are known.

Because the ACT did not complete its reform activity, the Council assesses it as not having complied with its CPA obligations in relation to TAB regulation.

Northern Territory

The Northern Territory Government reviewed the *Totalisator Licensing and Regulation Act* and the *Sale of NT TAB Act*. [7] The Government accepted the review recommendations and advised that no legislative change is necessary. The Northern Territory undertook to supply the Council with a copy of the review and the Government's response in mid-2003, when it anticipated having completed negotiations regarding the sale of the NT TAB

The Council assesses the Northern Territory as not having complied with its CPA obligations in relation to TAB regulation. At the time of 2003 NCP assessment, the Council had not received the Northern Territory's public benefit arguments for retaining restrictions. If these arguments are robust, then the Northern Territory would comply with its CPA obligations in this area.

[7] These Acts repealed and replaced the *Totalisator Administration and Betting Act*.

Table 9.6: Review and reform of TAB legislation

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Totalizator Act 1916* *Totalizator (Off-Course Betting) Act 1964*	Market conduct, rules, establishment of the TAB	Review was not required.	Acts were repealed and replaced by the *Totalizator Act 1997*.	Meets CPA obligations (June 2001)
	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.	The Government argued that the cost of breaking the exclusive licence agreement (which does not expire until 2012) would more than outweigh any benefits. It indicated that it may consider introducing multiple wagering licences once the exclusive licence expires and that it will continue to work with other jurisdictions minimise any adverse cross-border impacts.	Meets CPA obligations (June 2003)
Victoria	*Gaming and Betting Act 1994* as it relates to betting	Licensing, legislated monopoly, market conduct, operations, funding for the racing industry	Review was completed in 1998. It recommended retaining the TABCORP monopoly to ensure an adequate prize pool size in Victoria to generate adequate funds for the racing industry. Victoria has indicated that substantial compensation would be required if the TABCORP licence was revoked.	The Government supported the review findings.	Meets CPA obligations (June 2003)
Queensland	*Racing and Betting Act 1980* and associated rules and Regulations (as they relate to the Queensland TAB)	Exclusive licence, market conduct, operations		The TAB-related provisions of the Act were 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)

(*continued*)

Table 9.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland (continued)	*Wagering Act 1998*	Exclusive TAB licence	Omnibus public benefit test review is under way. A draft review report was released for public consultation in April 2003. The Government's response is expected later in 2003.		Review and reform incomplete
Western Australia	*Betting Control Act 1954* *Totalisator Agency Board Betting Act 1960*	Exclusive TAB licence	Review was completed in 1998. It recommended relaxing restrictions on the operation of totalisators other than the TAB.	The Government retained the prohibition on the licensing of additional off-course totalisators in the Bills that restructure its racing industry.	Does not meet CPA obligations (June 2003)
South Australia	*Authorised Betting Operations Act 2000*	Exclusive TAB licence	Omnibus review is complete. It finds that removal of the TAB exclusive licences would involve significant compensation costs and has the potential cost of additional problem gambling.	The Government accepted that revoking exclusive licences would not be in the public interest.	Meets CPA obligations (June 2003)
Tasmania	*Racing and Gaming Act 1952* (except as it relates to minor gaming) which was renamed the *Racing Regulation Act 1952*	TAB Licensing and operations	The Tasmanian Government has agreed to the preparation of legislation that will transfer the regulation of TOTE Tasmania from the *Racing Regulation Act 1952* to the *Gaming Control Act 1993*. The proposed new legislation will be assessed in accordance with Tasmania's gatekeeper provisions.	The Government indicated that other providers of fixed odds or sports betting endorsements will be able to operate from 2004, either over-the-counter or at an approved sporting event. However, new legislation will retain the TOTE Tasmania monopoly on the provision of totalisator wagering services.	Review and reform incomplete

(*continued*)

Table 9.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Betting (ACTTAB Limited) Act 1964* *Betting (Corporatisation) (Consequential Provisions) Act 1996*		Review was completed in 1999. It 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 ACT expressed its willingness to consider further the issue of non-exclusive TAB licensing arrangements and to participate in an interjurisdictional forum on the matter. The ACT was instrumental in the establishment of a national task force to examine issues dealing with cross border betting by race and sports bookmakers and would prefer to defer any examination of TAB licensing issues until the findings of the task force are known.	Review and reform incomplete
Northern Territory	*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*	Licensing	Review was completed in 2001. The review and the Government's response will be available following the completion of preliminary measures necessary to implement the findings of the review.	The Government approved the review recommendations in February 2002. No legislative changes are necessary.	Review and reform incomplete

Lotteries

Like TAB legislation, lotteries legislation is characterised by exclusive licences. Governments usually justify exclusive lottery licences on the basis that they are 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. Furthermore, as is the case with exclusive TAB licences, exclusive lottery licences do not have the virtue of limiting access to lottery gambling opportunities.

Most governments reviewed their legislation regulating lotteries, sometimes as part of broad reviews of all their gambling legislation. Some jurisdictions introduced or are considering arrangements providing for more than one lottery provider. Following its review and reform, Tasmania has the potential for competition to occur between suppliers of over-the-counter lottery services. In its 2002 NCP assessment, the Council assessed Tasmania as having met its CPA obligations in this area. Table 9.7 summarises jurisdictions progress in reviewing and reforming their lotteries legislation.

New South Wales

In New South Wales, the *Public Lotteries Act 1996*[8] governs lotteries and other games such as lotto and soccer pools. This Act provides for the licensing of operators of commercial lotteries and for the regulation of such games. When NSW Lotteries was corporatised under the *NSW Lotteries Corporatisation Act 1996*, it was granted an exclusive licence to conduct seven lottery games until 2007, after which the licences become contestable. New South Wales conducted statutory five-year reviews of these Acts. The review reports were tabled in Parliament in December 2002 and a Government decision on the competition issues raised in the reports is anticipated in mid-2003 following further public consultation.

The reviews recognised the potential costs arising out of exclusivity arrangements (such as limits on the ability of Government to transfer a licence to another party), but recommended retaining the exclusive licence until the legislated expiry date. It considered repealing the provisions before this date would have a net public cost. It found that NSW Lotteries has made long-term decisions based on the exclusive period specified in the licences, and that to reduce the exclusivity period might undermine the corporation's financial viability. The review also noted that no other jurisdiction appears likely to make their licences contestable before this date, so that the lifting of the restrictions would be a significant competitive disadvantage to New South Wales and result in a transfer of lottery activity and revenue to other States.

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8 The Public Lotteries Act replaces the *Lotto Act 1979,* the *NSW Lotteries Act 1990* and the *Soccer Football Pools Act 1975.*

The review also considered that an immediate deregulation of current arrangements would be contrary to the Government policy of restricting the growth of new gambling opportunities in New South Wales.

Other competition issues considered by the review included the less stringent harm minimisation requirements imposed on lottery gaming compared with other gaming, such as poker machines. The review found that the differing approaches are justified on the basis that other gaming poses substantially greater risks of harm — a finding that the Productivity Commission inquiry supported.

Because New South Wales did not complete its reform activity, the Council assesses it as not having met its CPA obligations in relation to lotteries legislation.

Victoria

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 lottery 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 New South Wales lapses in 2007. It also stated that it intends to issue public lottery licences after July 2007 through a transparent, contestable, competitive tender. In the 2002 NCP assessment, the Council considered that Victoria's public interest arguments justified transitional reform implementation. It thus assessed Victoria as meeting its CPA obligations in relation to lottery legislation

In 2003 Victoria extended the Tattersall's exclusive licence until 2007. The extended licence was granted on the basis that Tattersall's agrees with the Gaming Minister on a format that discloses the costs of operating its gaming related licences in Victoria, so as to create greater transparency in financial reporting. Victoria remains concerned that any move to increase licence numbers is likely to provide limited economic benefits for the State while every other State has a sole licensed operator. Victoria also pointed out that larger prize pools and larger jackpots resulting from a single seller increase player interest and ticket sales. The Council considers that these considerations do not constitute a sufficient public benefit argument for extending exclusivity. While the Council recognises that Victoria established the conditions for multiple provision of lottery services and the opportunity for a national market after 2007, it now assesses Victoria as not having complied with its CPA obligations in relation to lotteries.

Queensland

Following its initial NCP review of the *Lotteries Act 1994*, 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's omnibus review of gambling regulation included a review of the new legislation, the *Lotteries Act 1997*. The draft report of the omnibus review was released for public consultation in April 2003. It argues that the exclusive licence was necessary to facilitate the extensive infrastructure required to deliver the product and to ensure the continued short-term viability of existing lotteries in Queensland. In addition, the costs to the Government of breaching the licence, along with the proliferation of gambling that may arise from the granting of additional licences, would pose an appreciable cost to the community. The review recommended retaining the exclusive licence until its expiry.

While the Government has not completed reforms arising from the omnibus gambling review, the Council accepts that for Queensland to revoke its exclusive lottery licence before its expiry date would involve significant cost to the community. The Council thus assesses Queensland as having met its CPA obligations in relation to lotteries legislation.

Western Australia

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 that provides for the Government to license operators other than the Lotteries Commission if 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 in the public interest. It is not clear whether the current powers of the Lotteries Commission are consistent with the more competitive lotteries market recommended by the review of the Gaming Commission Act.

Because Western Australia did not complete its reform activity, the Council assesses it as not having complied with its CPA obligations in relation to lotteries.

South Australia

South Australia reviewed lottery legislation as part of its omnibus review of gambling legislation. The review found that, while the State-operated Lotteries Commission does not have exclusivity in a technical sense, it enjoys market dominance that is not dissimilar to exclusivity. The review raised the following arguments in favour of maintaining the current arrangements.

- The Lotteries Commission has a wide distribution network. Increased competition may lead sellers to focus on profitable areas to the detriment of regional South Australia.

- Exclusivity provides for the highest probity standards. In addition, the Independent Gambling Authority must approve Lotteries Commission codes of practice.

- Exclusivity maximises the revenue available to the community as owner of the exclusive licence.

- Lottery entry costs are lower in South Australia than in the ACT, where there is competition between two suppliers of lottery products.

However, the review provided little detailed analysis to support its conclusions.

- There is no evidence to suggest that multiple sellers of lottery products would not service regional South Australia.

- Sellers other than the Lotteries Commission can be subject to probity checks at little additional cost.

- While the cost of a lotto ticket may be slightly less in South Australia than the ACT, the review did not consider the likely return via prize money.

- No evidence was provided to support the contention that current arrangements maximise community revenue.

The Government accepted the review recommendation to maintain exclusivity, stating that the availability and terms of lottery products through the Lotteries Commission are adequate and that the community obtains a financial benefit from the current arrangements.

The Council assesses South Australia as not having met its CPA obligations in relation to lotteries legislation because it considers that the Government's public benefit arguments do not support indefinitely retaining exclusivity for the Lotteries Commission.

The ACT

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 from any legislative restrictions. It also found no barrier to new entrants. The review recommended no change to the legislation, and the Government accepted this recommendation.

The restrictions in the ACT legislation are aimed at probity and do not limit the number of lottery providers. The Council thus assesses the ACT as having complied with its CPA obligations in relation to lottery legislation.

The Northern Territory

The Northern Territory completed a review of *Gaming Control Act*, which regulates the Territory's lotteries. A Government response to the review was anticipated before 30 June 2003.

Given that the Northern Territory did not complete review and reform activity, the Council assesses it as not having complied with its CPA obligations in relation to lottery legislation.

Table 9.7: Review and reform of lotteries legislation

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*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)
	NSW Lotteries Corporatisation Act 1996 *Public Lotteries Act 1996.*	Exclusive licensing	Statutory reviews incorporating an assessment of NCP issues were completed in December 2002. The reviews considered that there would be a net public cost in repealing the exclusive licence provisions before their expiry date. To reduce the period might undermine the licensee's financial viability. Also, lifting the restrictions in the absence of a national market would pose a significant competitive disadvantage to New South Wales and result in a transfer of lottery gaming activity and revenue to other States.	A decision on the competition issues raised in the review reports is anticipated later in 2003, following further public consultation.	Review and reform incomplete (June 2003)

(*continued*)

Table 9.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Tattersall Consultations Act 1958* *Public Lotteries Act 2000*	Legislated monopoly	Review was completed in 1997.	*Public Lotteries Act 2000* repealed this Act. New Act allows for multiple suppliers, but Victoria has extended the exclusive Tattersalls licence until 2007.	Does not comply (June 2003)
Queensland	*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 the *Lotteries Act 1997*, which was reviewed as part of the omnibus review of gambling in Queensland.	Meets CPA obligations (June 2001)
	Lotteries Act 1997	Exclusive licence	Act was reviewed as part of the omnibus review of gambling in Queensland. A draft review report was released for public consultation in April 2003. The Government's response is expected later in 2003. The draft report found that the exclusive licence is necessary to ensure the viability of existing Queensland lotteries and should be retained until its expiry date. The Council accepts the public interest evidence.	No reform is necessary.	Meets CPA obligations (June 2003)

(*continued*)

Table 9.7 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 was completed. It recommended retaining restrictions.	The Government is considering its response.	Review and reform incomplete
Western Australia (continued)	*Gaming Commission Act 1987*	Lottery licensing	Review was completed in 1998. 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 that are the subject of such an agreement; allowing for the licensing of professional fundraisers; removing the definition of 'foreign lottery' from the legislation; and making related amendments.	The Government is considering its response. Amendments will affect the *Lotteries Commission Act 1990*.	Review and reform incomplete

(*continued*)

Table 9.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*State Lotteries Act 1966*	Exclusive licence	Omnibus review was completed in 2003. It recommended retaining the effective exclusivity of the Lotteries Commission's licence because exclusivity • ensures a wide distribution network that includes regional South Australia; • provides for the highest probity standards; • maximises the revenue available to the community; and • provides low lottery entry costs compared with those in the ACT where there is competition between lottery suppliers.	The Government accepted that revoking exclusive licences would not be in the public interest.	Does not comply (June 2003)
Tasmania	*Gaming Control Act 1993* (as applying to lotteries)	Licensing	Review was completed.	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.	Meets CPA obligations (June 2002)

(*continued*)

Table 9.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Lotteries Act 1964* *Pool Betting Act 1964* *Unlawful Games Act 1984*		Review was completed in 1998. It found that the current duopoly is no barrier to new entrants and recommended no change to the legislation.	The Government accepted the recommendation.	Meets CPA obligations (June 2003)
Northern Territory	*Gaming Control Act* and regulations	Licensing	Review was completed the review report is under consideration by the Government.		Review and reform incomplete

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, and restrictions on betting on other sports events.

All jurisdictions except Tasmania completed reviews of all their racing and betting legislation. Tasmania restructured its racing industry and is drafting new legislation, which it will assess via its legislation gatekeeping process (see chapter 13). Table 9.8 summarises jurisdictions' progress in reviewing and reforming their racing and betting legislation.

New South Wales

The New South Wales review of its racing and betting legislation (the *Racing Administration Act 1995*, the *Greyhound Racing Authority Act 1985* the *Harness Racing Act 1977*, the *Bookmakers Taxation Act 1917* and the *Thoroughbred Racing Board Act 1996*) recommended only minor changes to the State's racing and betting legislation. The Government accepted the review recommendation to allow bookmakers to operate as proprietary companies. The review also recommended retaining other restrictions, such as the Racing Administration Act's requirement of a A$200 minimum phone bet for bookmakers and its prohibition on interstate betting providers advertising in New South Wales. The minimum bet level was reduced to A$100 from 25 February 2003 and only applies to metropolitan gallops meetings.

In the Council's 2002 NCP assessment, it assessed New South Wales as having met its CPA obligations in relation to the *Sydney Turf Club Act 1943*, and the *Australian Jockey Club Act* 1873. The Council's 2002 NCP assessment report also contains a full discussion of the review, its recommendations and the Council's assessment that New South Wales had not met its CPA obligations in relation to the minimum bet levels and advertising restrictions contained in the Racing Administration Act. The Council assesses the remaining legislation as having complied with CPA obligations

Victoria

Victoria 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 was mostly complete at the time of the 2002 NCP assessment. After

consultation with the industry, the following progress took place during 2002-03.

- The phased reduction of minimum telephone bet limits, initiated in July 2001, continued. The limits will be reduced each year until totally abolished by July 2004.

- Amendments to relevant legislation were passed in 2002 allowing individually registered bookmakers to form partnerships subject to approval by the Bookmakers and Bookmakers' Clerks Registration Committee and the licensing requirements of the controlling bodies. The amendments also allow individually registered bookmakers to form restricted corporations in which only bookmakers may serve as directors or hold shares, and subject the operation of such corporations to approval by the committee and the licensing requirements of controlling bodies.

- The Government indicated its willingness to remove restrictions on 24-hour trading on race meetings for appropriately monitored telephone or Internet betting subject to the requirement that bookmakers operate from licensed racecourses. It varied trading hours to allow betting from 'scratching time' (usually 8.00 am) until three hours after the last race held at the venue on the day.

- The Government also indicated that it may approve internet betting once the racing industry and the bookmaking profession develop a whole-of-industry system and an associated body of rules that will safeguard the interests of punters and the racing industry.

The Council assesses Victoria as having complied with its CPA clause 5 obligations relating to the regulation of the racing and betting industry.

Queensland

The Queensland Government's review of its racing and betting legislation reported in 2000. The Government consequently implemented a number of reforms, including removing the A$200 minimum bet limit on bookmakers and removing of the prohibition on the entry of other racing codes into the regulated racing industry through the *Racing Act 2002*. Queensland undertook a further public benefit test on Racing Act restrictions which either were not covered in the earlier review or were inconsistent with the review's recommendations. All identified restrictions were assessed as being in the public interest. The Queensland Government now has no direct involvement in the State's racing industry other than to ensure probity and integrity.

The Council assesses Queensland as having complied with its CPA clause 5 obligations relating to the regulation of racing and betting.

Western Australia

Western Australia completed reviews of its racing industry legislation, then repealed the *Racing Restrictions Act 1927*, (which governed aspects of greyhound racing), and reformed the *Betting Control Act 1954*, the *Totalisator Agency Board Betting Act 1960*, the *Racing Restrictions Act 1917* and the *Western Australian Greyhound Racing Association Act 1981* via four Bills that were before the Parliament at 30 June 2003. The Bills propose to merge the principal club functions of the Western Australian Turf Club, the Western Australian Trotting Association and the Western Australian Greyhound Racing Authority, together with the off-course betting activities of the TAB, into a single controlling authority to be known as Racing and Wagering Western Australia.

While the Government is implementing many NCP review recommendations (including the establishment of a controlling authority for horse racing that is not thoroughbred racing or harness racing), two significant restrictions remain.

- The prohibition on the licensing of additional off-course totalisators, which will provide a competitive advantage to Racing and Wagering Western Australia (see section on TABs).

- Minimum bet levels for bets lodged via the telephone or Internet with Western Australian bookmakers will continue, although at reduced levels. From 1 April 2003, the minimum bet level has been reduced from A$200 to A$100 for metropolitan betting and A$100 to A$50 for country betting. From 1 July 2003, the minimum bet for Western Australian bookmakers has been reduced to $50 for metropolitan betting and there is no longer a minimum bet for country betting. Racing and Wagering Western Australia will further review the issue of minimum bets before July 2004. In announcing these changes, the Minister noted that they would bring Western Australia into line with Victoria, South Australia and Tasmania, and were part of a national plan to achieve consistency in all areas of bookmakers' operations.

Western Australia retained these restrictions, contrary to the recommendations of its review. The Government has argued that the reductions in minimum bet levels will bring the State into line with Victoria and South Australia. but Victoria is committed to removal of the minimum bet level in 2004 and South Australia's review recommended its removal. Queensland and the ACT have already removed the restriction.

The Council assesses Western Australia as complying with its CPA obligations in relation to the *Racing Restrictions Act 1927*. Given that Western Australia did not complete its reform activity, and that its proposed reforms retain two significant restrictions which are not supported by a public interest case, the Council assess the State as not complying with its CPA obligations in relation to the balance of its racing and betting legislation.

South Australia

South Australia repealed the *Racing Act 1976* and developed replacement legislation (the *Authorised Betting Operations Act 2000*) which is being considered as part of the State's omnibus gambling legislation review. The Act contains probity, harm minimisation and consumer protection restrictions that the review supported. In addition, the review recommended:

- removing of the exclusion of the major betting operations licensee from conducting fixed odds betting on races;
- removing of the restriction that bookmakers cannot be a body corporate;
- removing of minimum telephone bet limits for bookmakers; and
- clarifying of the criteria for issuing permits to bookmakers.

The phase out of minimum telephone bets is already embodied in the bookmakers' rules and will be fully implemented from 1 July 2004. The Government has recently released a discussion paper to racing industry stakeholders for consultation. The paper provides Government support for the other findings of the review and is seeking industry agreement to their adoption. 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.

Given that South Australia did not complete its reform activity, the Council assesses it as not having complied with its CPA obligations in relation to racing and betting legislation.

Tasmania

In its 2001 NCP assessment, the Council assessed Tasmania as complying with its CPA obligations in regard to the Tasmanian *Harness Racing Board Act 1976*. Following a restructure of its racing industry, Tasmania is preparing new racing and betting legislation to replace the *Racing Act 1983* and *the Racing Regulation Act 1952*. It intends to introduce the new legislation to Parliament later in 2003 and review the legislation via its gatekeeping process for new legislation (see chapter 13, volume 2). Because Tasmania did not complete its review and reform activity, the Council assesses it as not having complied with its CPA obligations in relation to its racing and betting legislation.

The ACT

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 reforms in line with the review recommendations, including:

- transferring responsibility for licensing bookmakers from the racing clubs to the ACT Gaming and Racing Commission;
- removing the limits on telephone betting; and
- removing the limits on the number of sports betting licences.

The only NCP issue that is not fully implemented concerns the sports bookmakers' security guarantee. An actuarial study to examine the size of the guarantee and the operational risk of each sport bookmaker is to commence soon, with an expected completion date of late 2003. In February 2003, the ACT Gambling and Racing Commission determined it would adopt an interim security guarantee of A$250 000 in assets because this is same figure used in New South Wales and the Northern Territory. The amount is deemed necessary to provide a sufficient safety net to cover winnings and thus ensure public confidence in sports bookmaking activities.

Although the ACT did not finalise the issue of bookmakers' guarantees, the proposed interim measure is sufficient to enable the Council to assess the ACT as having met its CPA obligations for racing and betting legislation.

The ACT also repealed the *Racecourses Act 1935*. Racing clubs are now regulated by the *Racing Act 1999*, which provides for other racing organisations 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. In the 2002 NCP assessment, the Council assessed the ACT as having complied with its CPA obligations in relation to these Acts in the 2002 assessment.

The Northern Territory

The Northern Territory review of the *Racing and Betting Act* and Regulations and the *Unlawful Betting Act* is complete and is due to be considered by the Government in September/October 2003. Given that the Northern Territory did not complete its review and reform activity, the Council assesses it as not having complied with its CPA obligations in this area.

Table 9.8: Review and reform of legislation regulating racing and betting

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*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, although relaxing on some operating structures for bookmakers.	The Government accepted the review recommendations.	Racing Administration Act – Does not meet CPA obligations (June 2002) *Greyhound Racing Authority Act 1985, Harness Racing Act 1977, Bookmakers Taxation Act 1917* and *Thoroughbred Racing Board Act 1996* – Meets CPA obligations (June 2003)
	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 were 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	Provisions that constitute and incorporate the Sydney Turf Club			

(*continued*)

Table 9.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*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 for expanded sports betting other than issuing an additional football tipping competition licence. It noted that reforms of interstate advertising restrictions were best promoted at the national level and undertook to promote deregulation through the Australian Racing Ministers' Conference. The *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 Government also removed restrictions on bookmakers' operating structures and hours of trading.	Meets CPA obligations (June 2003)

(*continued*)

Table 9.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*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. The Government endorsed the review recommendations in November 2000. A further public benefit test on the new Racing Act found the remaining restrictions to be in the public interest by.	The *Racing Act 2002* enacted the review recommendations, including removing the majority of nonprobity-based restrictions on bookmakers (particularly those relating to minimum phone betting, betting type and recording of betting).	Meets CPA obligations (June 2003)
Western Australia	*Betting Control Act 1954* *Totalisator Agency Board Betting Act 1960*	Market conduct, operations, licensing	Review was completed in 1998. It recommended: • relaxing restrictions on the operation of totalisators other than by the TAB; • relaxing restrictions on bookmakers and their operations; • removing bet limits in the Regulations, leaving the racing clubs to set limits as they see fit; and • removing limits on minimum telephone bets with bookmakers; and • relaxing some restrictions on the operations of the TAB.	The *Betting Legislation Amendment Act 2001* implemented reforms to the operation of bookmakers. However, the Government retained minimum telephone bet limits (at reduced levels) until 2004. The Bills establishing the restructure of its racing industry (see Table 9.6).Western Australia retain the prohibition on the licensing of additional off-course totalisators.	Review and reform incomplete

(continued)

Table 9.8 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: • provisions that establish centralised control of horse racing are in the public interest and should be retained; • the authority of the Western Australian Turf Club should be limited to thoroughbred racing; • alternative forms of horse racing be should be licensed where in the public interest; and • the establishment of a single independent regulator should be considered if the Western Australian Turf Club isshown to have improperly used its power as controlling authority to favour its own club activities over other clubs under its control.	The *Racing Restriction Acts 1917* and *1927* will be repealed and replaced by the Racing and Gambling Legislation Amendment and Repeal Bill 2003. In addition, three other reform Bills have been prepared: • the *Racing and Wagering Western Australia Bill 2003*; • the *Racing Restriction Bill 2003*; and • the *Racing and Wagering Western Australia Tax Bill 2003*. The Bills were before the Legislative Assembly at 30 June 2003. They implement a number of NCP reforms from reviews of the Racing Restriction Acts and the review of the *Western Australian Greyhound Racing Authority Act 1981*. The Bills establish Racing and Wagering Western Australia as the new governing body for all Western Australian racing. This body has an exclusive licence to conduct off course totalisator betting.	Does not meet CPA obligations (June 2003)
	Racing Restrictions Act 1927	Conduct of greyhound racing	Review was completed in 1999. It recommended repealing the Act.	Act was repealed and replaced by the Racing and Gambling Legislation Amendment and Repeal Bill 2003.	Meets CPA obligations (June 2003)

(*continued*)

Table 9.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Western Australian Greyhound Racing Association Act 1981*	Registration, conduct	Review was completed. It recommended repealing provisions that limit the number of meetings that the Western Australian Greyhound Racing Authority may hold.	Removal of these provisions is included in the Bills before Parliament (see the *Racing Restrictions Act 1917*).	Review and reform incomplete
South Australia	*Racing Act 1976*	Barrier to entry, market conduct	Review was completed in 2000.	Act was repealed and replaced by the *Authorised Betting Operations Act 2000*.	Meets CPA obligations (June 2002)
	Authorised Betting Operations Act 2000	Licensing, market conduct	Omnibus review is complete. It recommended: • removing the exclusion of the major betting operations licensee from conducting fixed odds betting on races; • removing the restriction that bookmakers cannot be a body corporate; • removing minimum telephone bet limits for bookmakers; and • clarifying the criteria for issuing permits to bookmakers.	The Government will further consider these matters following consultation with the racing and wagering industry.	Review and reform incomplete
Tasmania	*Tasmanian Harness Racing Board Act 1976*	Registration, conduct	Review was completed.	Act was repealed and replaced by the *Racing Amendment Act 1997*.	Meets CPA obligations (June 2001)

(*continued*)

Table 9.8 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 was 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.	Review and reform incomplete

(*continued*)

Table 9.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Bookmakers Act 1985*		Review was completed in 1999.	The Government implemented reforms via the *Race and Sports Bookmaking Act* 2001 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; and allowing flexibility in the locations where betting offices can operate. After an actuarial examination due to be completed in late 2003, the ACT will complete reform relating the size of the betting security guarantee to the amount of risk. An interim guarantee is based on requirements in other jurisdictions.	Meets CPA obligations (June 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 was repealed and in part replaced by the Racing Act. The new legislation was assessed under the ACT's gatekeeper provisions for new legislation.	Meets CPA obligations (June 2002)

(*continued*)

Table 9.8 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Racing and Betting Act* and Regulations *Unlawful Betting Act* and Regulations	Licensing and registration	Review was completed and is due to be considered by the Government shortly.		Review and reform incomplete

Gaming machines

All States and Territories, except Western Australia completed reviews of gaming machine legislation or have reviews under way. The Western Australian Government considered the regulation of gaming machines (which are located only in the Burswood Casino) when reviewing its casino legislation (Table 9.5). Table 9.9 summarises jurisdictions' progress in reviewing and reforming their gaming machine legislation.

New South Wales

In New South Wales, the *Liquor Act 1982* and the *Registered Clubs Act 1976* regulate gaming machine activity. A joint review of these Acts commenced in 1999 but was not completed. In 2001, the Government implemented changes to gaming machine regulation, including a freeze on the number of machines in hotels and clubs, via the *Gaming Machines Act 2001*. (The Gaming Machine Act deals with the gambling provisions of the Liquor Act and the Registered Clubs Act.) The Act caps machine numbers, both in total (104 000) and by venue type (450 for clubs and 30 for hotels), establishes markets for existing licences, limits operating hours for gaming machines, restricts advertising and introduces other harm minimisation measures. The Department of Racing and Gaming completed a review of the Gaming Machines Act in March 2003. The Government has considered the review findings and publicly released the review report in June 2003. The review found a net public benefit arising from the harm minimisation measures contained in the Act. The review also found that a restriction on the transferability of licences from nonmetropolitan to metropolitan New South Wales was important in maintaining social cohesion in rural areas.

The harm minimisation reforms (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, thus meet the CPA clause 5 guiding principle.

Competition questions also arise from the Gaming Machines Act's granting of TAB Limited's exclusive investment licence to supply, finance and share the profits from gaming machines in hotels. The first issue is the exclusivity of the investment licence. In its 2003 NCP annual report, New South Wales reported more fully on the public benefit reasons for granting the licence, New South Wales stating that before the introduction of the investment licence:

- approved gaming devices could be supplied to hoteliers only by the holder of an amusement device dealer's licence (a dealer) or the holder of an amusement device seller's licence (a seller);

- only a person approved by the Liquor Administration Board could finance the acquisition of approved gaming devices, and the board would not approve a dealer or a seller; and

- a hotelier could share receipts from an approved gaming device only with a person who had a financial interest in the hotel declared to the Licensing Court.

The Government's reasons for introducing the investment licence were:

- to assist smaller hotels to acquire approved gaming devices that comply with the standard adopted by the Liquor Administration Board in 1995. All approved gaming devices were to comply with this standard by 31 December 2000. Many smaller hotels required assistance to finance the replacement of noncomplying approved gaming devices. (To date, 14 venues have entered financial arrangements with TAB Limited under the investment licence, for 154 gaming machines); and

- to facilitate the introduction of the Statewide Linked Jackpots System by permitting TAB Limited to finance approved gaming devices in hotels.

New South Wales considered that introducing the investment licence increased competition in the markets for the supply of approved gaming devices and for the financing of approved gaming devices, by giving hoteliers a choice between:

- outright acquisition from a dealer or a seller;

- outright acquisition from the holder of an investment licence;

- acquisition from a dealer, seller or the holder of an investment licence with some form of financing from a financier not otherwise connected to the gaming industry; and

- acquisition from the holder of an investment licence with some form of financing or sharing of profits.

New South Wales also considered that the potential for monopolistic conduct by TAB Limited will be limited by competition from dealers and sellers in relation to supplying approved gaming devices, and from financiers not connected to the gaming industry in relation to financing the acquisition of approved gaming devices. It stated that dealers and sellers have historically been restricted from financing or sharing in the profits of approved gaming devices because of conflicts of interest and probity issues that may arise if dealers or sellers have a stake in the profits of the approved gaming devices that they sell to hoteliers. It also stated that the Government is particularly concerned with maintaining responsible gambling policies and that allowing dealers and sellers to share in the profits of approved gaming devices might undermine these policies. On the issue of probity, New South Wales pointed out that both TAB Limited and host venues (hotels) have satisfied probity obligations

The second issue is a potential conflict of objectives. TAB Limited has an exclusive licence to monitor gaming machines (the centralised monitoring system — CMS) in addition to its exclusive investment licence. TAB Limited thus seeks to ensure gaming machine probity under its monitoring role while ensuring gaming machine returns are maximised. The New South Wales Government previously reported that controls and procedures within TAB Limited adequately address this matter. It stated that TAB Limited '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' (Government of New South Wales 2002, p. 32). The Council has no reason to doubt the probity of TAB Limited, but nevertheless observes that a more structured ringfencing arrangement would give greater assurance on probity matters.

While the activities of TAB Limited under the terms of the investment licence will increase competition, even greater competition would result if other suppliers who meet probity requirements were allowed to carry out similar functions. The Council considers that New South Wales has not established a public benefit case for making the investment licence an exclusive licence. The Council thus assesses New South Wales as not having met its CPA obligations in relation to the Gaming Machines Act.

Victoria

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 undertook 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. Victoria introduced further responsible gambling measures as part of the *Gaming Machine Control (Amendment) Act 2002.* Harm minimisation measures include modifying game and gaming machine design, restricting cash accessibility in gaming venues, regulating player loyalty programs and enabling the introduction of more stringent advertising restrictions.

As reported in the 2002 NCP assessment, the Council considers that Victoria has met its CPA clause 5 obligations relating to gaming machine legislation.

Queensland

Queensland reviewed its *Gaming Machine Act 1991* as part of its omnibus gambling review. The draft review report examined venue caps (280 for

licensed clubs and 40 for hotels), noting that machine numbers in hotels had risen from 4963 in June 1997 to 13 360 in June 2000 as the venue cap was increased. Over the same period, machine numbers in licensed clubs had increased from 16 079 to 18 360. The review concluded that applying the same cap to hotels as to clubs would lead to further growth in machine numbers and associated harm. The review also supported the higher cap for clubs on the grounds that the revenue raised from gaming machines in clubs is used to fund community facilities and activities. Further, it supported the Statewide cap on gaming machines, finding that the removal of this restriction would lead to the continued proliferation of gaming machines in the State and encourage problem gambling.

Each club and hotel in Queensland is required to enter into an agreement with a licensed monitoring operator. The operators insure the integrity of each machine and supply the Government with financial information from each gaming machine. They also supply new and used machines, ancillary gaming equipment and other services, including maintenance. Currently there are four licensed monitoring operators and each is restricted to a maximum of 40 per cent of total market share. The draft review examined the 40 per cent limit finding that the provision ensures that Queensland has more competitors in the market than other jurisdictions. It doubted, however, that the restriction was necessary in the current market, in which experienced operators use well tested systems. Further, it found that removing the restriction is unlikely to markedly reduce the number of licensed monitoring operators in the market and that the Government's ability under the Act to set a maximum price for monitoring services should ensure smaller venues are not disadvantaged by licensed monitoring operators attempting to use their market power to raise prices.

The Government is completing the review and expects to finalise its response in September 2003.

Because Queensland did not complete its review and reform activity, the Council assesses Queensland as not having complied with its CPA obligations in relation to gaming machines.

South Australia

South Australia considered its *Gaming Machine Act 1992* as part of the omnibus review of its gambling legislation that reported in 2003. Gaming machines at the Adelaide Casino are regulated under the *Casino Act 1977* and the Casino Approved Licensing Agreement. The provisions of that Act and the Agreement reflect the provisions of the Gaming Machines Act including definitions.

The review found that:

- the restriction on gaming machine licences being issued to hotels and clubs only is justified as a harm minimisation measure;

- the role of the State Supply Board as single gaming machine supplier and service licensee should be removed and a more competitive market structure should be developed; and

- a scheme enabling the transfer between venues of the right to operate gaming machines (without breaching the venue cap) should be introduced.

The Government concurred that a more competitive arrangement should replace the State Supply Board's monopoly on service provision. It considered, however, that the board's role as the single supplier of machines has public benefits in that:

- the Office of the Liquor and Gambling Commissioner approves all applications lodged for new gaming machines and components and no unauthorised machines or games are ordered;

- gaming machine sales comply with legislative provisions prohibiting installation of new games with less than a 87.5 per cent return to players;

- all machines are installed as per approved applications;

- financial arrangements between parties are transparent and equitable, with gaming machine licensees paying the board for gaming machines and components before installation, and the board forwarding payment to manufacturers after installation;

- the purchase of machines is allowed only where appropriate spare parts are in stock and where technicians have been trained in the servicing and operation of the machine;

- all machines purchased are supplied with a service and operation manual in accordance with terms and conditions of the agreement; and

- all dealings are in accordance with the Act.

The Government considers that alternative approaches of strict regulatory approvals and probity processes for manufacturers are complicated by the multinational nature of the businesses and authorised officers. It considers that the board acts to overcome these difficulties, ensuring all gaming machine licensees receive equitable treatment and removing the opportunity for any dubious financial dealings. The board scrutinises the content of all sale agreements and can ensure these are within expectations — for example, manufacturers cannot seek profit sharing arrangements with licensees or provide favourable pricing terms to a single licensee without justification.

The Government has stated that:

- it expects to introduce legislative amendments to abolish the State Supply Board's service licence in the spring 2003 session of Parliament; and

- it will further consider other review findings (including the proposal for a permit transfer scheme) once the Independent Gambling Authority's

inquiry into the future management of gaming machine numbers in South Australia is completed.

The Council notes that the State Supply Board's monopoly on gaming machine supply does not require venues to deal with a single supplier when purchasing gaming machines. The arrangements require venues to deal through the State Supply Board once the venue has made arrangements to deal with a gaming machine manufacturer. The process does not restrict competition in dealing with manufacturers or selecting or negotiating purchase agreements. The Council accepts that it provides a benefit by ensuring that regulatory standards are met via the requirement that all agreed commercial contractual arrangements pass through the State Supply Board.

Because South Australia is yet to fully respond to its review recommendations on permit transferability the Council assesses it as not having complied with its CPA obligations in relation to gaming machines.

Tasmania

Tasmania completed a minor review of its *Gaming Control Act 1993*, finding that the restrictions on gaming machine operations should be retained on the grounds of probity. The review specifically excluded the 1993 Deed between the Crown and Federal Hotels that gave Federal Hotels an exclusive 15 year licence to conduct casino and gaming machine operations.

In correspondence dated 13 December 2001, Tasmania advised the Council that:

- a compensation claim would arise from revoking the exclusive licence; and
- it did not intend extending or renewing the licence with Federal Hotels beyond its expiry date.

In response, the Council indicated that it:

- accepted Tasmania's argument that the likely compensation claim from early termination of the exclusive licence may exceed any benefits from ending the licence before its expiry date; and
- sought a clear undertaking that Tasmania would not consider any exclusivity arrangements beyond 2008 with any potential operator.

On 6 May 2003, the Tasmanian Treasurer advised the Council that Tasmania would introduce legislation granting Federal Hotels an exclusive 15 year licence to conduct casino and gaming machine operations until 2018[9]. The Treasurer also announced the introduction of a Statewide legislative cap on

[9] Some background to this decision is provided in the section on casinos.

gaming machines to be set at 3680 — 287 more than the current number of machines in Tasmanian venues. The arrangements provide for a limit of 2500 gaming machines to be accessible through hotels and clubs. Venue limits for machines are to remain at the current limits of 30 for licensed hotels and 40 for licensed clubs.

Tasmania's regulatory impact statement finds the benefits of the restrictions outweigh the costs, and justified the caps on the basis of harm minimisation and consumer protection. Referring to the Productivity Commission finding that caps on gaming machine numbers can encourage gaming operators to operate existing machines more intensely and in areas where they achieve highest returns, the regulatory impact statement argued that retaining venue caps will limit this behaviour by Federal Hotels. Also, the limit on the total number of machines which may be installed in hotels or clubs means that Federal Hotels will be unable to increase the wider availability of machines through clubs and hotels by reducing the number of machines at the State's two casinos.

The regulatory impact statement stated that there is no statutory limitation on the number of machines, other than the venue limits in the current Deed. It also stated that Federal Hotels indicated that if it did not have exclusivity, then it would significantly increase the number of gaming machines. The regulatory impact statement concluded that in the absence of exclusivity, the 1993 Deed would prevent the Government from introducing caps on gaming machines before 2008, resulting in an estimated increase of at least 1500 in machine numbers during this period.

In return for exclusivity, Federal Hotels agreed to:

- give up its existing rights to increase gaming machine numbers without restriction (see above);
- increase the contribution rate to the Community Support Levy, in respect of licensed clubs, from 2 per cent to 4 per cent of gross profit and at no cost to clubs; and
- use its best endeavours to improve player protection measures and to support State Government efforts in this area.

In addition, Federal Hotels will pay higher annual licence fees and higher gaming machine taxes, and venue operators will receive higher financial returns from Federal Hotels and an enhanced ability to choose the machine/game mix for their particular venue. The regulatory impact statement argued that the latter offsets venues' lack of choice of gaming machine operator.

The changes to the Gaming Control Act required to provide the exclusive licence were passed by Tasmania's Legislative Assembly in June 2003, but have not been passed by the Legislative Council.

Tasmania considers that the nature of the Deed previously entered into with Federal Hotels means that exclusivity is the only way to achieve the objective of limiting gaming machine numbers. The regulatory impact statement did not indicate how it arrived at the figure of 1500 new machines in the absence of exclusivity. Tasmania subsequently explained that the estimated increase in machine numbers is based on the number of currently licensed venues that would be entitled to an increased number of machines and an estimate of the number of currently unlicensed venues, hotels predominantly, that could accommodate gaming machines in future. However, the extent of any future increase in machine numbers remains uncertain, particularly as Federal Hotels has not already seen fit to exercise its unrestricted power to increase machine numbers. The regulatory impact statement rejected counteracting the potential increase in gaming machine numbers with increased player protection and harm minimisation measures on the grounds that the gambling industry is already highly regulated and that further regulation would impinge on the legitimate nature of gambling as a form of entertainment for the community. It maintained that tighter regulatory measures are not guaranteed to increase player protection. However, Tasmania does not appear to have fully considered the range of alternative measures available to reduce the intensity of machine use and thereby offset the impact of any increase in machine numbers.

The public benefit argument that applies to casino exclusivity — that exclusivity limits access to a form of gambling (table games) — cannot be applied to gaming machines because they are already easily accessed. The entry of additional suppliers of gaming machines into the Tasmanian market (or the threat of entry) would possibly bring some benefits in expanded choice for venue owners and consumers. The Council has already indicated its acceptance of Tasmania's position that the likely compensation claim from termination of the exclusive licence before 2008 may exceed any benefits from ending the licence before this date. However, the Council would consider Tasmania as failing to meet its CPA obligations if the proposed extension to the exclusive licence proceeds. The Council considers that Tasmania's proposal to extend the exclusive licence would have the effect of eliminating any prospect of competition for a lengthy period without the support of a compelling public interest case.

Tasmania also completed its review of the *TT-Line Gaming Act 1993* which provides for the licensing of gaming machines and other gaming activities on board TT line ships. The review recommended retaining the licensing and other restrictions in the public interest. The Council assesses Tasmania as having complied with its CPA obligations in relation to this Act.

The ACT

The ACT's legislation discriminates between gaming machine venues. Only registered clubs may obtain licences for class C machines (more modern machines). Six holders of a general liquor licence are each eligible for up to 10 licences of class B machines (older, draw poker machines) and tavern

licensees may apply for a maximum of two class A machines (simple machines that are no longer manufactured).

The ACT completed an initial review of its *Gaming Machine Act 1987* in 1998, but subsequently referred the Act to the ACT Gambling and Racing Commission for review. The commission finalised its review during 2002 and provided it to the Government in October 2002.

The review report was released in October 2002. Its most significant recommendation was to restrict gaming machine licences to clubs. The report considered that gaming machine revenue should be used for the benefit of the community rather than for the profit of the licensee but that allowing all not-for-profit organisations to access licences would create difficulties in monitoring entities' administrative arrangements. It stated that among not-for-profit organisations, clubs have historically demonstrated that they are ideally set up to control and operate gaming machines. The report also recommended:

- tightening the definition of a club and more clearly specifying the amounts to be paid as community and charitable contributions;
- breaking the nexus between liquor and gaming machines by:
  - phasing out the right to operate class B gaming machines as held by six general liquor licence holders; and
  - not allowing tavern licensees to replace their obsolete class A gaming machines with class C machines;
- maintaining the current cap on gaming machines (5200); and
- introducing a central monitoring system.

The review did not clarify the objectives of the Act. The ACT Government has, however, informed the Council that it considers that a primary objective of any revised legislation should be to ensure that the benefits from the proceeds of the operation of gaming machines accrue to the community. It considers that this objective could not be achieved in any other way apart from restricting the issue of gaming machine licences to 'not for profit' organisations, specifically licensed clubs. The Council considers that the restriction of licences to clubs does not appear necessary to meet another possible objective of the Act — that of minimising harm from problem gambling. The ACT Government is yet to announce its response to the review report, and the Council therefore assesses the ACT as not having complied with its CPA obligations in this area.

The Northern Territory

The Northern Territory review of its gaming machine legislation is complete and is due to be considered by the Government shortly. The Northern Territory did not complete its reform activity therefore the Council it as not having complied with its CPA obligations in relation to gaming machines.

Table 9.9: Review and reform of legislation regulating gaming machines

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Liquor Act 1982* *Registered Clubs Act 1976*	Regulation of the use and supply of gaming machines	A preliminary review was overtaken by the gaming reform package of July 2001.	The gambling provisions of the Acts are covered by the by the *Gaming Machines Act 2001*.	Meets CPA obligations (June 2003)
	Gaming Machines Act 2001	Regulation of the use and supply of gaming machines; provision for an exclusive investment licence for TAB Limited to supply and finance gaming machines for hotels and to share in the profits of the gaming machines supplied.	Review was completed by the Department of Gaming and Racing in March 2003 and publicly released in June 2003. It found that there is a net public benefit from the harm minimisation measures contained in the Act.	The Government is considering the review report. New South Wales has reported that it considered the exclusive investment licence to be in the public interest as it increases competition in the supply and finance of approved gaming machines.	Does not meet CPA obligations (June 2003)
Victoria	*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 the market power of bingo venues, to enhance charitable and community organisations' fundraising abilities.	Meets CPA obligations (June 2001)

(*continued*)

Table 9.9 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*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 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); • renegotiating the Agreement Act 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; • retaining venue limits on machine numbers; • retaining existing probity restrictions	Review report and Government response were released 18 July 2001. The Government accepted most of the review recommendations.	Meets CPA obligations (June 2003)

(*continued*)

Table 9.9 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
Victoria (continued)			• retaining restrictions on 24-hour gaming; and • retaining the restriction on an operator having two venues within 100 kilometres of each other.		
Queensland	*Gaming Machine Act 1991*	Licences, venue caps	Omnibus public benefit test review is under way. A draft review report was released for public consultation in April 2003. The review recommended the continuation of a Statewide cap and venue caps, differential caps for clubs and hotels and the removal of the requirement that a Licensed Machine Operator hold no more than 40 per cent of the market.	The Government's response is expected later in 2003.	Review and reform incomplete

(*continued*)

Table 9.9 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
South Australia	*Gaming Machines Act 1992*	Licences, conduct restrictions	Part of an omnibus review of South Australia's gaming legislation completed in 2003. For gaming machines, the review recommended that: • the restriction on gaming machine licences being issued to only hotels and clubs is justified on a harm minimisation basis; • the role of the State Supply Board as the single gaming machine supplier and service licensee should be removed and a more competitive market structure should be developed; • venues should be able to transfer the right to operate gaming machines (without breaching the venue cap).	The Government has accepted a number of the review recommendations but has not passed amending legislation.The Government intends to retain the State Supply Board as a monopoly supplier of gaming machines on the basis that this allows regulatory standards to be met, but does not restrict venues in their dealings with gaming machine manufacturers.	Review and reform incomplete
Tasmania	*Gaming Control Act 1993*	Deed provides an exclusive licence to supply and operate gaming machines	The initial decision to grant exclusivity has not been reviewed. A proposed extension of the exclusive licence was accompanied by a regulatory impact statement arguing that this was in the public interest because it prevented an increase in machine numbers in venues where more intensive machine use is likely.	Parliament is yet to pass a Bill to implement the extension of the exclusive licence.	Review and reform incomplete

(*continued*)

Table 9.9 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
Tasmania (continued)	*TT-Line Gaming Act 1993*	Licensing, market conduct, operations	Review was completed. It recommended retaining restrictions.	The Government accepted the recommendations.	Meets CPA obligations (June 2003)
ACT	*Gaming Machine Act 1987*	Licensing and conduct	The review of the *Gaming Machine Act 1987* by the ACT Gaming and Racing Commission reported in October 2002. The review recommended restricting the issue of gaming machine licences to clubs and phasing out the licences held by some liquor licence holders.	The Government is yet to respond to the review the Gaming Machine Act.	Review and reform incomplete
Northern Territory	*Gaming Control Act* and Regulations *Gaming Machine Act* and Regulations	Licensing, operations, conduct	Review was completed.	The Government is considering the review.	Review and reform incomplete

Internet gambling

Table 9.10 summarises jurisdictions progress in reviewing and reforming their internet gambling legislation.

The Commonwealth

The Commonwealth Government 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 Government was still to provide a net public benefit argument for its legislation. In particular, the Government did not demonstrate that it could meet its objectives only by restricting competition. It 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.

The Commonwealth Government has initiated a statutory review of the *Interactive Gambling Act 2001*, as required by s. 68 of that Act. The review is required to consider the social and commercial impact of interactive gambling services and the effectiveness of the Act in dealing with these effects. A draft report for Ministerial consideration was expected in mid-2003.

Because the Commonwealth Government did not complete its review and reform activity, the Council assesses it as not having complied with its CPA obligations in this area.

Victoria

Victoria enacted the *Interactive Gaming (Player Protection) Act 1999* to enhance consumer protection. The Act's measures are consistent with those endorsed by the Productivity Commission inquiry, so the Council assesses Victoria as having complied with its CPA obligations in this area.

Queensland

Queensland's *Interactive Gaming (Player Protection) Act 1998* provides for the licensing and control of all forms of interactive gambling in Queensland. The Commonwealth Government subsequently enacted its legislation prohibiting Australian online and interactive gambling service providers (other than some lotteries and wagering) from providing services to people in Australia. As a result, the only operator licensed under Queensland's legislation surrendered its licence on 1 October 2001. Queensland is considering the Act as part of its omnibus review of gambling legislation. It expected to complete the review and finalise the Government response by July 2003.

Given the nature of the restrictions in the Commonwealth Act, the Council accepts that it is appropriate for the Commonwealth to complete its review before Queensland completes its review.

The ACT

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' (Government of the ACT 2002, p. 49). It is a legislative requirement that the Minister must provide reasons for such a decision, and the decision is reviewable by the Administrative Appeals Tribunal,

In its 2002 NCP assessment, the Council expressed its concern with licensing processes that provide entities, including Ministers, with discretionary powers where the criteria for applying the discretion are not defined. The Council considers that objective public criteria focusing on probity and consumer protection objectives should be specified to guide the Minister's application of the discretion.

The ACT Gambling and Racing Commission is conducting a review of the *Interactive Gambling Act 1998*, primarily as a consequence of the enactment of the Commonwealth *Interactive Gambling Act 2001*. The Commonwealth Government is to conduct a statutory review of its Act over the remainder of 2003, and the ACT considered it prudent for the outcomes of the Commonwealth's review are known before completing its own review. The ACT acknowledged the Council's concern with the licensing processes and will examine them as part of the commission's review.

Given the nature of the restrictions in the Commonwealth Act, the Council accepts that it is appropriate for the Commonwealth to complete its review before the ACT completes its review.

Table 9.10: Review and reform of legislation regulating Internet gambling

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth	*Interactive Gambling Act 2001*	Bans on the issue of internet gambling licences that would provide gambling services to Australian players	Review has commenced and will report in 2003.		Review and reform incomplete
Victoria	*Interactive Gaming (Player Protection) Act 1999*	Licensing, conduct restrictions		Act is directed at consumer protection and consistent with the Productivity Commission's approach.	Meets CPA obligations (June 2003)
Queensland	*Interactive Gaming (Player Protection) Act 1998*	Licensing, conduct restrictions	Act was included in Queensland's omnibus review of its gambling legislation.	Act was overtaken by the Commonwealth Act, banning Internet gambling.	Review and reform incomplete
The ACT	*Interactive Gambling Act 1998*	Licensing, conduct restrictions	Review is under way but now awaiting completion of the Commonwealth review.		Review and reform incomplete.

Minor gambling

The category of minor 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. Table 9.11 summarises jurisdictions' progress in reviewing and reforming their minor gambling legislation.

New South Wales

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 1998*. New South Wales informed the Council that the Unlawful Gambling Act is not for NCP review and that it is reviewing the Racing Administration Act in the general racing legislation review. The Gambling (Two Up) Act is new legislation that New South Wales reported was reviewed in September 1998. 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 review retained this restriction because it found that deregulation may encourage the entry of unscrupulous operators running unfair games, incurring additional costs for ensuring compliance with rules and protecting players. Submissions to the review suggested no public demand for increased availability of the game.

New South Wales undertook a combined review of the *Lotteries and Art Unions Act 1901* and the *Charitable Fundraising Act 1911*. The Government released the review on 28 October 2002. The Acts relate to what is often minor gambling — mostly fundraising by charitable organisations and not-for-profit organisations, and 'free' lotteries and trade promotions.

The review recommended:

- including specific objects for the Lotteries and Art Unions Act;
- having the States and Territories explore the possibility of greater uniformity in their minor gambling legislation;
- using a negative licensing approach to games of chance conducted by registered clubs;
- relaxing the 'foreign' (that is, not New South Wales) lottery restrictions to permit the conduct of Australian community-based lotteries in New South Wales, provided such lotteries meet the same standards of probity and fairness expected of a New South Wales lottery; and

- removing the restriction on cash prizes that may be offered in trade promotion lotteries.

The Government accepted the review recommendations, and Parliament passed amending legislation in June 2003. The Council thus assesses New South Wales as having complied with its CPA obligations in relation to minor gambling.

Victoria

The Victorian review of the *Club Keno Act 1993* reported in September 1997 and made four recommendations as follows:

- that permissible venues for club keno should be liberalised to include, for example, any club or hotel in Victoria and sale through retail outlets;

- that exclusive licences given to Tattersall's and TABCORP be removed and club keno licences made available to those who pass probity checks;

- that flexibility exist in game rules to allow potential competitors to propose new game rules; and

- that, in view of the small relative size of club keno and foreshadowed, the government may wish to combine reform implementation with other changes to gambling legislation

The Government released its response in 2003. Victoria previously advised 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, including the Club Keno Act, within its current term. The Government's accepted the last recommendation and decided to consider the other review recommendations until as part of the comprehensive review of the Victorian electronic gaming machine industry scheduled for 2006.

The Council notes that the Government's decision to defer action until 2006 is in accord with the review's last recommendation. Also, as club keno is a minor game in the overall gambling market, the Government's decision will have only minor consequences, the Council assesses Victoria as having met its CPA obligations in relation to this legislation.

Queensland

Queensland is considering the *Keno Act 1996* and the *Charitable and Non-profit Gambling Act 1999*[10] as part of its omnibus gambling legislation review.

[10] The *Charitable and Non-profit Gambling Act 1999* replaced the *Art Unions and Public Amusements Act 1992*, which was repealed.

Currently, Jupiter's Gaming Pty Ltd has an exclusive licence to provide keno until 2007. The draft review supported the exclusive licence as necessary to permit the operator to develop short-term and medium-term viability in given the costs of establishing keno operations. The draft report noted that the Government would have to pay compensation if it revoked exclusivity and that the Government could consider issuing a second licence after 2007. Charitable and nonprofit gaming is regulated in four categories and in most cases, a licence is not required. Queensland expected to complete the review and finalise the Government response by July 2003.

Because Queensland did not complete its review and reform activity, the Council assesses it as not having met its CPA obligations in relation to minor gambling.

Western Australia

Minor gaming in Western Australia is regulated by the Gaming Commission Act 1987. A review of the Act was completed in 1998 and recommended:

- removing the restriction on casino games being played for community gaming, subject to appropriate changes being negotiated in the Burswood Casino Agreement;
- removing the restriction on the playing of two-up, subject to appropriate changes being negotiated in the Burswood Casino Agreement;
- retaining a licensing system for organisations conducting bingo which should be conducted for community benefit rather than for private gain;
- retaining licensing requirements and associated operation restrictions for minor lotteries which should continue to be available to only charitable and community-based organisations; and
- licensing professional fundraisers.

Amendments to legislation to effect the review recommendations are yet to occur. The Council therefore assesses Western Australia as not having complied with its CPA obligations for minor gambling.

South Australia

South Australia regulates minor gambling under the *Lottery and Gaming Act 1936*. The Act authorises fundraising and trade promotion lotteries, bingo and sweepstakes, and requires licences when prizes in these activities exceed given amounts. The Act was included in South Australia's omnibus review of its gambling legislation. The review reported in March 2003 and found that the legislation protects consumers by ensuring the probity and integrity of gambling activities, but suggested the following minor amendments:

- participation in bingo and the purchase of instant lottery tickets should be restricted to individuals aged 18 years and over; and

- sweepstakes and Calcutta sweepstakes should be conducted on only events approved for this purpose by the Independent Gambling Authority.

The Government concurred with the review findings, but it noted that the age limit for participation in bingo and instant lottery tickets should be the same as that for the sale of SA Lotteries products, (16 years). The lotteries age limit is before the Parliament for consideration.

The Council assesses South Australia as not having complied with its CPA obligations in relation to minor gambling because the State did not complete its reform activity.

Tasmania

Tasmania drafted new legislation (included in the *Gaming Control Act 1993*) covering minor gambling, including charitable and nonprofit gambling. The Government considered this legislation under its legislation gatekeeper provisions (see Chapter 13) and found that the restrictions contained in the Act are justified as being in the public benefit. The Council assesses Tasmania as having met its CPA obligations in relation to minor gambling.

Table 9.11: Review and reform of legislation regulating minor and other gambling

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Gaming and Betting Act 1912*	Licensing, market conduct	Act is not for review.	Act was 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		Review is not required, as it is a criminal Act not subject to NCP.		Meets CPA obligations (June 2001)
	Gambling (Two Up) Act 1998	Market conduct, rules	Review was completed in 1998. It recommended retaining the regulations that stipulate the rules of the game and restrictions on when and where two-up may be played, finding that deregulation may encourage entry by unscrupulous operators running unfair games.	Reform is not required.	Meets CPA obligations (June 2003)

(*continued*)

Table 9.11 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
New South Wales	*Lotteries and Art Unions Act 1901* *Charitable Fundraising Act 1991*	Conduct, operations	A joint review was completed in July 2002. It recommended relaxing the restrictions on: • the maximum value of cash prizes that may be offered in conjunction with a trade promotion; and • cross-border advertising and sales. It also recommended the introducing a negative licensing system for games of chance conducted by registered clubs.	The Government accepted the review recommendations and amending legislation was passed in June 2003.	Meets CPA obligations (June 2003)
Victoria	*Club Keno Act 1993*	Rules, conduct	Review was completed in 1997, Recommending reforms to eligible venues, licensing, and provision for potential rule changes. The review also recommended synchronising reforms with changes to the electronic gaming machine industry arising from a foreshadowed review in 2006.	The Government will consider the recommended reforms as part of the 2006 review of the electronic gaming machine industry.	*Meets CPA obligations (June 2003)*
Queensland	*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)
	Keno Act 1996 *Charitable and Non-profit Gambling Act 1999*	Exclusive licences, other licences, market conduct, and rules	Omnibus public benefit test review is under way. A draft review report was released for public consultation in April 2003.	The Government's response is expected later in 2003.	Review and reform incomplete

(*continued*)

Table 9.11 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
Western Australia	*Gaming Commission Act 1987* (as it relates to minor gaming)	Licensing, rules, conduct	Review was completed in 1998. It recommended no change to most restrictions, including licensing for most minor gaming activities. It recommended removing restrictions on casino games for community gaming, and two-up, subject to necessary changes being negotiated in the Burswood Casino Agreement and licensing of professional fundraisers.	Amendments have not been made yet.	Review and reform incomplete
South Australia	*Lottery and Gaming Act 1936*	Licensing, rules	The Act was included in South Australia's omnibus review of its gambling legislation. The review reported in March 2003 and found that the legislation protects consumers by ensuring the probity and integrity of gambling activities. The review suggested minor amendments, including a requirement that only those 18 years and over be allowed to participate in bingo and purchase instant lottery tickets.	The Government concurred with the review findings but it noted that the age limit for participation in bingo and instant lottery tickets should be the same as that applicable to the sale of SA Lotteries products, (currently 16 years). The age limit for SA Lotteries products is currently the Parliament for consideration.	Review and reform incomplete
Tasmania	*Racing and Gaming Act 1952* (as it relates to minor gaming)	Licensing, conduct, operations	Minor review was completed.	Gaming components of this Act were transferred to the *Gaming Control Act 1993* and assessed under the gatekeeper provisions. The restrictions were found to be in the public interest.	Meets CPA obligations (June 2003)

10 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 and construction regulations and approvals, and the 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 aspects of a 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 $A350–450 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 may issue certificates for developments that require 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 by, for example, 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 NCP 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 may undertake that assessment.

Private certification generally involves a registration scheme, entry requirements and compulsory insurance. The Council accepts that these requirements are usually 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 competition restrictions that are not consistent with the principles of effective regulation, the Council assesses NCP compliance against whether public benefit arguments justify the restrictions.

Review and reform activity

The Council has previously assessed Queensland, South Australia, Tasmania, the ACT and the Northern Territory as having met their CPA clause 5 obligations in relation to their NCP reviews of planning and approvals legislation. Table 10.1 details each jurisdiction's review and reform of planning and approval legislation.

New South Wales

New South Wales reformed its development assessment system in 1998 to integrate development consents, provide appropriate assessment and increase competition in compliance functions. It now has a streamlined 'one-stop shop' system for development, building and subdivision approvals under the *Environmental Planning and Assessment Act 1979* (EP&A Act) (removing the need for subsequent local government approvals). Accredited certifiers can compete with councils in the assessment of compliance functions and technical standards. 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. The Government agreed in principle to the tribunal's recommendations.

The New South Wales Government is undertaking a review of planning. 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 planning; 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 New South Wales Government advised the Council in December 2002 that it had not listed the EP&A Act for review under the CPA and therefore did not intend to report on this legislation. It stated that it would continue to provide information on 30 planning and land use reform projects to the Council. The Council advised New South Wales that it accepted that the competition restrictions in the EP&A Act are being examined in the context of other review processes.

New South Wales provided an update on the 30 projects in its 2003 NCP annual report. The nature and status of the projects are detailed in box 10.1.

Box 10.1: Planning and land use projects under review by New South Wales under the EP&A Act

1. Develop policy options for integrated approvals system (completed).
2. Review referral processes and concurrences in local planning policies (under way).
3. Extend the guarantee of prompt service to concurrent approvals under the EP&A Act (completed).
4. Review multiple controls on land clearing under the State Environmental Planning Policy (completed).
5. Integration of total catchment management objectives in planning instruments (under way).
6. Examine the feasibility of incorporating plans for river, land and habitat management, environmental protection and forestry reserves into planning instruments under the EP&A Act (under way).
7. Review and reform regulations affecting mining (under way).
8. Review and reform regulations affecting mariculture (completed).
9. Review and reform regulations affecting forestry, including the corporatisation of State Forests (will not proceed).
10. Review EP&A Act s. 90 'heads of consideration' for development consent (completed).
11. Review potential for increasing 'as of right developments' (competed).
12. Consider potential for private certification of building, subdivision waters and sewerage approvals (completed).
13. Integrate building and planning approvals (completed).
14. Examine zoning prohibitions for anticompetitive effects and consider wider adoption of performance standards (under way).
15. Review and reform development without consent for change of use in industrial areas (completed).
16. Consider combining development and re-zoning applications (completed).
17. Review heritage approvals and consider better integration with development approval/ building approval processes (completed).
18. Consider potential for standardising consent conditions, zoning classifications and definitions of performance standards (under way).
19. Conduct stage II review of pollution control Acts to streamline and rationalise licensing procedures (completed).
20. Review water legislation and licensing (completed).
21. Develop framework for coordinated/integrated development approvals conditions and other requirements and advice on the use of the framework (under way).
22. Develop best practice guidelines for coordinated/integrated development approvals system for mining and extractive industry (completed).
23. Develop best practice guidelines for planning focus (completed).
24. Develop best practice guidelines for community consultation (under way).
25. Review endangered species legislation to integrate licences and development approvals (completed).
26. Adopt the reformed Australian Building Code with minimal variation (completed).
27. Convert siting rules to performance standards (completed).
28. Extend and improve performance benchmarking of local councils (completed).
29. Conduct public consultation to improve the operation of current approval rights and the dispute resolution system (under way).
30. Examine the potential for consolidating land, water and related natural resource management legislation into a single statute (completed).

The Council accepts that the wider approach adopted by New South Wales in pursuing the 30 targeted planning and land use reform projects has merit, although it is not clear how these projects incorporate the CPA clause 5 guiding principle. The Council considers that New South Wales made substantial progress in addressing potential restrictions on competition in planning and development processes, but that it has yet to complete some important reform projects. The Council thus assesses New South Wales as not having met its CPA clause 5 obligations in this area.

Victoria

Victoria completed its review of the *Planning and Environment Act 1987* in early 2001. The review found that Victoria's planning legislation achieved its objective in an effective and efficient manner, and that the competition restrictions identified were 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 Victorian Government is considering its response to the review's recommendations. The majority of the recommendations will be implemented by way of amendments to planning schemes and administrative arrangements; only minor legislative amendments are required, which will be included in the next amendment to the Act anticipated for the 2003 spring session of Parliament. Since the legislative restrictions were found to be in the public interest, the Council assesses Victoria as having met 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 2000, which consolidated this legislation. The NCP review examined both the proposed and existing legislation, because the Bill was essentially a consolidation of the existing legislation. The review was almost finalised, but the change of Government in November 2001 meant that it was not submitted to Cabinet.

The current Government re-activated the consolidation of the planning legislation with the release of a position paper in April 2002. The Government received a number of submissions and is developing a new green Bill, which will be called the Planning and Development Bill 2003. The Bill is expected to be released for an eight-week public comment period in late November 2003. The purpose of the Bill is to elicit submissions on the broad proposals contained in the position paper and a number of fresh proposals. Following review and analysis of submissions on the Bill the Government anticipates introducing a consolidated Planning and Development Bill 2003 to Parliament. It is proposed that a reworked joint NCP review of the existing

legislation and the Planning and Development Bill 2003 to Cabinet as soon as the Bill provisions are finalised. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it did not complete its reform activity.

Table 10.1: 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 on 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) was completed . Review of plan-making is under way, with a white paper released in February 2001 proposing the 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. Review and reform are part of a wider, whole-of-government approach addressing planning and land use reform. Many reforms have been implemented but a few significant issues are outstanding.	Review and reform incomplete
Victoria	*Planning and Environment Act 1987*	Controls on land use, sets procedures for the issue of planning permits and approval	Review was completed in 2001. The review found that Victoria's planning legislation achieved its objective in an effective and efficient manner, and that the competition restrictions identified were in the public interest. The review recommendations aimed to improve the manner in which the Act is administered to enhance planning effectiveness and efficiency.		Meets CPA obligations (June 2003)
Queensland	*Integrated Planning Act 1997* (which replaced *Local Government [Planning and Environment] Act 1990*)	Controls on land use, sets procedures for the issue of planning permits and approval	Review was completed in October 1997. It found the Integrated Planning Act merely sets up a planning framework and is far less prescriptive than the Act it replaced. Review reported that the Act does not restrict competition.		Meets CPA obligations (June 2002)

(*continued*)

Table 10.1 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 on land use, via town planning schemes	The current Government re-activated the consolidation of the planning legislation with the release of a position paper in April 2002. The Government received submissions on the position paper and is developing the Planning and Development Bill 2003. The Bill is expected to be released for public comment in late November 2003.	Following the review and analysis of submissions on the Bill, the Government anticipates introducing a consolidated Planning and Development Bill 2003 to Parliament.	Review and reform incomplete
South Australia	*Development Act 1993* and Development Regulations 1993	Controls on 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 on 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 10.1 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 on concessional grants of land and development approval processes	Review was completed 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 on land use Sets procedures for the issue of planning permits and approval	Review of 1999 Act was completed in September 2000. The report is not public. The 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 technical provisions governing the way in which builders and developers operate. The regulations aim to ensure 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.

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. 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 $A350 million, equivalent to some 1.5 per cent of total building activity (then valued at around $A25 billion) each year (IC 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 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.

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 most jurisdictions. 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 (IC 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 — that is, whether restrictions on competition provide a net community benefit and are needed to restrict competition to achieve the objective of the legislation — the Council looks for the following outcomes:

- Governments should ideally adopt the Building Code of Australia and minimise variations from that code. While the code permits State-based variations, excessive variations can increase costs. Where significant State-based variations exist, the Council looks 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 competition would 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

NCP reviews of legislation in the building area have tended to focus more on building certification and occupational licensing than on building regulations. All States and Territories, however, have adopted the Building Code of Australia with regional variations (ABCB 1999).

New South Wales, South Australia, Tasmania and the ACT completed NCP reviews of aspects of their building legislation and have met their CPA clause 5 obligations. The Council also assessed Victoria's building regulations as meeting CPA clause 5 obligations in 2001. There are still some outstanding building approvals issues. Table 10.2 details the progress of each jurisdiction's review and reform of its building regulations and approval legislation.

Victoria

The *Building Act 1993* 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.

Victoria completed its review of the Act in 1999. The Government considered the review in conjunction with its assessment of the *Architects Act 1991,* partly to consider opportunities to integrate Victoria's building and architects legislation.

Victoria is considering its response to the review of architects legislation, focusing on the Victorian review but also accounting for the Inter-Governmental Working Party's response to the Productivity Commission inquiry into Architects Acts and the government and industry working group initiated by the Australian Procurement and Construction Ministerial Council. Legislative amendments are planned for the 2003 spring session of Parliament, with related Regulation changes to follow. The Council assesses Victoria as not having met its CPA clause 5 obligations because it did not complete its reform activity in this area.

Queensland

Queensland's review of the *Building Act 1975*, which dealt with provisions related to the regulation of building certifiers, was completed in June 2002. The Government accepted all but one of the review's recommendations (relating to the ability of local governments to recover auditing costs where a private certifier approves development). The *Plumbing and Drainage Act 2002* assented to on 13 December 2002, implemented the recommendations. The Council assesses Queensland as having met its CPA clause 5 obligations in this area.

Western Australia

Western Australia reported that new legislation is 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 advised that responsibility for the administration of the Act and Regulations had been transferred to the Department of Housing and Works in May 2003, which delayed the drafting of the new legislation. A recent change in Ministerial responsibilities in June 2003 created further delays in approval of the new legislation. The Government advised that the new legislation will be examined under gatekeeping legislation. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

The Northern Territory

After completing a review of its *Building Act*, in July 2002 the Government:

- endorsed the review recommendations ss. 21, 41 and 46 of the Act be repealed, because they are redundant or anticompetitive in nature;
- endorsed the review recommendations that 14 other anticompetitive sections be retained because it is in the public interest to mandate standards of building practitioners, building products and practices; and
- directed that the general review of the Act consider 'other issues' raised in the NCP review.

An amendment Bill was prepared to repeal ss. 21, 41 and 46 of the Act. The *Building Amendment Act 2003* was assented to on 7 July 2003.

A general review of the *Building Act* is under way and the Territory's gatekeeping process for new legislation will ensure any resulting amendments will meet the CPA tests. This general review will address 'other issues' referred to in the NCP review.

The Council assesses the Northern Territory as having met its CPA clause 5 obligations.

Table 10.2: 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*	Building regulations, building approval procedures, 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 accredited certifiers to certify development. The State adopted the 1996 Building Code of Australia.	Meets CPA obligations (June 2001)
Victoria	*Building Act 1993*	Building regulations, building approval procedures, accreditation of building surveyors	Review was completed in 1998. It focused on occupational regulation of building practitioners, including building surveyors. The Government considered the review in conjunction with its assessment of the *Architects Act 1991,* in part, to enable consideration of any opportunities to integrate Victoria's building and architectural legislation	The Government is considering the review report.	Building regulations — meets CPA obligations (June 2001) Building approvals — review and reform incomplete
Queensland	*Building Act 1975* and Standard Building Law and Building Regulation 1991	Building regulations, building approval procedures, accreditation of building certifiers	Review completed in June 2002. The Government accepted all but one of the review's recommendations (the exception related to the ability of local governments to recover auditing costs where a private certifier approves development).	The review's recommendations were implemented in the *Plumbing and Drainage Act 2002*, which amended the *Building Act* 1975 as per the review recommendations.	Meets CPA obligations (June 2003)
Western Australia	*Local Government (Miscellaneous Provisions) Act 1960* and Building Regulations 1989	Building regulations, building approval procedures	New legislation is currently being drafted to replace the Acts. However, responsibility for the administration of the Act and regulations was transferred to the Department of Housing and Works in May 2003. During the transfer, drafting was postponed.	Drafting of the new legislation is under way.	Review and reform incomplete

(*continued*)

Table 10.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
South Australia	*Development Act 1993* and Development Regulations 1993	Building regulations, 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 were 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 gatekeeping 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 gatekeeping requirements.	Meets CPA obligations (June 2001)
	Local Government (Building and Miscellaneous Provisions) Act 1993 (except health issues and part III)	Building regulations, building approval procedures		Building provisions were replaced by the *Building Act 2000,* which was assessed under the gatekeeping requirements.	Meets CPA obligations (June 2001)
	Building Act 2000	Building regulations, building approval procedures, accreditation of building certifiers	The regulatory impact statement on the Act was released in August 1999. The new Act provides a framework for regulation of the building industry. 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 in 2003, following the completion of industry consultation.	Meets CPA obligations (June 2001)

(continued)

Table 10.2 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	
ACT	*Building Act 1972*	Building regulations, building approval procedures, 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)	This legislation introduced private certification of building work. Review was completed in November 2000.		Meets CPA obligations (June 2002)
Northern Territory	*Building Act*	Building regulations, building approval procedures, building practitioners licensing	A review was undertaken in 1999 and endorsed in July 2002. The review recommended that: ss. 21, 41 and 46 of the Act be repealed because they are redundant or anticompetitive; other anticompetitive provisions of the Act be retained because they can be justified under clause 5(1) of the CPA; and 'other issues' raised in the NCP review be considered during the general review of the Act.	*The Building Amendment Act 2003* gives effect to the review recommendations in full. The Bill was assented to on 7 July 2003.	Meets CPA obligations (June 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 architects legislation on behalf of all States and Territories except Victoria (PC 2000d), 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 2000d, pp. 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 2000d, 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 the 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 certification channels.

The joint response provided a framework that State and Territory governments adopted and the Australian Procurement and Construction Ministerial Council endorsed. Consequently the framework establishes the basis for the Council's assessment of jurisdiction's compliance in this area. Table 10.3 details each jurisdiction's review and reform of legislation regulating architects.

New South Wales

New South Wales advised that on 21 May 2003 it introduced the Architects Bill 2003, which provides for the repeal of the *Architects Act 1921* and the implementation of the nationally agreed framework, including:

- the introduction of the concept of a registered architect to replace the concepts of 'chartered architect' and 'nonchartered' architect that the *Architects Act 1921* uses;
- the removal of the requirement that at least one third of the directors of a corporation or company offering architectural services be chartered architects;

- the introduction of a new system for making complaints against and disciplining architects who are found guilty of unsatisfactory professional conduct or professional misconduct;

- the inclusion in the membership of the Board of Architects of New South Wales (to be renamed the NSW Architects Registration Board) of community, consumer and industry representatives;

- the establishment by the Regulations of codes of professional conduct for architects;

- the extension of the ability of the board to fund its own activities by imposing and recovering fees for the services that it provides; and

- the extension of the board's role in accrediting courses of study for architecture and promoting discussion on architectural issues in the community.

The Bill was passed by the Legislative Assembly on 27 May 2003 and is before the Legislative Council. The Council assesses New South Wales as not having met its CPA clause 5 obligations because it did not complete its reform activity.

Victoria

As stated, Victoria did not participate in the Productivity Commission review, having already subjected its Architects Act and subordinate legislation to independent NCP review in 1998-99. The review undertaken in 1998-99 also addressed Victoria's Building Act and its subordinate legislation, partly to consider opportunities to integrate Victoria's building and architects legislation. When the Government decides its response, implementation of recommendations of the joint architects and building legislation review will be undertaken concurrently.

Victoria advised that legislative amendments are planned for the 2003 spring session of Parliament, with related Regulation changes to follow. The Council assesses Victoria as not having met its CPA clause 5 obligations because it did not complete the reform process.

Queensland

Queensland advised the Council that it implemented the national working party's recommendations in the *Architects Act 2002,* which commenced on 1 January 2003. The context in Queensland is now as follows:

- the inclusion of broad building industry and consumer representation on the Board of Architects of Queensland;

- no substantive restrictions on the practice of architecture;

- provisions for only registered architects to use the title 'architect' or 'registered architect', although no longer any general restriction on the use of derivatives;

- no longer a requirement for company registration for architects responsible for services provided by the company;

- independent and transparent disciplinary processes, conducted via the Queensland Building Tribunal; and

- encouragement of architects boards to identify means of broadening current certification channels.

The Council assesses the Queensland as having met its CPA clause 5 obligations in this area.

Western Australia

Western Australia endorsed the legislative review of is *Architects Act 1921* in December 2001. Cabinet approved the drafting of amendments to the Act in March 2002 in response to the review. The Architects Bill 2003 is in keeping with all of the review recommendations.

- Membership of the Architect's board will be broadened to include industry, consumer and educational representatives.

- The Bill does not include restrictions on practice, it protects title only.

- The title 'architect' will be restricted to registered persons only, but derivatives that describe a recognised competency are permitted (for example, landscape architect or architectural draftsperson).

- Organisations that offer the services of an architect must have adequate arrangements to ensure an architect supervises, controls and is ultimately responsible for the architectural work provided.

- Complaints and disciplinary procedures will be modified, with the introduction of an informal conciliation and inquiry process, and the provision of avenues for appeal.

- Requirements for registration will be moved to the Regulations and refer to a national-standard setting body, the Architects Accreditation Council of Australia, which is developing a broader system of certification that accounts for different combinations of qualifications and experience.

The public consultation period for the Architects Bill 2003 closed on 4 April 2003. The major change arising from the public consultation period is the composition of the Architect's Board will half consist of registered architects to provide the necessary architectural understanding for the board to carry out its functions. A final draft Bill is being prepared for introduction to Parliament

during the 2003 spring session. Accordingly, the Council assesses Western Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

South Australia

South Australia advised the Council that the relevant Minister will be asked to endorse the State review's recommendations where they are critical to addressing competition policy. A Bill to amend the *Architects Act 1939* will then be prepared and introduced to Parliament. The Government has not yet introduced the Bill. Accordingly, the Council assesses South Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

Tasmania

Tasmania reported that the *Building Act 2000* which commenced in 2003, dealt with most recommendations arising from the review of the *Architects Act 1929*. It expects to amend the Architects Act during 2003-04 to account for the remaining recommendations.

The Council assesses Tasmania as not having met its CPA clause 5 obligations because it did not complete the reform process.

The ACT

The ACT advised that it is assessing the feasibility of licensing architects under the proposed Construction Occupations Licensing Act. The proposed reforms are consistent with the recommendations of the Productivity Commission's review and the Australian Procurement and Construction Council's national principles for the harmonisation of Architects Acts. The ACT Government advised that consultation with the Royal Australian Institute of Architects and the Architects Board failed to gain agreement on the proposed new Act. Accordingly, a rewrite of the *Architects Act 1959* is to be undertaken to incorporate the Productivity Commission's recommendations and the national harmonisation principles. The Council assesses the ACT as not having met its CPA clause 5 obligations because it did not complete the reform process.

Northern Territory

The Northern Territory advised that its Architects Amendment Bill 2003 has been drafted and is about to be presented to Cabinet. The significant amendments in the draft Bill are:

- provision for complaints by consumers through a new complaint process;

- five Architects Board members instead of three, including two nonarchitects;
- simplified rules relating to architectural companies and partnerships; and
- simplified requirements for the education and training of architects, in accordance with the standards set by the Australian Accreditation Council of Australia.

The Northern Territory advised that the Bill will be introduced into the Legislative Assembly after Cabinet approval. The Council assesses the Northern Territory as not having met its CPA clause 5 obligations because it did not complete the reform process.

Table 10.3: Review and reform of legislation regulating architects

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Architects Act 1921*	Registration, entry requirements, reservation of title, disciplinary processes, business restrictions	Productivity Commission review was completed in August 2000 and recommended the repeal of the Act. Previous State review was commenced but not completed.	On 21 May 2003, Government introduced the Architects Bill 2003, which provides for the repeal of the *Architects Act 1921* and the implementation of reforms agreed under the national working group response to the review. This Bill was passed by the Legislative Assembly on 27 May 2003 and is before the Legislative Council.	Review and reform incomplete
Victoria	*Architects Act 1991*	Registration, entry requirements, reservation of title, disciplinary processes, business restrictions (ownership provisions that at least two thirds of company directors must be registered architects)	Review was completed in February 1999. It recommended retaining title restriction and registration requirements, and reducing business restrictions (including reducing the ownership provision that at least one director or partner must be a registered architect).	Legislative amendments are planned for the spring 2003 session of Parliament, with related Regulation to follow.	Review and reform incomplete
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 the repeal of the Act.	The recommendations of the working group were implemented by the *Architects Act 2002* which commenced on 1 January 2003.	Meets CPA obligations (June 2003)

(*continued*)

Table 10.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Architects Act 1921*	Registration, entry requirements, 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 the repeal of the Act. The Government endorsed its legislative review of the Act in December 2001, and the Productivity Commission review in February 2002.	Cabinet approval for the drafting of amendments to the Act was granted in March 2002. The public consultation period for the Architects Bill 2003 closed on 4 April 2003, with a final draft Bill being prepared for introduction to Parliament in the 2003 spring session.	Review and reform incomplete
South Australia	*Architects Act 1939*	Registration, entry requirements, 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 the repeal of the Act. Previous State review was completed.	South Australia advised the Council that the Bill was likely be prepared by June 2003. As at 30 June 2003 it had not been introduced.	Review and reform incomplete
Tasmania	*Architects Act 1929*	Registration, entry requirements, reservation of title, disciplinary processes, business restrictions, business licensing	Productivity Commission review was completed in August 2000 and recommended the repeal of the Act.	Majority of the recommendations from the review were dealt with in the *Building Act 2000,* which commenced in 2003. The Act will be amended during 2003-04 to account for the remaining recommendations.	Review and reform incomplete

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
ACT	*Architects Act 1959*	Registration, entry requirements, reservation of title, disciplinary processes	Productivity Commission review was completed in August 2000 and recommended the repeal of the Act.	Consultation with the Royal Australian Institute of Architects and the Architects Board failed to gain agreement on their inclusion in the proposed new *Construction Occupations Licensing Act*. As a result, a rewrite of the *Architects Act 1959* is to be undertaken that will incorporate recommendations from the Productivity Commission's review and the Australian Procurement and Construction Council's national harmonisation principles.	Review and reform incomplete

(continued)

Table 10.3 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Architects Act*	Registration, entry requirements, reservation of title, disciplinary processes	Productivity Commission review was completed in August 2000 and recommended the repeal of the Act. Previously completed Northern Territory review has been put on hold.	Amendment Bill has been drafted and will be introduced to the Legislative Assembly after Cabinet approval.	Review and reform incomplete

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 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 Government accepted the review in its entirety.

The review recommended the continued regulation of the profession but removing anticompetitive legislative elements that could not be justified on public interest grounds. The review identified co-regulation as the preferred approach to the continued regulation of professional engineers — that is, joint administration by the engineering profession and a statutory governing body. Under the proposed approach, the profession would take responsibility for assessing applicants for registration and the Government would administer the legislation, including accrediting professional bodies and taking disciplinary action where misconduct is identified. The existing business licensing of units and associated professional indemnity insurance requirements would remain.

The legislative amendments required to meet the recommendations were extensive in nature, so the Queensland Government decided to incorporate the amendments in a new Act, the *Professional Engineers Act* 2002, which repealed the 1988 Act. The 2002 Act provides that only registered professional engineers may provide professional engineering services. It meets NCP obligations by no longer requiring the registration of engineering companies and engineering units, thereby freeing up the manner by which the business of engineering services may be conducted. It achieves the preferred approach of co-regulation through the proposed adoption (through the promulgation of regulations under the Act) of professional standards for the national registration of engineers and the accreditation of professional associations for assessing applications. The State will set standards for registration, professional associations will assess applicants for registration against the set standards, and the board will register those applicants who have been assessed as meeting professional standards.

The *Professional Engineers Act 2002* commenced operation on 1 January 2003. The Act implements the findings of the NCP review of the previous legislation, consistent with the implementation in the *Architects Act 2002* of the

recommendations relating to the Productivity Commission's review of legislation regulating architecture. The Council assesses Queensland as having met its CPA clause 5 obligations (table 10.4).

Table 10.4: Review and reform of legislation regulating engineers

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Professional Engineers Act 1988*	Restrictions on entry, registration, reservation of title and practice, disciplinary process, commercial restrictions and business licensing	The outcome of this review was support for the continued regulation of the profession, but removal of anticompetitive elements that could not be justified on public interest grounds. The review identified co-regulation as a preferred approach for the regulation of professional engineers — that is, joint administration by the engineering profession and a statutory governing body.	The required amendments to existing legislation to meet the recommendations were extensive, so the Queensland Government incorporated the amendments in a new Act, the *Professional Engineers Act 2002*, which repealed the 1988 Act. The new Act commenced on 1 January 2003.	Meets CPA obligations (June 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.

The regulation of surveyors aims to maintain the integrity of the land tenure system supporting the land and property markets. Accordingly, the Council considers that public benefit arguments support, in principle, the licensing and registration of cadastral surveyors.

Review and reform activity

In its 2001 NCP assessment, the Council assessed the ACT as having met its CPA obligations in this area because it had completed a review of the *Surveyors Act 1967* and passed a new Act. The Council also assessed Western Australia as having met its CPA obligations in relation to the *Strata Titles Act 1985*. In its 2002 NCP assessment, the Council assessed the Northern Territory as having met its CPA obligations in this area. Table 10.5 details each jurisdiction's review and reform of legislation regulating surveyors.

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 companies and on advertising; and that the Government change the Surveyors (Practice) Regulation 2001 to make it less prescriptive about the methods of surveying.

The *Surveyors Act 2002,* assented to on 29 October 2002, repealed the 1929 Act and removed the restrictions on the naming and ownership of surveying companies and on advertising. The Act retained the system of registration of surveyors, as recommended by the review. The review found that a net public benefit from maintaining this system to ensure the integrity of the State cadastre (register of land boundaries). The Council assesses New South Wales as having met its CPA clause 5 obligations in this area.

Victoria

Victoria's review of the *Surveyors Act 1978* was completed in July 1997. It 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; and
  - specify integrity criteria;
- reducing some commercial restrictions that
  - require surveyors or related professions to form a majority of members/directors of a company engaging in cadastral survey work; and
  - allow the Surveyors Board to set fees; and
- reducing barriers to the interstate mobility of surveyors.

The Victorian Government substantially accepted the recommendations of the review. It advised the Council that the Land Surveying Bill 2001 was introduced to Parliament in May 2001 to effect the recommendations. The Bill lapsed in November 2002 following the calling of an election and the consequent proroguing of Parliament. The Government reported that re-introduction of the Bill is part of its legislative priorities and program.

Victoria also reported that the Surveyors Board implemented the recommendation that surveyors be allowed to gain practical training through course work as an alternative to training under a supervising surveyor. In relation to the recommendations to reduce barriers to the interstate mobility of surveyors, Victoria reported that the Surveyors Board is investigating costless interstate licensing through the Reciprocal Surveyors Boards of Australia & New Zealand. The Council assesses Victoria as not having met its CPA clause 5 obligations because it did not complete the reform process.

Queensland

Queensland completed a review of the *Surveyors Act 1977* in 1997. The review supported retaining the licensing system for cadastral surveyors. 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 the requirement that the majority of directors of bodies corporate must be registered surveyors. The review also supported retaining the requirement that consulting surveyors (those surveyors providing surveying services for a fee) hold insurance.

The Government endorsed the review recommendations. The Government noted in relation to business name approvals that the *Business Names Act 1962* provides a satisfactory alternate means of assessing and approving business names. The Government also noted that the existing provision for the board to set fees has not been used by the board for many years.

The Government consulted with the Surveyors Board of Queensland before and during the preparation of the draft Bill. An exposure draft of the Bill was released in August 2002, complemented by presentations at a number of seminars around the State. Written responses were received from surveying industry groups and individual surveyors. The draft Bill was modified to address issues raised during the consultation process. As a result, the Surveyors Bill 2003 was introduced to Parliament on 27 May 2003 and is scheduled for debate in August 2003. The bill retains the current model for regulating surveyors, and removes three restrictions that the NCP review identified and did not support. The Council assesses Queensland as not having met its CPA clause 5 obligations because it did not complete the reform process.

Western Australia

The Western Australian review of the *Licensed Surveyors Act 1909* and the *Strata Titles Act 1985* was completed in 1998. The review recommended:

- broadening the make-up of the Land Surveyors Licensing Board to include consumer representation; and

- replacing the requirement for licensed surveyors to be of good fame and character with provisions determining eligibility to practise. A more detailed rule, prohibiting the granting of a licence to an applicant who has a criminal record of offences involving business fraud or dishonest business practices, should be enacted.

The review recommended retaining the following restrictions:

- the licensing and regulation of surveyors (including the required periodic renewal of a practising certificate) based on the applicant's ability to provide proof of investment in continuing professional development, such as education, survey practice, or training of a survey graduate. The public benefit of this restriction — that is, being the maintenance of ongoing minimal professional standards, and therefore the integrity of the State's cadastral infrastructure — was perceived to outweigh the potential funding and administrative costs to the Western Australian Land Surveyors Licensing Board, and the compliance costs to individual surveyors;

- the provision for a surveyor whose licence or practising certificate has been suspended or cancelled, or restricted with special conditions, to apply to the board for the alteration or removal of those conditions. The potential of the board to discriminate unfairly between surveyors charged with similar offences, and therefore to unnecessarily restrict the availability of surveying services in the marketplace, was seen to be outweighed by the potential benefit of restoring the full range of business opportunities to affected surveyors;

- the requirement that licensed surveyors either purchase professional indemnity insurance cover or show proof of existing cover (under an employee–employer subcontracting arrangement), as a condition of the annual renewal of the practising certificate. The review found that the restriction addresses a specific commercial failure in the provision of surveying services, thereby contributing to improved performance in the industry and reducing the incidents of severe financial loss suffered by users of surveying services.

These reforms are being implemented in the *Acts Amendment and Repeal (Competition Policy) Bill 2002* which is before Parliament. The Standing Committee on Uniform Legislation and General Purposes recommended in its report on 10 June 2003 that the Bill be passed without amendment. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

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 recommended removing restrictions on companies and partnerships, and adding new provisions to make it an offence for any person to exert undue influence over a licensed surveyor to provide a service in an inappropriate or unprofessional manner. A draft Bill containing these reforms was prepared for introduction to Parliament in 2003. The Government has not yet introduced the Bill. The Council assesses South Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

Tasmania

The Tasmanian review of the *Land Surveyors Act 1909* was competed in July 1999. It recommended retaining the restrictions relating 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, and removing restrictions on the number of graduates under supervision and on the power of the board to set fees.

The Tasmanian Government released its 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.

In November 2002, Tasmania passed the *Surveyors Act 2002* which implemented deregulation of the surveying profession to a greater extent than envisaged by the review. The Council assesses Tasmania as having met its CPA clause 5 obligations.

Table 10.5: Review and reform of legislation regulating surveyors

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), reservation of title and practice, disciplinary processes, business conduct (regulation of the making of surveys and advertising)	Review was completed in August 2001. It recommended clarifying the objects of the Act and retaining the system of registration and the Board of Surveyors; substantially retaining current standards and requirements subject to ongoing review; considering removing restrictions on naming and ownership of surveying companies and on advertising; and possibly changing the Surveyors (Practice) Regulation 2001 to make it less prescriptive about the methods of surveying.	The *Surveyors Act 2002* received assented on 29 October 2002. The Act repealed the *Surveyors Act 1929* and removed the restrictions on to the naming and ownership of surveying companies and on advertising. The Act retained the system of registration of surveyors, as recommended by the review. The review found a net public benefit from maintaining this system to ensure the integrity of the State cadastre (register of land boundaries).	Meets CPA obligations (June 2003)
Victoria	*Surveyors Act 1978*	Licensing, registration, entry requirements (education, experience, integrity criteria), reservation of title and practice, disciplinary processes, business conduct (ownership restrictions, fees)	Review was completed in 1997. 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 companies 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 Victorian Government substantially accepted the recommendations of the review. The Land Surveying Bill 2001 was introduced to Parliament in May 2001 but lapsed in November 2002 following the calling of an election. The Victorian Government reported that progression of the Bill is a consideration of the Government's legislative priorities and program.	Review and reform incomplete

(continued)

Table 10.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Surveyors Act 1977*	Licensing, registration, entry requirements (education, experience, good fame and character), 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. The review supported retaining the licensing system for cadastral surveyors. The Government accepted this recommendation. The review also recommended removing a number of restrictions on competition. An exposure draft of the Bill was released in August 2002. Written responses were received from surveying industry groups and a individual surveyors.	The Surveyors Bill 2003 was introduced to Parliament on 27 May 2003 and scheduled for debate in August 2003. The Bill retains the current model for regulation of surveyors, and removes three restrictions that the public benefit test identified and did not support. Whilst the NCP review recommendations relating to business name approval were accepted, the Government noted that the *Business Names Act 1962* provides an alternate means of assessing and approving them. The Government also noted that the existing provision for the board to set fees has not been used for many years	Review and reform incomplete
Western Australia	*Licensed Surveyors Act 1909*	Licensing, entry requirements (competency [education and experience], age, good fame and character, continuing professional development), reservation of title and practice, disciplinary processes, business conduct (including professional indemnity insurance)	Review, in conjunction with the review of the *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. Reforms are being implemented in the Acts Amendment and Repeal (Competition Policy) Bill 2002 which is before Parliament.	Review and reform incomplete

(continued)

Table 10.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Strata Titles Act 1985*	Provision for only licensed surveyors to '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 the 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 person test), reservation of title (and derivatives), reservation of practice, disciplinary processes, business conduct (including ownership restrictions), business licensing	Review was completed in 1999 the report was released in 2002. It recommended removing restrictions on companies and partnerships and adding new provisions to make it an offence for any person to exert undue influence over a licensed surveyor to provide a service in an inappropriate or unprofessional manner.	A draft Bill containing these reforms was prepared for introduction to Parliament in 2003. As at 30 June 2003, the Government had not introduced the Bill.	Review and reform incomplete

(continued)

Table 10.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Land Surveyors Act 1909*	Licensing, registration, entry requirements, reservation of practice, disciplinary processes, business conduct (number of supervised graduates, discretionary power for surveyors board to publish and enforce a scale of fees, survey practice standards)	Review was completed in July 1999 and the report was released in December 2000. It 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). The review recommended removing the following restrictions: the number of graduates under supervision and the board's power to set fees.	Tasmania passed the *Surveyors Act 2002* to implement deregulation of the surveying profession to a greater extent than envisaged by the review.	Meets CPA obligations (June 2003)
ACT	*Surveyors Act 1967* *Surveyors Act 2001*	Licensing, entry restrictions (educational prerequisites), 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 a chief surveyor.	The Government accepted all recommendations but deferred considering the removal of compulsory postgraduate entry requirements until all jurisdictions 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)

(continued)

Table 10.5 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Licensed Surveyors Act*	Licensing, registration, entry requirements (education, experience, possibly exams, fit and proper person test), 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.	The Government endorsed the review outcomes in February 2000.	Meets CPA obligations (June 2002)

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 restricts 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 thus 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, which are well-informed consumers. Consequently 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. Table 10.6 details each jurisdiction's review and reform of legislation regulating land valuation.

Review and reform activity

New South Wales

New South Wales completed a review of the *Valuers Registration Act 1975* in 2000. While the review found that the impact of existing restrictions on competition was not significant, it recommended replacing the current registration scheme with a negative licensing regime. The proposed scheme involves core legislation that would provide for qualification and practice requirements and disciplinary action. 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 compulsory conditions for carrying on business as a valuer.

In April 2000, the Government approved the review's recommendations, subject to further consultation. The consultation process found, contrary to assumptions of the original review, that an increasing number of consumers are dealing directly with valuers and that valuers are experiencing difficulty in obtaining professional indemnity insurance due to instability in the insurance industry. There was evidence that introducing a negative licensing scheme would considerably increase the risk of financial losses to consumers if incorrect valuations were given. The margin of benefits from reducted regulation under a negative licensing scheme would not offset these risks.

As a result, the Government decided in May 2002 to retain the existing positive licensing scheme as the regulatory option providing the greatest net public benefit. Such a system provides consumers with the protection of knowing that a valuer possesses the necessary qualifications to practise and has not been disqualified. The Government also approved reforms to improve the efficiency of the existing scheme and to reduce the regulatory burden on valuers. These include the introduction of a single licence arrangement to replace the current system of five licences; the creation of a more flexible system of qualification and competency standards; and the introduction of three-year registration periods to replace annual renewals.

The Valuers Bill 2003 was introduced to Parliament on 29 April 2003, passed without alteration on 20 May 2003 and assented to on 28 May 2003. The *Valuers Act 2003* repealed the *Valuers Registration Act 1975*. The Council assesses New South Wales as having met its CPA clause 5 obligations.

Queensland

Queensland completed a review of the *Valuers Registration Act 1992* in October 1999. The review found that deregulation is likely to deliver a net public benefit in the medium to long term, but poses a risk to infrequent users of valuers in the short term. The review recommended retaining registration (with a further review in three years) and removing other geographic and price control restrictions. The Government endorsed the review recommendations in February 2000 and introduced amending legislation to Parliament in March 2001. The amendments include a recomposition 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.

Queensland advised that proclamation and implementation of changes to the Act and Regulations were completed by 1 May 2002. The amending legislation provided for:

- broadening the membership of the Valuers Registration Board to include two business and community representatives in addition to three registered valuers;

- the introducing of competency-based renewal for the registration of valuers and the listing of specialist retail valuers in addition to the existing requirements for first-time registration (suitable academic or demonstrated adequate experience for registration as a valuer, or demonstrated experience for listing as a specialist retail valuer); and

- removing the anticompetitive restriction on trading that the board might have placed on a specialist retail valuer.

The Council assesses Queensland as having met its CPA clause 5 obligations.

Western Australia

The Department of Consumer and Employment Protection reviewed the *Land Valuers Licensing Act 1978* in 1999. It recommended revoking the required registration of land valuers and abolishing the Land Valuers Licensing Board. The review was not finalised at the time, pending the outcomes of the Gunning Committee of Inquiry (concerning 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 was commissioned in April 2000 and published its final report on 1 September 2000. The Temby Royal Commission was commissioned on 11 June 2001 to investigate whether unlawful or improper activities or practices relating to the finance broking industry have occurred 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.*

The Government endorsed the Royal Commission's findings, which constituted a public interest argument to support the licensing of land valuers. The NCP review was updated to reflect this endorsement and the amended NCP review was endorsed by Cabinet on 4 August 2003. The review found that the following restrictions were in the public interest and should be retained:

- the requirement for land valuers to be licensed;

- the criteria for licensing;

- the power to discipline land valuers;

- the power to set maximum remuneration received by valuers;

- the power to prescribe fees for licensing and other administration services; and

- the power to prescribe a code of conduct.

In light of the review's recommendations, and the Government's response, no further legislative action is required. Accordingly, the Council assesses Western Australia as having met its CPA clause 5 obligations.

An intra-agency committee review of the *Valuation of Land Act 1987* was completed. 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 the requirement to be eligible for membership 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 review recommended retaining the following restrictions in the Act, on the basis of furthering the public interest.

- The Valuer-General cannot engage any person who is employed by or is a member of any rating agency or taxing authority under contract as a valuer. This restriction separates valuation activities from the rating and taxing functions of the Government.

- Any person employed in the administration of the Act is prohibited from engaging in any private valuation work without the written consent of the Valuer-General. Without this restriction, unfair competitive advantages might accrue to employees of the Valuer-General's office.

- Rating and taxing authorities must obtain the Valuer-General's approval to undertake valuation activities for rating and taxing purposes, and the Valuer-General may attach conditions to this approval. This restriction separates valuation from rating and taxing activities and also allows the Valuer-General to maintain consistency in valuation practices over time.

- The Valuer-General's Office has information-gathering powers that exceed those available to private valuers. The office does not use the information to provide commercial services, however, so the restriction conveys no competitive advantage to the office over private valuers. Further, such information is regarded as critical for core valuation activities of the office. To reduce the chances of competitive advantages arising in the future, a legislative requirement was introduced for the Valuer-General to advise the Minister regularly of the types of information collected under the Act, and for the Minister to authorise for the release of information to the public when the Minister considers that it is in the public interest to do so.

- The Valuer-General has immunity for any act or omission carried out in good faith and relating to activities under the Act. The limited protection against claims of negligence in performing statutory activities does not

protect the Valuer-General against liabilities incurred in performing nonstatutory activities that are the private sector also undertakes. The Valuer-General purchases relevant insurances at commercial rates and enjoys no competitive advantage from this provision. Given the advantage of the limited statutory immunity, however, assessed the review restriction as providing a net public benefit.

- Fees may be levied on members of the public, including private valuers, for copies of or extracts from valuation rolls. This restriction provides a small public benefit through cost recovery, while imposing no significant costs on the public or on private valuers who wish to obtain information from the valuation roll.

Amendments are being progressed via the Acts Amendment and Repeal (Competition Policy) Bill 2002 which is currently being considered by Parliament. The amendments implement the recommendations of the review, including:

- removing the restriction that the Valuer-General shall be qualified for membership of the Australian Institute of Valuers as a fellow or associate. The amended section will require only that a person appointed as Valuer General shall be able to demonstrate a high level of qualifications and experience in the valuation of land;

- removing the restriction that any person engaged as a valuer by a rating or taxing authority for the purpose of making valuations for rating or taxing purposes, must be licensed under the *Land Valuers Licensing Act 1978* or qualified for membership of the Australian Institute of Valuers as a fellow or associate;

- introducing a legislative requirement for the Valuer-General to advise the Minister regularly of the types of information collected under the Act, and for the Minister to authorise for the release of such information to the public, when the Minister considers that it is in the public interest to do so.

The Council assesses Western Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

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 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 examine the current requirements and broaden the number and type of acceptable qualifications (Office of Consumer and Business Affairs 1999). The Government endorsed the review

recommendations and awaits approval of a national training package, which it undertakes to implement. Once the national training package has been endorsed, South Australia will review the prescribed qualifications for valuers with a view to prescribing core competencies rather than qualifications.

The Industry Training Advisory Board (Property Services) recently commenced reviewing the Property Development and Management Training Package. A national industry-driven board, the Industry Training Advisory Board, is conducting the review for the Australian National Training Authority, a Commonwealth statutory authority. The review is to develop competency standards for valuers. The first stage of the review is due to be completed in November 2003 and the second stage (the endorsement and recognition of competencies) is likely to be completed in 2005.

The Council assesses South Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

Tasmania

Tasmania completed a review of the *Land Valuation Act 1971* and the *Valuers Registration Act 1974* in July 1998. The review recommended tendering 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. The review also recommended greater administrative separation of the Valuer-General and Government Valuation Services, and the abolition of the Valuers Registration Board

The Government accepted the review recommendations and, in December 2001, implemented them in the *Valuation of Land Act 2001* (which repealed the *Land Valuation Act 1971* and the *Land Valuation Amendment (Relocatable Homes) Act 1999*) and the *Land Valuers Act 2001* (which repealed the *Valuers Registration Act 1974).* Tasmania assessed the new Acts under its legislation gatekeeping requirements and the Acts commenced operation in 2002. The Council assesses Tasmania as having met its CPA clause 5 obligations.

Table 10.6: Review and reform of legislation regulating land valuers

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, reservation of practice, provisions that confer functions on the Property Services Council.	Departmental review was completed in 2000, recommending a negative licensing scheme to replace the current system. The consultation process found that introducing a negative licensing scheme would considerably increase the risk of financial losses to consumers if incorrect valuations were given. The margin of benefits from reduced in regulation under a negative licensing scheme would not offset these risks. As a result, the Government decided in May 2002 to retain positive licensing as the regulatory option providing the greatest net public benefit. The Government also approved reforms to improve the efficiency of the existing scheme and to reduce the regulatory burden on valuers.	The Valuers Bill 2003 was introduced to Parliament on 29 April 2003, passed without alteration on 20 May 2003 and assented to on 28 May 2003. The *Valuers Act 2003* repealed the *Valuers Registration Act 1975*.	Meets CPA obligations (June 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 persons test), reservation of title and practice, disciplinary processes, business conduct (including advertising)	Department review was completed in October 1999. Review found that deregulation is likely to a deliver net public benefit in the medium to long term, but in the short term is a risk to infrequent users of valuers. It recommended retaining registration (with a further review in three years) and removing other geographic and price control restrictions.	Changes to the Act and Regulations were completed by 1 May 2002. The amending legislation provided for broadening the membership of the Valuers Registration Board, introducing competency-based renewal for the registration of valuers and the listing of specialist retail valuers; and removing the anticompetitive restriction on trading for specialist retail valuers.	Meets CPA obligations (June 2003)

(continued)

Table 10.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Land Valuers Licensing Act 1978* and Regulations	Licensing, entry requirements (membership of Institute of Valuers or education and four years experience, and possibly exams), reservation of title and practice, business conduct (including board setting of maximum fees, code of conduct)	The 1999 review of the Act (by the Department of Consumer and Employment Protection) was not finalised pending the findings 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 Royal Commission recommended that valuers be licensed. The Government endorsed the findings of the Royal Commission.	The NCP review was updated to reflect this endorsement and the amended NCP review was endorsed by Cabinet on 4 August 2003. The review recommended that the legislative restrictions were in the public interest and should be retained.	Meets CPA obligations (June 2003)
	Valuation of Land Act 1987	Valuer-General powers and activities	Review by an intra-agency committee completed. Public consultation involved submissions following the release of an information paper. The review recommended defining the eligibility for the position of Valuer-General less narrowly (dropping the requirement; removing the restriction that any person making valuation for rating and taxing purposes must be licensed under the 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.	Review and reform incomplete

(continued)

Table 10.6 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), 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 acceptable qualifications. The Industry Training Advisory Board (Property Services) recently commenced reviewing the Property Development and Management Training Package. A national industry-driven board, the Industry Training Advisory Board, is conducting the review for the Australian National Training Authority. The review is to develop competency standards for valuers. The first stage of the review is due to be completed in November 2003 and the second stage (the endorsement and recognition of competencies) is likely to be completed in 2005.	The Government endorsed the review recommendations and awaits approval of a national training package, which it undertakes to implement. Once the national training package has been endorsed, South Australia will review the prescribed qualifications for valuers with a view to prescribing core competencies rather than qualifications.	Review and reform incomplete

(continued)

Table 10.6 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Land Valuation Act 1971*	Gives Valuer-General a monopoly on provision of valuation services to local government (for purpose of determining local rates)	Major review was completed in conjunction with the review of the *Valuers Registration Act 1974.* Review recommended tendering 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 a 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 and repealing the *Land Valuation Act 1971* and the *Land Valuation Amendment (Relocatable Homes) Act 1999,* was passed in 2001 and commenced operation on 28 June 2002.	Meets CPA obligations (June 2003)
	Valuers Registration Act 1974	Licensing, registration, entry requirements, reservation of title and practice, disciplinary processes, specification of conduct that may result in deregistration	Major review was completed in conjunction with the review of the Land Valuation Act.	*Land Valuers Act 2001*, implementing reforms and repealing the *Valuers Registration Act 1974*, was passed in 2001 and commenced operation on 28 June 2002.	Meets CPA obligations (June 2003)

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 10.7 details 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 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 (Centre for International Economics 2000d).

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 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 previous NCP assessments, the Council has assessed Victoria and Tasmania as having met their CPA obligations in this area.

New South Wales

The *Home Building Act 1989* (formerly the *Building Services Corporation 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 work and plumbing.

In September 1996, the Government released a green paper outlining options for the 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. The draft Bill proposed retaining the builders licensing system because the home warranty insurance scheme is not yet able to keep out unscrupulous builders. It proposed to tighten existing licensing arrangements and speed up the disciplinary process.

New South Wales passed the *Home Building Legislation Amendment Act 2001* in July 2001, proclaiming various elements on 10 August 2001, 30 November 2001 and 1 January 2002. Remaining parts of the Act commenced during 2002. On 12 March 2002, the New South Wales and Victorian governments announced the harmonisation of the two States' home warranty insurance schemes, with reforms that will provide ongoing protection for home owners. Further changes to home warranty insurance (agreed with Victoria) were implemented in the *Home Building Amendment (Insurance) Act 2002,* which commenced on 1 July 2002. The Council assesses New South Wales as having met its CPA clause 5 obligations.

Queensland

The non-safety and safety aspects of the *Electricity Act 1994* and associated Regulations were reviewed separately. The non safety aspects of Queensland's electricity legislation are discussed in chapter 7, volume 1.

The review of the safety aspects of the Electricity Act was conducted in two parts:

- independent consultants undertook a public benefit test of the safety-related licensing provisions in the legislation, including the issuing of licences, qualifications, the regulation of persons who require a licence, licence classes and type of work, and disciplinary action; and

- an intradepartmental committee considered the nonlicensing safety provisions, including safety and technical standards, electrical installations, cathodic protections systems and the approval of electrical articles.

The review, endorsed by the Government in February 2002, recommended:

- continuing occupational and business licensing for electrical work, in the public interest;
- amending the definition of electrical work to allow greater competition in relation to less dangerous extra-low voltage work;
- broadening the legislation's objectives to include consumer protection provisions based on minimum financial and insurance requirements for contractors;
- addressing administrative arrangements for the licensing system in a consideration of institutional options such as the creation of a new independent electricity safety regulator;
- continuing disciplinary provisions (although the report noted concerns about how effectively the existing disciplinary provisions supported compliance);
- continuing provisions requiring compliance with relevant safety and technical standards, in the public interest; and
- conducting further consultation on the extent of adoption of performance-based provisions relating to safety and technical requirements for electric lines or works, and the safeguarding of persons working on electric lines and electrical installations.

As a result, the Queensland Government passed the *Electrical Safety Act 2002* and Regulations which commenced on 1 October 2002 and addressed the above recommendations.

Three recommendations relating to licensing provisions were referred to an industry working group to consider their implementation. The working group:

- recommended retaining the status quo for existing electrical worker licences, given health and safety reasons and the net benefit to the community.
- acknowledged the existence of alternative competency-based pathways for licence qualifications (which the public benefit text did not acknowledge). The competency-based pathways continue under the Electrical Safety Regulation 2002.
- supported the recommendation to reduce ownership restrictions on electrical contracting businesses and made them more consistent across business forms. Amendments to the Electrical Safety Regulation 2002 are being progressed to remove restrictions on eligibility for an electrical contractor's licence.

The Electrical Safety Regulation 2002 requires all persons who conduct a business or undertake electrical work to have an electrical contractor's business licence and meet certain business and financial requirements. Previously, such a licence was required only for electrical installation work.

The regulatory impact statement, *Proposed Electrical Safety Regulations under the Electricity Act 1994*, examined potential competition restrictions. It noted inconsistencies in the previous electrical contractor licensing regime — that is, consumers were protected when they engaged an electrician for installation work (such as installing a ceiling fan) but not for electrical repair work (such as repairs to whitegoods).

In examining the competition impact, the regulatory impact statement reconsidered the key community benefits for electrical contractors' licences. Specifically that licensing:

- reduces transaction costs for consumers;
- corrects information asymmetry and information problems;
- protects third parties; and
- enforces obligations to perform, particularly given that the licensing regime includes disciplinary processes.

It concluded that the same arguments applied to contractors performing electrical repair work. Safety benefits to industry and consumers of contractor licence reform were deemed to outweigh costs, such as efficiency and compliance costs, and restrictions on competition. Regulatory amendments made on 28 February 2003 made it easier for businesses applying for an electrical contractor's licence by:

- reducing ownership restrictions by making eligibility requirements consistent for sole traders, partnerships and corporations; and
- broadening the options for a business seeking to meet the business skills requirement. A business may now split the technical and business requirements between two people (for example, a qualified technical person and a qualified business person).

The Council assesses Queensland as having met its CPA clause 5 obligations.

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 was endorsed by the Expenditure Review Committee of Cabinet. The Western Australian Government indicated that the review concluded that licensing of electricians is in the public interest, but further examination of some provisions is warranted. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

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 NCP review was completed in February 2003 and recommended retaining the present licensing and registration regimes for plumbing, gas fitting and electrical contractors and workers. The conclusion of the review was that continued regulation under the Act is justified because the benefit from protecting of public health and safety, and against consumer loss, is perceived to exceed the costs of regulation. The review considered alternative form of regulation, including reliance on the common law, general consumer protection legislation, the insurance market and negative licensing, but none was considered to be a satisfactory option.

The review identified certain trivial restrictions on competition and proposed amendments, but these are not required changes for CPA clause 5 compliance. The review report is with the Minister for consideration. If Cabinet endorses the reform recommendations then a Bill to implement the change is expected to be drafted and introduced to in June 2003 or later in the year. Since the reform recommendations do not address CPA requirements, the Council assesses South Australia as having met its CPA clause 5 obligations.

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 result justified the Government's role in ensuring 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 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 to a new Act under the oversight of the Department of Justice and Community Safety (Allen Consulting Group 2000b).

The ACT Government accepted 21 of the 22 recommendations and drafted legislation. It did not accept a provision for a peer group to overturn the registrar's decisions on strictly technical matters. The Government's model involves a suitably qualified panel to provide technical advice before the registrar makes a decision. Further, decisions can be appealed through the Administrative Appeals Tribunal. The 2001 ACT elections meant that the

introduction of legislation was postponed until 2002. The ACT Government approved the continuation of legislative drafting in December 2002. The draft *Construction Practitioners Licensing Bill* and regulations were tabled in the Legislative Assembly on 24 June 2003. The Council assesses the ACT as not having met its CPA clause 5 obligations because it did not complete the reform process.

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 the restrictions are retained, then the electrical workers and contractors licensing board should articulate their objectives and demonstrate that experience is the best way of achieving these objectives;
- amending the 'fit and proper person' test to signal its criteria;
- removing exemptions for the Power and Water authority from licensing requirements; and
- conducting a more general review of the Act, including reducing duplication in assessment and accreditation, changing the composition of the board, updating the language in the Act and reviewing the level of enforcement.

The Government approved the review recommendations in November 2000. Following a review of the administrative structures supporting the Act, it introduced a Bill to amend the Act in June 2003. The Act was passed by the Legislative Assembly on 14 August 2003 and is before the Administrator for assent. The Council assesses the Northern Territory as having met its CPA clause 5 obligations.

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 the following changes to licensing, including:

- in New South Wales, discontinuing the licensing of workers for metal roofing, mechanical services, duct fitting and sprinkler fitting;
- in Victoria, discontinuing the licensing of workers for metal roofing, mechanical services, duct fitting and sprinkler fitting;
- in Tasmania, discontinuing the licensing of workers for metal roofing and mechanical services;
- in the ACT, discontinuing the licensing of workers for sprinkler fitting;
- in South Australia and the Northern Territory, amending the licensing arrangements to allow separate licensing of water plumbers; and
- in Victoria and Tasmania, changing 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; licensing authorities should discontinue assessment or examination; that duplicates training authorities' assessment or examination; formal demonstration of competence be the only criterion for licensing; and 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 its 2001 NCP assessment, the Council found Victoria and Western Australia (in relation to plumbers) had met their CPA clause 5 obligations in this area. The previous section on electrical workers noted that the Council had assessed South Australia as meeting its CPA obligations relating to the review and reform of the *Plumbers Gas Fitters and Electricians Act 1995*. In New South Wales, plumbers and gasfitters are regulated under the *Home Building Act 1989* which is assessed above.

Queensland

Independent consultants completed a review of the *Sewerage and Water Supply Act 1949* under the supervision of an interdepartmental committee in June 2002. The Act establishes the occupational regulation framework for plumbers and drainers in Queensland, and provides for licensing, registration and entry requirements.

The review made recommendations about minimum product standards; the licensing of plumbers and drainers; and local government inspectors. The Queensland Government accepted the review's recommendations. The *Sewerage and Water Supply Act 1949* is being replaced by the *Plumbing and Drainage Act*, which was assented to on 13 December 2002 and will commence (with its subordinate legislation) on 1 November 2003. The new Act implements part of the outcomes of the NCP review. Following finalisation of the Standard Plumbing and Drainage Regulation under the new Act, the recommended information program (in conjunction with training on the new legislation) will commence in 2003. The Council assesses Queensland as having met its CPA clause 5 obligations.

Western Australia

In Western Australia, the *Gas Standards Act 1972* and the Gas Standards (Gasfitting and Consumer Gas Installations) Regulations 1999 provide that only a person with the appropriate gas fitters licence may carry out gasfitting work on a consumer's gas installation. The Act and Regulations deal with the licensing of gasfitters, registration, entry requirements (knowledge and skills, fit and proper person's test) and the reservation of practice. A review of the legislation was endorsed by the Expenditure Review Committee of Cabinet. The Western Australian Government indicated that the review concluded that licensing of gas fitters is in the public interest, but further examination of some provisions is warranted. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

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 included 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.

Tasmania advised the Council that the Government has not yet considered the review's recommendations. Tasmania has proposed new occupational licensing legislation to provide for the licensing and registration arrangements for plumbers, gas fitters and electricians. A discussion paper seeking submissions from industry, local government and other interested parties has been considered. A Cabinet Minute proposing a new occupational licensing scheme has been drafted. It is expected to be forwarded to the Minister for submission to Cabinet before legislation implementing the review recommendations is introduced to Parliament in the 2003 spring session. The Council assesses Tasmania as not having met its CPA clause 5 obligations because it did not complete the reform process.

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 is in the public interest where restrictions directly reduce identified and important harms. The Council accepts that it is appropriate that some plumbing and gas fitting practices are reserved for suitably qualified persons.

Drafting of legislation governing all building trades was halted by the calling of the 2001 election. The ACT Government approved the continuation of legislative drafting in December 2002. The draft Construction Practitioners Licensing Bill and regulations were tabled in the Legislative Assembly on 24 June 2003. The Council assesses the ACT as not having met its CPA clause 5 obligations because it did not complete the reform process..

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 specify its objectives and explicitly recognise the national competency 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, so long as 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 (Centre for International Economics 2000f).

The Northern Territory Government approved the recommendations of the review report and endorsed the findings of the review in January 2003. The Plumbers and Drainers Licensing Amendment Bill was introduced in June 2003. and was passed by the Legislative Assembly on 12 August 2003. It is currently

before the Administrator for assent. The Council assesses the Northern Territory as having met its CPA clause 5 obligations.

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, including loss of life if, for example, a building collapses (Allen Consulting Group 2000b).

Review and reform activity

Legislation covering builders in New South Wales, the ACT and the Northern Territory has been discussed in earlier sections on building regulations and approvals, and specific occupations. This section discusses review and reform progress in the remaining jurisdictions. In its 2002 NCP assessment, the Council considered that Western Australia and Tasmania had met their CPA clause 5 obligations in this area.

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.

Victoria advised that legislative amendments are planned for the 2003 spring session of Parliament, with related regulation changes to follow. The Council assesses Victoria as not having met its CPA clause 5 obligations because it did not complete the reform process.

Queensland

The review of the *Queensland Building Services Authority Act 1991* and the Queensland Building Services Authority Regulation 1992 was completed in August 2002. The review made the following recommendations:

- *Licensing*. There is a strong argument for setting technical criteria via licensing, mainly because this approach helps to provide a good standard of

consumer protection in an efficient manner. Opportunities to enhance these components have been identified.

- *Financial requirements for licensees*. The requirements should be retained in the short term but modified to raise the threshold for self-assessment (currently $A250 000) and closely and flexibly attuned to better reflect and manage risk. Formal statutory financial requirements would not be necessary in the long term if private insurance were introduced.

- *Home warranty insurance.*

  - It should be possible to enhance licensing and other regulatory arrangements over time such that home warranty insurance would no longer be necessary.

  - It should be possible at some point to relax the requirement that home warranty insurance be provided by only a public monopoly.

  - Given recent developments in interstate home warranty markets, it would not be sensible to make major changes to the insurance arrangements at this stage.

  - A further review of the potential to introduce competition into the Queensland home warranty insurance scheme should be conducted before mid-2004 when the Building Services Authority is next negotiating reinsurance contracts.

  - Queensland arrangements should be examined for whether they are too generous in terms of the insurance product specified.

  - The current arrangement whereby the Building Services Authority undertakes both insurance and licensing functions creates a conflict of interest between commercial and regulatory functions which necessitates the separation of these functions.

  - An inherent and important conflict of interest arises from the Building Services Authority undertaking licensing, insurance and workmanship functions in relation to home building. Legal separation and full commercialisation of the insurance function would provide a clear public benefit.

  - The Government should seek advice on whether it is necessary to seek an exemption under the *Trade Practices Act 1974* for the public monopoly status of the Building Services Authority insurance scheme.

The *Residential Tenancies and Other Legislation Amendment Act 2003* which amended (in addition to other Acts) the *Queensland Building Services Authority Act 1991* received assent on 2 June 2003. The relevant amendments gave effect to the recommendations of the NCP review relating to reinforcing the independence of the statutory insurance fund and enabling prudential

requirements to be prescribed by regulation. The status of the balance of the reforms recommended by the NCP review is as follows:

- *Licensing.* The existing licensing system is to be retained while adopting more flexible and focused technical requirements and support the Building Services Authority's proposal to streamline licence categories. The existing dispute resolution system will be retained as it is working well.

- *Financial requirements for licensees.* The requirements for licensees to be retained was accepted but further consideration will be given in relation to the recommendations to raise the threshold for self-assessment and other possible adjustments to better reflect and manage risk.

- *Home warranty insurance* A further review of the statutory insurance scheme is be conducted prior to the end of 2004. The further review is to take into account the findings of the National Review of Home Builders Warranty Insurance and Consumer Affairs conducted by Professor Percy Allan and prepared for the Ministerial Council on Consumer Affairs.

The nature of the cover mandated by the statutory insurance policy is to be reviewed so as to ensure that it provides a satisfactory level of consumer protection while minimising risks to the insurance provider and encouraging responsible behaviour by parties having control of risk factors. This has implications for the no-fault nature of cover for subsidence, provisions allowing early termination of contracts by consumers, the lack of an excess and the low threshold for claims.

Queensland also advised that investigation will be carried out and a report provided on the insurance and regulatory arrangements under the Act, including whether or not there would be advantages in separating the insurance and regulatory functions of the Authority and whether or not it is necessary to seek an exemption under the *Trade Practices Act 1974* for the public monopoly status of the Authority's scheme.

Amendments were made to the Act (commencing operation 4 July 2003) to introduce provisions to:

- require the statutory insurance scheme (including the insurance fund) to be managed by the Authority independently of its other functions and in accordance with actuarially sustainable principles; and

- enable a regulation to require the statutory insurance fund to be managed in accordance with an external standard of fund administration.

The Council assesses Queensland as having met its CPA clause 5 obligations, but notes the review's finding that at some point the requirement that home warranty insurance be provided by a public monopoly should be relaxed. (Statutory monopoly provision of insurance is discussed in chapter 6)

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 comment.

South Australia advised that the part of the review dealing with the financial resources requirements for contractors and mandatory building indemnity insurance was omitted from the final report released by the Government. This area was referred back to the review panel for reconsideration in light of the collapse of HIH, one of only two providers of building indemnity insurance in South Australia. A supplementary issues paper, dealing with financial and insurance requirements, was released for public and industry comment. However, this process was overtaken by the commissioning and completion of a national review dealing with the same issues. A national working party is now developing recommendations for a package of nationally consistent reforms to building legislation aimed at reducing building disputes and indemnity insurance claims. It is likely that financial resources and reputation requirements in the Act will be increased rather than decreased as a result of this process. Therefore, the finalisation of the Supplementary Review of the financial resources and building indemnity insurance requirements has been deferred pending completion of the national reform process. The national working party intends to report recommendations to the Ministerial Council for Consumer Affairs by mid-2003 and reforms are expected to be implemented in the second half of 2003.

The final report released by the Government made recommendations relating to reducing the financial reputation requirements for contractors. The changes, which overlap the national review, focus on reducing builder insolvency rates. These recommendations will be considered together with the reform recommendations arising from the national review, which are anticipated to result in a Bill to be introduced to Parliament in the second half of 2003. The Council assesses South Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

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. 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 inquire 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. The Minister endorsed the review recommendations subject to a full review of the Act being completed. The full review was scheduled to be with the Minister for Consumer and Employment Protection by the end of July 2003. The Council assesses Western Australia as not having met its CPA clause 5 obligations because it did not complete the reform process.

Table 10.7: 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 passed. The 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), 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 $A5000 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 the 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. Further changes to home warranty insurance (agreed with Victoria) were implemented in the *Home Building Amendment (Insurance) Act 2002.* The Act commenced on 1 July 2002	Meets CPA obligations (June 2003)

(*continued*)

Table 10.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Victoria	*Building Act 1993*	Licensing, 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 was completed in 1998. It recommended: 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 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 advised that legislative amendments are planned for the 2003 spring session of Parliament, with related Regulation changes to follow.	Review and reform incomplete
	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 noted 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)

(continued)

Table 10.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Victoria (continued)	*Building (Plumbing) Act 1998*	Licensing, registration	Refrigeration mechanics	New legislation was assessed under Victoria's legislation gatekeeping arrangements.	Act removes exemption of refrigeration mechanics from licensing for registration.	Meets CPA obligations (June 2001)
	Building Control (Plumbers Gasfitters and Drainers) Act 1981		Plumbers, gasfitters, drainers		Act was repealed and replaced by the *Building Act 1993*.	Meets CPA obligations (June 2001)
	Electric Light and Power Act 1958		Electrical trade work		Act was repealed and replaced by the *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 person test', financial requirements), 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)	Review was completed in August 2002. Several of its recommendations are detailed in the chapter.	The *Residential Tenancies and Other Legislation Amendment Act 2003* received assent on 2 June 2003. The relevant amendments gave effect to the recommendations of the NCP review for changes to the Act.	Meets CPA obligations (June 2003)

(*continued*)

Table 10.7 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	The nonsafety and safety aspects of Electricity Act 1994 and Regulations were reviewed separately. Independent consultants prepared a public benefit test report under the supervision of an interdepartmental committee. Cabinet endorsed the report's recommendations and an implementation strategy in February 2002.	The *Electrical Safety Act 2002* and Regulations commenced on 1 October 2002, addressing the safety recommendations. Three other regulatory amendments were made on 28 February 2003.	Meets CPA obligations (June 2003)
	Sewerage and Water Supply Act 1949 and Regulations	Licensing, registration, entry requirements (qualifications, prescribed practical experience), reservation of practice, disciplinary processes, provision for the making of plumbing and drainage standards	Plumbers, drainers	Independent consultants completed a review of the Act 1949 under the supervision of an interdepartmental committee in June 2002. The review made recommendations about minimum product standards; the licensing of plumbers and drainers; and local government inspectors. The Queensland Government accepted the review's recommendations.	The 1949 Act was replaced by the *Plumbing and Drainage Act 2002* which received assented on 13 December 2002 and will commence (with its subordinate legislation) on 1 November 2003. The new Act implements part of the outcomes of the NCP review.	Meets CPA obligations (June 2003)

(continued)

Table 10.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Western Australia	*Country Towns Sewerage Act 1948* and Bylaws Metropolitan Water Supply, and Drainage Bylaws 1981	Licensing, registration, entry requirements (certificate of knowledge and competence, five years experience, fit and proper persons test, 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)
	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 persons test'), reservation of practice (either licensed or under licensed supervision), disciplinary processes	Plumbers, tradespersons (under general direction of plumber)	Review recommended 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 recommendations.	Meets CPA obligations (June 2001)

(continued)

Table 10.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*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 $A200), entry requirements (degree/apprenticeship/ experience and exams, age, good character), reservation of title and practice, disciplinary processes, business licensing	Painters	Review was completed in 1998, concluding that the 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.	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. The Minister endorsed it subject to a full review of the Act. The full review was scheduled to be with the Minister for Consumer and Employment Protection by the end of July 2003.	Review and reform incomplete

(*continued*)

Table 10.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
Western Australia (continued)	*Gas Standards Act 1972* and Gas Standards (Gasfitting and Consumer Gas Installations) Regulations 1999	Licensing, registration, entry requirements (knowledge and skills, 'fit and proper person test'), reservation of practice	Gasfitters	A review of the legislation was endorsed by the Expenditure Review Committee of Cabinet. The review concluded that licensing of gas fitters is in the public interest, but further examination of some provisions is warranted.		Review and reform incomplete
	Electricity Act 1945 and Electricity (Licensing) Regulations 1991	Licensing, entry requirements (apprenticeship/training and experience/exam, 'fit and proper person test'), reservation of practice, disciplinary processes	Electricians	A review of the legislation was endorsed by the Expenditure Review Committee of Cabinet. The review concluded that licensing of electricians is in the public interest, but further examination of some provisions is warranted.		Review and reform incomplete
	Builders Registration Act 1939 and Regulations	Licensing, registration, entry requirements (training and practical experience, age, good character, sufficient material and financial resources), reservation of practice, business licensing	Builders	Review 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 Act 1996	Requirement of written contracts, conditions (including mandatory insurance)		Review, in conjunction with a review of the Builders Registration Act was completed. 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 with the rest of Australia). Also recommended that insurance authorisation be modified so the Minister (rather than insurers) approves policies.	The *Building Legislation Amendment Act 2000* was proclaimed in 2001.	Meets CPA obligations (June 2002)

(continued)

Table 10.7 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 person test', no bankruptcy in past 10 years for supervisor: qualifications, 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 part of the review dealing with the financial resources requirements for contractors and mandatory building indemnity insurance was omitted from the final report released by the Government. This area was referred back to the review panel for reconsideration in light of the collapse of HIH. A supplementary issues paper, dealing with financial and insurance requirements, was released for public and industry comment. However, this process was overtaken by a national review dealing with the same issues. The finalisation of the supplementary review of the financial resources and building indemnity insurance requirements has been deferred pending completion of the national reform process which is expected to report to the Ministerial Council for Consumer Affairs by mid-2003.	Implementation of these recommendations will be considered together with the recommendations arising from the national review, which are anticipated to result in a Bill to be introduced in the second half of 2003.	Review and reform incomplete

(continued)

Table 10.7 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Occupations*	*Review activity*	*Reform activity*	*Assessment*
South Australia (continued)	*Plumbers, Gas Fitters and Electricians Act 1995*	Licensing (contractors), registration (workers), entry requirements (for contractor: qualifications, experience, no undischarged bankruptcy, 'fit and proper person test', sufficient business knowledge and experience and financial resources; for worker: qualifications, experience), reservation of practice (for plumbing: water, sanitary or draining work or the installing or testing of backflow prevention devices), disciplinary processes	Plumbers, gasfitters, electricians	The NCP review was completed in February 2003 and recommended retention of the present licensing and registration regimes because the benefits in terms of protection of public health and safety and against consumer loss are considered to exceed the costs of regulation. The review considered alternatives to forms of regulation, including reliance on the common law, general consumer protection legislation, the insurance market and negative licensing. However, none was considered to be a satisfactory option.	The review identified certain trivial restrictions on competition and proposed amendments, but these changes are not required for CPA clause 5 purposes.	Meets CPA obligations (June 2003)

(*continued*)

Table 10.7 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 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), reservation of practice (sanitary, mechanical services, water and backflow prevention plumbing, draining and roof plumbing, any o r plumbing work, gasfitting), disciplinary processes	Plumbers, gasfitters	Review recommendations included: reducing areas of reservation of practice; limiting qualifications and experience required to demonstrate competence for registration; implementing an appropriately constituted self-certification system; and amalgamating registration and plumbing inspection systems to reduce overlap and the regulatory burden on plumbers. Proposed new occupational licensing legislation is being considered by the Government, to provide for the licensing and registration arrangements for plumbers, gas fitters and electricians. A discussion paper was released, seeking submissions from industry, local government and other interested parties.	A Cabinet Minute proposing a new occupational licensing scheme was drafted and is expected to be forwarded to the Minister for submission to Cabinet before legislation to implement the review is introduced to Parliament in the 2003 spring session.	Review and reform incomplete
	Building Act 2000	Mandatory accreditation, entry requirements (including continuing professional development), reservation of practice, disciplinary processes, business conduct (insurance)	Building practitioners for building and plumbing work over $A5000	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 commenced from 1 January 2003, following the completion of industry consultation.	Meets CPA obligations (June 2002)

(*continued*)

Table 10.7 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), reservation of practice, disciplinary processes, business conduct (insurance)	Building practitioners	Targeted public review, in conjunction with the 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 did not agree with the recommendation for a peer group to have the power to overturn registrar's decisions on strictly technical matters.	Drafting of legislation governing all building trades was stopped by the 2001 Election. An Exposure Draft Bill for the Construction Practitioners Licensing Act together with regulations were tabled on 24 June 2003.	Review and reform incomplete
	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.	Review and reform incomplete

(*continued*)

Table 10.7 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 person test'), 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 above.	See discussion of Building Act.	Review and reform incomplete
Northern Territory	*Building Act*	Licensing, provision for the establishment of building technical standards, registration of building practitioners and certifiers, regulation of building matters (including the registration of building products), permits, appeals processes	Building practitioners	A review was undertaken in 1999 and endorsed in July 2002. The review recommended that: ss. 21, 41 and 46 of the Act be repealed, because they are redundant or anticompetitive in nature; other anticompetitive provisions of the Act be retained because they are justified under clause 5(1) of the CPA; and 'other issues' raised in the review be considered during the general review of the Act.	*The Building Amendment Act 2003* was introduced into the Legislative Assembly on 30 April 2003 to effect the full recommendations of the review. The Bill was passed by the Parliament and is now before the Administrator for assent.	Meets CPA obligations (June 2003)

(*continued*)

Table 10.7 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 person test'), reservation of practice (electrical work unless extra-low voltage)	Electrical workers	Review was completed in October 2000. Consultation involved the public release of an 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.	A Bill to amend the Act was introduced in June 2003. The Act was passed by Parliament on 14 August 2003 and is before the Administrator for assent.	Meets CPA obligations (June 2003)
	Plumbers and Drainers Licensing Act	Licensing, registration, entry requirements (qualifications or experience, fitness of character), 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 explicitly recognise a national competency based approach; the board's options in dealing with complaints be made widely known; the 'fit and proper person' test be maintained so long as appeal mechanisms are clear and accessible; and membership of the board be reviewed to establish whether the continued Power and Water Authority membership is desirable. The 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. The Plumbers and Drainers Licensing Amendment Bill was introduced in June 2003 and was passed on 12 August 2003. It is before the Administrator for assent.	Meets CPA obligations (June 2003)

11 Communications

The communications sector, embracing telecommunications, broadcasting and postal services, is vital to the efficient operation of the Australian economy. Business users and household consumers depend on these services. It is important, therefore, that the communications sector is not encumbered by legislative restrictions on competition that are not in the public interest.

The Commonwealth Government is responsible for legislation relating to the communications sector. Relevant legislation includes the *Broadcasting Services Act 1992*, the *Radiocommunications Act 1992*, parts XIB and XIC (relating to telecommunications competition regulation) of the *Trade Practices Act 1974* (TPA), and the *Australian Postal Corporation Act 1989*. Some of this legislation imposes competition restrictions that have been reviewed against national competition policy (NCP) considerations. These reviews have identified the competition implications of legislative restrictions and recommended alternative approaches to upholding the statutory objectives.

Regulation and technological change

The communications sector is a large and fast-growing part of the Australian economy — although growth is uneven among the sector's constituent parts. In 2001-02, Australia Post's domestic mail volumes increased by just 0.5 per cent while the overall volume of letters and parcels declined by 0.3 per cent (Australia Post 2002, p. 15). Pay television companies have also experienced low growth, partly reflecting the impact of government 'antisiphoning' regulations that give free-to-air broadcasters preferred access to major sporting events. The Commonwealth Government mandated that there will be no new free-to-air television broadcasters before the end of 2006 and that both standard and high definition digital services, and both analogue and digital services, should be 'simulcast' (which leaves little spectrum available for transmitting new digital services). Many commentators believe that these policies have contributed to the low uptake of digital television. The fast-growing segments of the communications market include mobile telephony and Internet services. Annual revenue growth in telecommunications averaged around 13 per cent between 1997 and 2000 (PC 2001b, p. 74).

The communications sector is subject to rapid technological change which is creating new industries and, in some cases, new competitors for large participants in the sector. Australia Post is experiencing slowing demand for its traditional postal services as e-mail and other forms of electronic transmission allow people to communicate and to pay bills in alternative ways. Australia Post is responding by diversifying into bill paying, travellers

cheques, banking and logistics services. In another sector, mobile telephony providers are supplying an alternative product to fixed telephony, although the 'local loop' owned by Telstra remains central to telephony services.

Technological developments will inevitably lead broadcasting companies to play a role in providing Internet services, because households will be able to use their televisions to access the Internet. This is an example of the convergence between the various parts of the communications sector. Some major companies appear to be positioning themselves across sectors for the commercial opportunities that technological change will allow. Examples are Telstra's 50 per cent holding in the pay television company Foxtel, and Australia Post's diversification into electronic bill paying.

Broadband technology will contribute to greater convergence of broadcasting and telecommunications. It will promote the capacity of companies to sell television, telephone and Internet services. Government regulations, however, can hold back the spread of broadband and some other technologies, impeding the efficiency of the communications sector and affecting the availability and cost of services to consumers.

The pace of technological change in communications, along with the difficulty of predicting developments and emerging market opportunities, complicates the regulatory task. Regulations introduced to deal with issues in a particular area may have unintended adverse impacts for another area. They may, for example, relate to technologies that are becoming obsolete, thus hindering the adaptation of producers and consumers to technological change by distorting the decisions that they make. In this way, regulation can reduce competition and market entry, and hinder market growth possibilities and the efficiency of the communications sector. In particular, government policies need to be 'technologically neutral' and not lock in particular technologies or design standards. As the Productivity Commission noted:

> *Regulation should apply only to areas where there are clearly identified problems and where regulation is an effective remedy. It should be transparent, predictable, accountable, consistent and fair.* (PC 2001b, p. 4)

Consideration of these impacts is central to the Competition Principles Agreement (CPA) clause 5 guiding principle that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs and that the objectives of the legislation can be achieved only by restricting competition.

Legislation restricting competition

Broadcasting Services Act

The Broadcasting Services Act embodies regulation that the Commonwealth Government has established on an *ad hoc* basis over time. The restrictions on competition include the following policies.

- The number of commercial free-to-air broadcasters is restricted to three in any geographic area until the end of 2006. The scope for new radio stations is also restricted.

- The commercial free-to-air television broadcasters are prohibited from multichannelling (although this policy will be reviewed by the end of 2005).

- The multichannelling restrictions are intended to protect pay television operators from direct competition, but these operators in turn are not allowed (under the 'antisiphoning' rules in the Broadcasting Services Act) to broadcast major sporting events that free-to-air broadcasters wish to show. The antisiphoning rules protect a major source of advertising revenue for the free-to-air television operators.

The Government mandated that television broadcasters simulcast both standard and high definition digital services. Standard definition has been considered satisfactory in other countries. Broadcasters are also required to simulcast analogue signals (which use a great deal of the available and valuable spectrum) and digital signals for several years. The simulcasting leaves little spectrum for new digital services, thus discouraging consumers from purchasing expensive set-top boxes to receive digital signals (PC 2000a, pp. 221–43).

The Broadcasting Services Act restricts the ability of datacasters to compete with broadcasters.[1] Under Schedule 6, datacasters are not allowed to transmit several types of programs, including drama, sports, music, lifestyle, documentary or quiz programs. The restrictions on the programs that datacasters can provide contribute to the dominance of broadcasting by the free-to-air stations and pay television operators.

[1] The Broadcasting Services Act defines a datacasting service as one that delivers content as text, data, speech, music or other sounds, visual images or any other form to persons having equipment appropriate for receiving that content, where the delivery of the service uses the broadcasting services band.

Radiocommunications Act

The Radiocommunications Act is the primary legislation governing the use of the radiofrequency spectrum. Radiofrequency spectrum is required for broadcasting and telecommunications services, and for community safety services such as those provided by country fire authorities, aviation, maritime and land transport safety bodies, and the Bureau of Meteorology. The wide range of spectrum users means that there are competing demands for this limited resource. The Australian Communications Authority conducts auctions for those parts of the spectrum that are particularly valuable to users. It also needs to ensure sufficient spectrum is available for noncommercial organisations that fulfil a public good role, such as the defence forces and the community services described above.

The Radiocommunications Act provides for the Australian Communications Authority to manage spectrum through:

- the issue and resumption of tradeable spectrum licences (which have a 'life' of 15 years);
- the issue of tradeable apparatus licences that allow people to use particular transmitters and/or receivers to provide specific services without interfering with each other;
- the issue of class licences that allow shared access to parts of the spectrum (typically for low power transmitters such as remote control devices that do not interfere with other users); and
- the reallocation of parts of the spectrum.

Australian Postal Corporation Act

Australia Post has a dominant position in the postal services market, reflecting its statutory monopoly in the provision of certain key 'reserved' services under the Australian Postal Corporation Act. These reserved services are:

- the collection and delivery of letters within Australia — the protection of Australia Post's position is provided by s. 30 of the Act, which defines the reserved service as applying to carriage of a letter up to 250 grams and for a fee that is up to four times the rate of postage for a standard postal article carried by ordinary post; and
- the delivery of incoming international mail.

While Australia Post is experiencing increasing competition from new technologies (such as e-mail and the Internet) for its traditional mail services, the statutory reserved services represent a major restriction on competition.

The Commonwealth Government has sought in recent years to address the competition implications of the Act, including:

- the reserved services;
- the delivery of the universal service obligation (USO), whereby Australia Post is required to make the standard letter service available at a single uniform rate of postage for all Australians. The principal NCP issue associated with the USO is its funding, with Australia Post funding the USO internally at an annual cost of around A$90 million. The Council of Australian Governments (CoAG) agreed in November 2000 that governments should directly fund community service obligation (CSO) payments; and
- competitive neutrality and access issues.

Review and reform activity

Broadcasting Services Act

In its 2000 review of broadcasting, the Productivity Commission (PC) described the regulatory arrangements as a legacy of inward looking, anticompetitive and restrictive 'quid pro quos'.

> *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 businesses of opportunities to develop new products and services for the world as well as Australian markets.* (PC 2000a, p. 15)

The Productivity Commission considered that Government policy was impeding the conversion to digital television, thereby inhibiting a greater number of broadcasters and increased choice for consumers. To effect a transition to digital television, the Productivity Commission argued that the Government should close down analogue services as soon as possible, end the requirement for high definition digital broadcasting, relax the restrictions on datacasting and multichannelling, and end the artificial distinction between datacasting and digital broadcasting.

Because analogue television is much less efficient than digital television in its use of spectrum, the existing broadcasters account for most of the spectrum. The antisiphoning rules deliver a substantial advantage to the existing broadcasters, who probably value the lack of significant competition and the relative stability of the industry structure. The Productivity Commission recommended that the antisiphoning rules should be relaxed.

The Productivity Commission also recommended that the Government separate spectrum access rights from broadcasting licences and convert broadcasting licence fees to spectrum access fees. It further contended that the Australian Communications Authority should sell access to spectrum through a competitive bidding process, and that all broadcasting licence holders should pay fees based on their use of spectrum rather than on their revenue. These proposals would free up spectrum availability and make it possible for more broadcasters to enter the industry. In this context, the Productivity Commission recommended removing the restrictions that prevent new broadcasters from entering before the end of 2006 (s. 28 of the Broadcasting Services Act).

The Commonwealth Government has made only a partial response to the inquiry report. On 5 August 2002, the Minister for Communications, Information Technology and the Arts announced 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.

On 19 December 2001, the Minister released an issues paper and called for submissions to a Government review of datacasting services as specified in schedule 6 of the Broadcasting Services Act. The stated purpose of the review was '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' (Alston 2001).

The datacasting issues paper discussed options for change but reiterated the Government's commitment not to issue new commercial broadcasting licences before the end of 2006. The report of the datacasting review was released on 10 December 2002. It provided the Government's decisions as follows:

> *The Government has decided that there should be no change at this time to the rules relating to the content which can be provided under a datacasting licence; that datacasters should not be able to provide additional services such as open narrowcasting and subscription broadcasting or narrowcasting; and that no change should be made at this time to the arrangements relating to use of a datacasting transmitter licence from 1 January 2007.*
>
> *The Government has considered that … no other option for defining the content which datacasters can provide was likely to result in greater opportunities to develop a viable business case without, in effect, breaching the moratorium on provision of new television broadcasting services before 31 December 2006.*
>
> *… It was not considered appropriate to allow datacasters to provide narrowcasting or subscription broadcasting services.*

> *It is premature to be deciding on arrangements relating to the use of spectrum, in particular for commercial television broadcasting, from 2007.* (DCITA 2002, p. 7)

The Government's response to the datacasting review effectively involved little change to existing arrangements. The Parliament passed legislation relating to community broadcasting in November 2002, and legislation relating to foreign ownership of media and cross-media rules reached the Senate in October 2002.

Assessment

The Council considers that the Productivity Commission's recommendations accorded with the principle of the CPA clause 5. The Commonwealth Government's response, however, has been limited, continuing with datacasting arrangements that prevent datacasters from becoming digital broadcasters and not yet addressing the restrictions related to the number of free-to-air broadcasters, multichannelling, digital television, antisiphoning and spectrum allocation.

The Commonwealth Government has addressed neither the benefits and costs to the community from these restrictions nor whether its objectives in broadcasting could be achieved without these restrictions. The Council assesses the Commonwealth as having failed to meet its NCP obligations, because it did not consider the major restrictions of competition against the CPA clause 5 principle.

Radiocommunications Act

The Productivity Commission conducted an NCP review of the Radiocommunications Act and related Acts in 2001-02. Accordingly, its review report is framed around the guiding principles embodied in CPA clause 5. The Treasurer and the Minister for Communications, Information Technology and the Arts released the final review report on 5 December 2002.

Although there are substitute technologies for some uses of spectrum — for example, cable television — mobile communication (and thus the spectrum) is the sole practical technology for many uses. This limitation contributes to the scarcity of the spectrum resource and the need for it to be used efficiently and in ways that do not restrict competition (PC 2002d, pp. xxxi–xxxii).

The Productivity Commission argued that noncommercial users who provide emergency and other essential community services that the private sector would not provide (that is, areas of 'market failure') should have access to parts of the spectrum. These users are not usually in a position to compete in spectrum auctions using their own financial resources. The Productivity Commission argued that they should not receive concessional prices for

spectrum; rather, they should be funded transparently from the Budget (PC 2002d, pp. lii-liii).

The Productivity Commission made several recommendations to enhance the role of the market in spectrum management. The Government accepted most of these recommendations. One exception, however, relates to the Productivity Commission's recommended repeal of the elements of ss 60 and 106 of the Radiocommunications Act that allow the Minister to impose limits on parts of the spectrum that any person may use. The Government rejected this recommendation on the basis that ss 60 and 106 are 'strongly pro-competitive' and work in harmony with s. 50 of the TPA.

Assessment

Although the Government has not completed its response to the Productivity Commission's radiocommunications report, it has accepted several significant recommendations that will benefit the community. The Government also released on 5 December 2002 its response to another radiocommunications report that an interdepartmental task force prepared as an NCP review and completed in June 2001. This review report made a number of largely technical recommendations, of which most do not appear to conflict with the Productivity Commission's recommendations. (In the one instance where they do, the Government's response deferred to the Productivity Commission recommendation). The Council assesses the Commonwealth Government as having made substantial progress towards fulfilling its NCP obligations in relation to the Radiocommunications Act and related legislation, but notes that the Government is still considering several recommendations. The Government has not yet met its clause 5 obligations because review and reform is incomplete.

Australian Postal Corporation Act

In 1997, the Commonwealth Government requested that the National Competition Council review the Australian Postal Corporation Act. 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 was also obliged to account for the Government's obligations under the CPA.

The Council's report was completed in February 1998. Its main recommendations were that:

- Australia Post continue to provide the Australia-wide letter service, with unprofitable parts of this USO treated as a CSO funded directly from the Budget;

- household letters remain reserved to Australia Post, with a mandated uniform rate of postage;

- open competition be introduced to the delivery of business letters, with Australia Post free to discount against a maximum charge set at the same level as the uniform rate for household letters;

- all international mail services be open to competition; and

- the Government regulate to ensure access on reasonable terms to Australia Post's CSO-funded services and post office boxes (NCC 1998).

In July 1998, the Commonwealth announced that it would reduce the scope of Australia Post's monopoly position. The Postal Services Legislation Amendment Bill 2000, however, was not introduced to Parliament until April 2000. The Government tabled an extensive explanatory memorandum with this Bill, which included regulatory impact statements.

The principal features of the Bill were:

- reductions in the scope of services reserved to Australia Post to encourage competition. Incoming international mail would no longer be a reserved service, and the protection afforded to Australia Post's domestic mail service would be reduced from 250 grams to 50 grams and from four times the standard postage rate to one times;

- the establishment of a postal services access regime under the TPA. The proposed new part XID of the TPA would help postal service competitors to access the services supplied by a strong market incumbent such as Australia Post; and

- the conversion of Australia Post from a statutory corporation to a public company under the Corporations Law, which would be consistent with the Government's competitive neutrality policy.

The Bill aimed to increase competition in postal services, encourage the long-term efficiency of the postal sector, and maintain the USO and the universal letter rate (McGauran 2000). The Government withdrew the Bill in March 2001, however, in the face of opposition in the Senate. It informed the Council in May 2003 that it is not intending to reintroduce the withdrawn legislation.

As an alternative, the Minister for Communications, Information Technology and the Arts announced on 14 November 2002 a package of postal reforms that could partly address the recommendations of the 1998 NCP review. The Government introduced the Postal Services Legislation Amendment Bill 2003 to Parliament on 19 June 2003. The Bill was referred to a Senate committee, which reported on 19 August 2003. This legislation will implement the partial reforms announced in November 2002. The Bill provides for the following measures:

- expanded powers for the Australian Competition and Consumer Commission (ACCC) to inquire into disputes about the terms and conditions relating to bulk mail interconnection arrangements;

- expanded powers for the Australian Communications Authority to cost Australia Post's CSOs and report on its quality of service and compliance with service standards;

- the introduction of accounting transparency for Australia Post (by giving the ACCC the power to determine record-keeping rules for Australia Post) to assure competitors that it is not unfairly competing by cross-subsidising its competitive services with revenue from reserved services.

- the 'legitimisation' of 'document exchanges' (businesses that provide mail collection and delivery services for professional businesses such as doctors and lawyers) and 'aggregators' (businesses that sort the mail of smaller companies so it qualifies for Australia Post's bulk mail discounts).

Assessment

The Government has yet to address the major restrictions in the Australian Postal Corporation Act because its proposed reforms in 2000 were blocked by the Senate. The restrictions relate to the monopoly that the Act accords Australia Post in the delivery of domestic mail and incoming international mail. The Government has not yet established that the reservation of these services to Australia Post yields a net public benefit or that it is the only way of meeting the objectives of the postal legislation.

The reforms introduced to Parliament on 19 June 2003 will have some pro-competitive impact. The Australian Communications Authority's monitoring of Australia Post's CSOs and service quality, however, does not compare with the enhanced quality of service that would be likely to arise if Australia Post were subject to competition in the delivery of standard mail and incoming international mail. Accounting separation will be helpful to competitive neutrality outcomes. The legitimisation of document exchanges will remove the risk of legal challenge to these entities; but it does not represent an increase in competition to Australia Post. Parliament's failure to pass the 2000 Bill or other reforms that comply with NCP obligations means that the Commonwealth Government has failed to comply with its CPA clause 5 obligations.

CPA clause 4 obligations relating to Telstra

Major reforms of Commonwealth Government legislation have contributed to increased competition in the telecommunications industry and delivered benefits for consumers in terms of price and choice. In 1991, Telecom (as Telstra was then known) lost its statutory monopoly position in the provision of telecommunications carriage services. The Government licensed Optus to be a second fixed network carrier, and Optus and Vodafone to be mobile telephone carriers in competition with Telstra. The Government allowed full competition in carriage services in the *Telecommunications Act 1997*, and there are currently around 80 carriers and 850 carriage service providers (who supply telecommunications services to the public on space rented from carriers' networks).

The Commonwealth Treasurer asked the Productivity Commission in June 2000 to review telecommunications competition regulation, but instructed it not to inquire into options for the structural separation of Telstra (in line with Government policy). The final inquiry report, released in December 2001, commented that Telstra's local loop is a natural monopoly owing to sunk costs and the fact that any-to-any connectivity is available only through the loop. While there are many carriers and service providers, Telstra and Optus dominate the fixed and local access market, providing around 70 and 19 per cent of the market respectively (PC 2001b).

Against this background, the Productivity Commission made recommendations that sought to improve the efficiency of the regime regulating access to telecommunications network facilities. Accounting for these recommendations, the Government introduced the Telecommunications Competition Bill 2002 to Parliament on 26 September 2002, and the legislation was proclaimed on 19 December 2002. This Act amends parts XIB and XIC of the TPA, the Telecommunications Act and the *Telecommunications (Carrier Licence Charges) Act 1997*. The second reading speech described the objectives of the legislation as:

- speeding up access to core telecommunications services. (The Act removes the 'merits review' of access arbitrations by the ACCC);

- facilitating investment in new telecommunications infrastructure. As a means of reducing uncertainty, potential investors will be able to make undertakings to the ACCC about access prices and terms and conditions that will apply to their prospective assets; and

- providing a more transparent regulatory market. The legislation requires Telstra's preparation of separate accounts of its wholesale and retail operations. The Government described the broad objective of accounting

separation as providing transparency to the ACCC and companies accessing the Telstra network.[2]

While Telstra no longer has a monopoly position in the telecommunications industry, CPA clause 4 matters remain relevant to any consideration of compliance with the CPA (see volume 1, chapter 3). In its 1999 NCP assessment, the Council noted that clause 4 'places a responsibility on the Commonwealth to have ensured prior to the partial privatisation of Telstra in 1997 that the telecommunications regulatory framework and Telstra's structure and commercial objectives facilitate competitive outcomes consistent with the community interest' (NCC 1999a, p. 360). At that time, the Commonwealth Government indicated that it would not pursue structural separation of the local fixed network, preferring to prohibit anticompetitive conduct by carriers or carriage service providers under part XIB of the TPA and to facilitate third party access to services provided by carriers or carriage service providers under part XIC.

The Council commissioned work by economic consultants, Tasman Asia Pacific, which it 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. It concluded, however, that a ring-fencing regime would not remove the sources of Telstra's market power and thus would not diminish 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 Commonwealth Government has not followed this course, preferring to rely on the effects of the 1997 measures that allowed full entry to the market by competitors to Telstra, and on the regulation of anticompetitive conduct and access arrangements. The legislative amendments to parts XIB and XIC of the TPA, as introduced in the Telecommunications Competition Act (and described above), are likely to enhance the effectiveness of this approach.

On 11 December 2002, the House of Representatives Standing Committee on Communications, Information Technology and the Arts announced that it had received a request from the Minister for Communications, Information Technology and the Arts to inquire into the structural separation of Telstra's core network from its other businesses. On 6 February 2003, the Minister

[2] The Minister for Communications, Information Technology and the Arts released a draft discussion paper on Telstra accounting separation for public comment on 19 March 2003. On 17 April 2003, the ACCC released a discussion paper that outlined proposed changes to the record-keeping rules that the ACCC applies to Telstra, Optus, Primus, Vodafone and AAPT. The changes are intended to complement the Government's introduction of an accounting separation regime for Telstra.

announced that 'there appears to be no valid reason for progressing this inquiry' (Alston 2003b) and the inquiry was discontinued.[3]

The Council remains of the view that achieving a competitive telecommunications industry capable of delivering substantial benefits to consumers may require the Government to further consider the structure of Telstra, including the option of the structural separation of the fixed network.

Competitive neutrality matters

Competitive neutrality measures seek to ensure significant government-owned businesses do not have an advantage over their private competitors simply as a result of their public ownership. They ensure 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. It claimed that Australia Post enjoys an advantage in competing for business because it receives preferential treatment in Customs' screening charges. In particular, it argued that Australia Post is advantaged by:

- higher dollar 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 Commonwealth Competitive Neutrality Complaints Office 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

[3] This decision followed a statement by the Shadow Minister for Communications on the same day that 'the existence of the minority shareholding in Telstra and the cost and complexity therefore associated with such separation, make that an inappropriate strategy for reforming Telstra' (Tanner 2003).

- the Government address concerns about charges for nonpostal items in high volume, low value consignments, as part of the broader issue of whether Australia Post should pay cost recovery charges for informal screening of incoming postal consignments (CCNCO 2000).

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 value thresholds for outgoing postal and nonpostal items were harmonised on 1 July 2002 when the first part of the Act commenced. The harmonisation of the value threshold for incoming postal and nonpostal items is expected to commence in June 2004.

The Commonwealth Government reported that it intends to introduce a charging regime for the full range of import entries as part of the international trade modernisation changes. Such a regime would address the second and third recommendations of the Commonwealth Competitive Neutrality Complaints Office.

Table 11.1: 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 barriers, content, antisiphoning rules, simulcasting requirement, spectrum allocation, restrictions on ownership, conduct, multichannelling and datacasting	Productivity Commission review was released in April 2000. Review raised significant questions and made extensive recommendations for reform, including: • separating licences granting access to spectrum from content-related licences that grant permission to broadcast, and converting broadcasting licences to access fees; • selling spectrum for new broadcasters competitively; • converting licence fees for existing commercial radio and television broadcasters to fees that reflect the opportunity cost of the spectrum; • permitting multichannelling and the provision of interactive services by commercial and national broadcasters; • removing restrictions that prevent the entry of new broadcasters before the end of 2006; • freeing up spectrum by setting a final date for the end of simulcasting of standard and high definition digital television services, and by making the broadcasting of high definition services optional rather than mandatory; and • relaxing the antisiphoning rules.	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). A review of datacasting by the Department of Communications, Information Technology and the Arts was released on 10 December 2002. The Government announced that there would be no change to the rules on datacasters' broadcasting content.	Does not meet CPA obligations (June 2003)

(*continued*)

Table 11.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth (continued)	*Radiocommunications Act 1992* and related Acts	Licensing, spectrum allocation	The Productivity Commission commenced a review of the Act and related Acts in July 2001. The review was completed on 1 July 2002 (and released by the Government on 5 December 2002). The Productivity Commission recommended legislative amendments to: • allow encumbered spectrum to be sold; • facilitate the conversion of apparatus licences to spectrum licences; • allow spectrum charges to be based on opportunity cost; • facilitate better use of spectrum by broadcasters; and • allow the Australian Communications Authority to re-assign spectrum licences three years before expiry.	The Government accepted the Productivity Commission's recommendations on conversion of licences, selling encumbered spectrum and re-assigning spectrum licences, and it will consider the recommendations on broadcasters' use of spectrum.	Review and reform incomplete

(*continued*)

Table 11.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Commonwealth (continued)	*Australian Postal Corporation Act 1989*	Legislated monopoly for Australia Post for activities including letter delivery and inward international mail	The Council completed a review in 1998, recommending reserving only household mail to Australia Post. The review also recommended (among other things): opening delivery of business letters and international mail to competition; funding unprofitable business associated with the USO from the budget; introducing access arrangements for post office boxes; and introducing accounting separation for Australia Post's retail, reserved services and CSO operations.	Amendment Bill (reducing Australia Post's 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; establishing a postal access regime under the TPA; and converting Australia Post to a Corporations Law company) was withdrawn in March 2001 following Senate opposition.	Does not meet CPA obligations (June 2003)

12 Barrier assistance measures

This chapter assesses the Commonwealth Government's fulfilment of its Competition Principles Agreement (CPA) clause 5 obligations in relation to barrier assistance measures used to support the passenger motor vehicle (PMV) and textiles, clothing and footwear (TCF) industries. The Government's obligation to review and, where necessary, reform the protective arrangements offered to industry via anti-dumping and countervailing legislation is also considered.

Industry assistance

Industry assistance was a key element of Australia's trade and industry policies. Successive Australian governments have sought to foster manufacturing, in particular, by erecting tariff barriers and setting import quotas to shield domestic producers from foreign competition. Governments have also used antidumping duties, tax concessions, subsidies, government procurement and public service pricing policies to assist industry. These instruments have shaped the structure of the Australian economy, mainly by protecting and sustaining selected industry sectors. Ad hoc reforms during the late 1960s and early 1970s led to declining government assistance for much of the manufacturing sector, except the PMV and TCF industries.

By the mid-1980s, large parts of Australian manufacturing were widely recognised as not being internationally competitive and of needing restructuring to promote innovation, modernisation and efficiency. In response, successive Commonwealth governments have pursued a gradual reform path to promote a more open and adaptive economy. For most industries, tariff rates are now 5 per cent or lower. Reductions in assistance for the PMV and TCF industries have also been substantial, although tariff rates in these industries remain high relative to elsewhere in the manufacturing sector. Other selective assistance measures provide added protection to these industries.

Legislative restrictions on competition

The principal forms of industry assistance that are a concern under clause 5 are those that restrict competition by creating a barrier to imports. The main

restriction is a tariff, which is a tax on imports that is intended to raise the price of imported goods to levels that make domestic product more competitive. Tariffs enable the assisted local producers to increase sales and/or the prices at which they can sell their goods on the Australian market. While this benefits some domestic producers, it increases the cost of purchasing goods subject to the tariffs (including locally produced substitutes), which distorts production and consumption patterns and restricts the range of products available for domestic users and consumers.

Most tariff rates are now at the general rate of 5 per cent or lower, so the restrictive effect of Australia's general tariff regime is mostly small. In contrast, the tariffs on the PMV and TCF industries — currently around three to five times the general rate — impose a significant restriction on competition.

Passenger motor vehicles

The PMV industry operates under the Commonwealth Government's post-2000 assistance arrangements, which commenced on 1 January 2001 and will run until 2005. Under these arrangements, the following tariffs apply:

- PMV tariffs frozen at 15 per cent, falling to 10 per cent on 1 January 2005;
- tariffs of 5 per cent on light commercial and four wheel drive vehicles and components; and
- vehicle tariffs on second-hand imports, *plus* a specific tariff of A$12 000 per vehicle (although concessions are available under the Specialist and Enthusiasts Vehicle Scheme — see volume 2, chapter 2).

Automotive tariff levels also influence the financial assistance delivered to various automotive producers under the Automotive Competitiveness and Investment Scheme (ACIS). The ACIS provides a capped subsidy to the industry, whereby eligible participants receive tradeable import duty credits based on their production, research and development and investment activities. Being tradeable, the duty credits have a dollar value (rather than being expressed as an *ad valorem* tariff).

In addition, the industry benefits from other initiatives, including budgetary assistance measures (eg research and development incentives) and preferential purchasing under the Commonwealth vehicle fleet arrangements.

The Productivity Commission (PC) (2000c) estimated that assistance measures provide the PMV industry with a net subsidy equivalent of at least A$1 billion a year (excluding assistance provided by State governments). The tariff and ACIS package represents the bulk of assistance to the industry, at around A$920 million a year (in subsidy equivalent terms).

Review and reform activity

The National Competition Council found in the 1999 National Competition Policy (NCP) assessment that the Commonwealth Government had not met it obligations under the CPA clause 5 in relation to review the *Customs Tariff Act 1995 - Automotive Industry Arrangements*. It considered that the Government decisions following the Industry Commission's review of these arrangements in 1997 had insufficient regard for the findings of that review. The Government froze tariff reductions over the period 2000–05 in contrast to the review's findings that an overall net benefit would result from faster and deeper tariff reductions.

In March 2002, the Government referred the post-2005 assistance arrangements for the automotive manufacturing sector to the Productivity Commission (formerly the Industry Commission) for inquiry. The terms of reference for the inquiry did not explicitly require the commission to account for the Government's CPA obligations, but did require it to bear 'in mind the Government's desire … to improve the overall economic performance of the Australian economy' (PC 2002e, p. v).

The Productivity Commission provided its final report to the Government in August 2002. It noted that assistance provided to the automotive industry in 2005, while historically low, would still be well above that available to most other Australian industries. It found that the industry had adjusted well to previous reductions in assistance and that reduced tariffs had influenced its transition to become a major exporter and innovator. While the inquiry's quantitative modelling of further assistance reductions suggested that adverse shifts in the aggregate price of Australia's exports relative to imports could outweigh the static resource allocation gains, the commission considered that such reductions would provide greater pressure for improvements in workplace productivity and other aspects of the industry's operations, and benefit consumers and businesses through lower prices.

The commission contended that these dynamic benefits provided a strong case for further reductions in assistance. It proposed, therefore, a target tariff of 5 per cent (equivalent to the general rate of assistance). It considered, however, that reducing assistance too quickly after 2005 could impose substantial costs on the community, given the industry's size and linkages with the rest of the economy.

After considering a range of possible transition paths, the commission recommended a package of assistance measures involving a tariff reduction and the continuation of transitional ACIS support to facilitate the adjustment process. It put forward the following three tariff reform options.

1. Reduce the tariff by 1 percentage point a year, commencing in 2006, so as to achieve a rate of 5 per cent in 2010, with no further reductions before 2015.

2. Leave the tariff at 10 per cent until 2010 and then reduce it in one step to 5 per cent, with no further reductions before 2015.

3. Leave the tariff at 10 per cent until 2010 and then reduce it by 1 percentage point a year so as to achieve the rate of 5 per cent in 2015.

While the commission expected the differences in the impact of the three options to be small, it judged that option 2 would provide the best balance between consumer and industry interests.

The commission's three following options for extending ACIS support involved an equivalent funding commitment in *net present value terms*, but with differing time profiles.

A Up to A$2 billion in funding allocated equally across two separate capped pools — one for vehicle producers and one for their suppliers — provided over five years, ceasing in 2010.

B Funding with an equivalent net present value to option A, allocated in the same way, provided over 10 years at a uniform rate, ceasing in 2015.

C Funding with an equivalent net present value to option A, allocated in the same way, provided over 10 years ceasing in 2015 with funding for the second five-year period set at half that for the first five-year period.

The commission preferred option A, arguing that it would help ensure the adjustment task confronting the industry is manageable. The commission also recommended the retention of the specific tariff on imported second-hand vehicles, despite finding that the tariff was 'effectively a ban on the importation of used vehicles' (particularly since the introduction of the Specialist and Enthusiast Vehicle Scheme — see volume 2, chapter 2) with significant adverse implications for consumers of imported used vehicles (PC 2002e). The commission considered that removing the specific tariff could destabilise an otherwise structured plan for phased reductions in assistance to automotive manufacturing. It recommended reassessing the issue once the transition program for the tariff–ACIS options had concluded.

The Government's announced its response to the commission's inquiry report in December 2002, along with the public release of the report. It accepted the commission's preferred option for tariff reform but, while choosing an approach consistent with the commission's reform proposals for ACIS, did not adopt any of the specific proposals. Instead the Government announced a substantial increase in funding, providing an additional 50 per cent (about A$4.2 billion) to continue ACIS for 10 years.

The Government introduced into Parliament the ACIS Administration Amendment Bill 2003 and Customs Tariff Amendment (ACIS) Bill 2003 on 25 June 2003. These Bills will enact the 2010 tariff reduction and give effect to the extension of ACIS.

The Productivity Commission is to conduct a further inquiry in 2008, to report on whether changes the legislated tariff reductions need changing, given conditions in the international trade environment.

Assessment

The Council is satisfied that the Commonwealth Government's review of the automotive industry's assistance arrangements was open, independent and rigorous. The Productivity Commission is an independent statutory authority, and its inquiry involved extensive public consultation and objective assessment processes. Its recommendations were well grounded in the available evidence.

The Council accepts that using the existing ACIS arrangements to facilitate the transition to a lower tariff environment is consistent with promoting the long term public interest. It considers that the commission's review established a robust case that the remaining restrictions — the temporary retention of higher tariff rates and transitional assistance for the automotive industry over the short to medium term — are in the public interest.

While the Government has provided more generous transitional assistance under budget funding for ACIS, it introduced a package of Bills to Parliament to implement reforms consistent with all of the commission's recommendations. Nevertheless, the Commonwealth has not met its CPA clause 5 obligations to review and reform the automotive industry's assistance arrangements as the Bill to implement the proposed reforms has not been passed by Parliament.

Textiles, clothing and footwear

The current assistance arrangements for the TCF industries comprise:

- the Textiles, Clothing and Footwear (Strategic Investment Program) Scheme (SIP), which provides grants for eligible investment in new and second-hand plant and equipment, research and development, production and ancillary activities related to restructuring[1]:

- a commitment to hold tariffs for TCF products at 2001 levels until 2005. From January 2005 the tariff:

[1] Funding is capped at A$678 million for the life of the program, with assistance to individual companies in any one year capped at 5 per cent of the company's annual sales.

  - for clothing & finished textiles will fall from 25 per cent to 17.5 per cent;
  - for cotton sheeting and fabrics, carpet, and footwear will fall from 15 per cent to 10 per cent;
  - for sleeping bags, table linen and footwear parts will fall from 10 per cent to 7.5 per cent; and

- the Expanded Overseas Assembly Provision Scheme, specific TCF policy by-laws and market access initiatives.

The lower tariff rates to commence in 2005 will continue the reductions in sectoral assistance that commenced during the 1980s. Nonetheless, even after these 2005 tariff reductions, the TCF sector will continue to receive tariff assistance above that afforded to general manufacturing activity.

Review and reform activity

In its 2002 NCP assessment, the Council found that the Commonwealth Government had not met its clause 5 obligations in relation to TCF assistance arrangements because the Government's decisions following the Industry Commission's 1997 review of the *Customs Tariff Act 1995 — Textiles Clothing and Footwear Arrangements* had insufficient regard for the findings of that review. The Government froze the tariff reductions over the period 2000–2005, despite the review's finding that an overall net benefit would result from faster and deeper tariff reductions. While the Council accepted that this decision may help support investment and employment in the TCF industry, the Government's decision was not consistent with the CPA objective of maximising the net benefit to the whole community.

The Government asked the Productivity Commission to evaluate current assistance arrangements for the TCF industry to provide policy options for post-2005 assistance and to report on related matters that will affect the sector's long-term viability. The commission commenced the inquiry on 19 November 2002 and provided a final report to the Government on 31 July 2003. As with the automotive inquiry, the terms of reference for the inquiry did not explicitly require the commission to take account of the Government's CPA obligations, but did require it to have 'regard to the Government's desire… to improve the overall economic performance of the Australian economy' (PC 2002a, p. 6).

The commission released a position paper on 16 April 2003 setting out its preliminary views on the industry and post-2005 TCF assistance arrangements. It considered that while the tariff pause and SIP arrangements have helped many TCF companies, the current arrangements are expensive and have the following deficiencies.

- The costs to consumers are high. Even following the legislated tariff reduction in 2005, the impost would still be about A$750 million a year. In addition, the SIP makes available an average of A$140 million a year to TCF companies (PC 2003b).

- As a percentage of value added, assistance to TCF production is five times that to manufacturing as a whole.

- The high level of support may be reducing the pressure on some companies to restructure their activities, and elements of the SIP appear to detract from its capacity to encourage improved competitiveness in the sector.

Given these costs and deficiencies, the commission considered that it would be inappropriate to roll over the assistance arrangements after 2005 without amendment. The commission also found that the sector's economic contribution to Australia, while significant could not justify continuing special assistance.

It noted that the lower assistance and the smaller size of the sector mean that the *net* cost of special assistance to the community is also lower. Quantitative modelling for the commission's inquiry supported the view that removing special support for TCF production would provide little measurable 'allocative efficiency' gain. The commission considered, nevertheless, that assistance reductions after 2005 would reinforce the competitive pressures on companies to improve their productivity, quality and delivery performance, to innovate, and to look for new markets. The reductions would also be consistent with Australia's international commitments and broader trade policy interests.

The commission considered that the decade after 2005 should be the last period of preferment for TCF production in Australia, meaning the target tariff rate should fall to the general rate of 5 per cent. After assessing various paths for reducing tariffs across the sector to 5 per cent, the commission proposed the following four options for consideration.

1. Maintain all TCF tariffs at 2005 rates until 2010, then reduce them to 5 per cent and maintain that rate to 2015.

2. Reduce all 2005 TCF tariffs in even annual steps to achieve 5 per cent in 2010, then maintain to 2015.

3. 'Tops down' to 5 per cent in 2010, then maintain that rate to 2015 — that is, reduce higher tariffs before lower tariffs.

4. Follow option 1, but reduce tariffs on apparel and certain finished textiles to 10 per cent in 2010, then to 5 per cent in 2015 (PC 2003b, p. 84).

The commission thought that the effects of options 1, 2 and 3 on company behaviour might not be greatly different. Under option 4 (the commission's preferred option), however, producers of apparel and certain finished textiles would receive an extra five years to adjust to the larger tariff reduction necessary to achieve the 5 per cent target rate. This option would thus delay

the benefits to consumers and user industries from lower tariffs, but lengthen the transitional period for those parts of the sector facing the largest reductions in assistance.

In presenting reform options, the commission noted that domestic TCF sector's adjustment to changing global realities is far from complete. It proposed, therefore, that a successor to the SIP (which is due to end in 2005) provide transitional assistance to support the tariff reductions. To give the sector time to adjust to future tariff changes, yet signal that its special assistance needs to end no later than 2015, the commission proposed the following approach.

- Following expiry of the current SIP in mid-2005, a new transitional support program would operate for eight years.
- Total funding for an initial four-year period would be set at A$560 million, equivalent to notional annual funding under the current SIP (in nominal terms).
- Funding for the subsequent four-year period would be halved to A$280 million.
- Transitional support would then terminate.

The commission also outlined options for tackling some deficiencies in the SIP. To avoid unnecessary disruption, however, the commission considered that other arrangements should remain, noting that tariff reductions would render assistance such as the overseas assembly provisions redundant over time.

The final inquiry report was completed on 31 July 2003 and forwarded to the Commonwealth Government for its consideration and release within twenty-five Parliamentary sitting days of receipt of the report.

Assessment

The Council is satisfied that the Commonwealth Government's review of the TCF sector's assistance arrangements was open, independent and rigorous. The Productivity Commission is an independent statutory authority, and its inquiry processes involve extensive public consultation and objective assessment processes. Its draft findings were well grounded in the available evidence.

The Council accepts that using the existing SIP arrangements to facilitate the transition to a lower tariff environment is consistent with promoting the long-term public interest. It considers that the commission's review indicates that the restrictions — the temporary retention of higher tariff rates and transitional assistance for the TCF sector over the short to medium term — can be in the public interest. Nevertheless, the Government has not met its

clause 5 obligations to review and reform the TCF sector's industry assistance arrangements because it had not completed the review and reform process. While industry assistance is a significant issue, assistance arrangements for the TCF sector are already in place until 2005. If the Government were to adopt a package similar to that proposed by the Productivity Commission, then some delay in review and reform would thus be unlikely to impose a significant cost on the community.

Antidumping and countervailing measures

'Dumping' occurs when a foreign supplier exports goods at a price below the 'normal value' (which is usually the price in the supplier's home market). Under World Trade Organization rules, a country can apply antidumping measures if dumped imports cause, or threaten to cause, material injury to a competing domestic industry. In addition, the World Trade Organization Agreement on Subsidies and Countervailing Measures (1995) allows members to apply countervailing duties where exports benefiting from certain forms of subsidy cause or threaten to cause material injury or serious prejudice to a domestic industry.

Like tariffs and other measures that raise the price of imports, antidumping and countervailing measures may restrict competition, protect a domestic industry and impose higher costs on domestic consumers. Relative to its share of world trade, Australia tends to be a frequent user of antidumping measures. Consequently, these measures have the potential to impose a significant cost on the economy.

Review and reform activity

Antidumping policy and administration have undergone important changes over the past decade. In 1988, following a review by Professor Gruen, the Commonwealth Government introduced changes, including setting sunset periods for antidumping actions and establishing the Anti-Dumping Authority. The impact of these measures was to reduce the scope to assist local industry.

Following the Willett Review (*Review of Anti-dumping and Countervailing Administration*, 1996), the legislation on antidumping and countervailing measures was amended and new arrangements became effective on 24 July 1998. Antidumping and countervailing measures continue to be subject to a five-year sunset clause, but administrative arrangements were streamlined. The most significant changes were:

- the shortening of the antidumping and countervailing investigation to a single stage (155 days) conducted by the Australian Customs Service; and

- the abolition of the Anti-Dumping Authority.

The streamlined administrative process for antidumping action in Australia may encourage Australian industry to pursue such actions more often. The new appeal process — which consists of a review of existing information with no further investigation — compared with the previous system — under which companies could call for and obtain information that was independent of the Australian Customs Service's investigation — could also result in more appeal outcomes that favour the retention of duties. That said, the number of new antidumping and countervailing cases *initiated* in Australia has been stable and relatively low over recent years (aside from a rise in 1997-98) compared with the early 1990s (PC 2002f). Antidumping and countervailing activity in Australia tends to fluctuate with the business cycle, however, with requests from industry for anti-dumping measures increasing in periods of economic downfall. The impact of the reforms may not be properly judged, therefore, for some time.

The Government was to examine the impact and effectiveness of the new system as part of its review of antidumping and countervailing regulation under the CPA — a review that was scheduled to commence in 1997-98. The Government postponed the review to allow full implementation of the new administrative arrangements. There may be a case for antidumping duties where predatory pricing or artificially low prices (such as where the purpose is to obtain hard currency) could damage long-term domestic interests or affect company viability. Overzealous application of antidumping duties, however, would deny Australians access to more affordable business inputs and consumer goods. The Government must evaluate these aspects of Australia's antidumping system to ensure that the system is working in the public interest.

Assessment

The Commonwealth Government has not made progress towards completing its review and reform of the competition restrictions contained in the *Anti-dumping Authority Act 1998*[2], the *Customs Act 1901* (part XVB), and the *Customs Tariff (Anti-dumping) Act 1975*. Despite the new administrative arrangements for antidumping having operated for over four years, the Commonwealth has not announced the timing or manner of its review of legislation on antidumping and countervailing measures. As a result, it has not met its CPA clause 5 obligations to review and reform antidumping legislation.

[2] It should be noted that the Anti-dumping Authority Act was repealed in December 1998.

Table 12.1: Commonwealth Government review and reform of legislation providing barrier assistance

Legislation	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Anti-dumping Authority Act 1998, Customs Act 1901 (part XVB), and *Customs Tariff (Anti-dumping) Act 1975*	Barrier to competition from low priced or discounted imports	Review has not commenced. The Government has not finalised the timing or manner of the review of legislation on antidumping and countervailing measures.	Reference to Anti-dumping Authority Act (which was repealed in December 1998) has been deleted following changes to the administrative arrangements for investigation of antidumping and countervailing measures.	Review and reform incomplete
Customs Tariff Act 1995 — Automotive Industry Arrangements	Barrier to competition from imports	Productivity Commission r*eview of automotive assistance* post 2005 was completed in 2002. A further Productivity Commission inquiry is scheduled for 2008.	Tariffs are to be reduced from 15 per cent to 10 per cent in 2005, then to 5 per cent on 1 January 2015. ACIS will be extended to 2015 as a transitional support measure.	Review and reform incomplete
Customs Tariff Act 1995 — Textiles Clothing and Footwear	Barrier to competition from imports	Productivity Commission's inquiry into t*extile, clothing and footwear assistance arrangements* post 2005 commenced in November 2002. It released its preliminary views in April 2003 and reported its findings to the Commonwealth Government on 31 July 2003.	Tariffs are to be reduced from 15 per cent to 10 per cent in 2005.	Review and reform incomplete

13 New legislation that restricts competition

Clause 5(1) of the Competition Principles Agreement (CPA) — the guiding principle — obliges governments to ensure that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Complying with CPA clause 5 involves the following three types of action by governments;

1. ensuring the existing stock of restrictive legislation meets the pro-competitive guiding principle — clause 5(3);
2. Requiring that all new legislation that restricts competition to be consistent with the guiding principle — CPA clause 5(5); and
3. Systematically reviewing legislation that restricts competition at least once every 10 years to ensure the guiding principle is met over time — clause 5(6).

By requiring new legislation that restricts competition to be consistent with the guiding principle, clause 5(5) completes the process of ensuring all (existing and new) legislation does not unnecessarily restrict competition.

All governments have some form of legislative *gatekeeping* arrangement to examine new and amended regulatory proposals. Under these arrangements, an impact assessment is triggered where new legislation is considered to have a nontrivial effect on competition. In most jurisdictions, other triggers also prompt a regulation impact assessment. The Commonwealth Government, for example, requires an impact assessment of all regulatory proposals, including proposals in the form of nondisallowable instruments, quasi-regulation (see box 13.1) and those resulting from international treaties that restrict competition or affect business.

Box 13.1: A glossary of legislative terms

Regulation includes any laws or other government 'rules' that influence the way in which people and businesses behave. Forms of 'regulation' include both primary legislation and subordinate legislation, either disallowable or nondisallowable. Quasi-regulation is also a relevant non-legislative category.

1. **Primary legislation** — Acts of Parliament
2. **Subordinate or delegated legislation**
   - **Disallowable instruments** — Regulations, statutory rules, By-laws, Orders, Ordinances, instruments or Determinations made by an executive government according to the powers bestowed by an authorising Act of Parliament. Delegated legislation must be tabled in Parliament and can be disallowed (vetoed) by a motion agreed to by members in any house of Parliament. Delegated legislation is closely scrutinised by a review committee of the Parliament (such as the Senate Standing Committee on Regulations and Ordinances at the Commonwealth level).
   - **Nondisallowable instruments** — instruments that are not subject to parliamentary disallowance. They may be made by boards, agencies, statutory authorities or departments, and are gazetted and/or tabled. One example is the Radiocommunications (Spectrum Licence Limits — 2 GHz Band) Direction No. 2 of 2000, which imposed restrictions on some potential bidders for radio frequency spectrum in the 2 gigahertz band.
3. **Quasi regulation** — those rules, instruments and standards to which government influences business to comply, but that do not form part of explicit regulation. Examples of quasi-regulation are industry codes of practice, guidance notes (such as a policy statement issued by the Australian Securities and Investments Commission concerning offers of securities made over the Internet), industry–government agreements and accreditation schemes.

Regulation impact statement (RIS) — also referred to as a regulatory impact statement, regulation impact assessment (RIA), competition impact analysis (CIA) and Public benefit test (PBT) — a document prepared by an agency responsible for a regulatory proposal. It is developed in consultation with affected parties and formalises and requires analysis of the impact of a regulation, including an assessment of risks, costs and benefits (quantitative and/or qualitative) and a consideration of possible alternatives (regulatory and nonregulatory). The process formalises good policy formulation and provides evidence to support recommendations for the most effective and efficient option for meeting the government's policy objectives.

Principles for effective gatekeeping

The National Competition Council considers the CPA clause 5(5) obligation to mean that governments should have in place legislation gatekeeping arrangements that are comprehensive and robust and thus maximise the opportunity for achieving high quality regulation. It informed all jurisdictions before this 2003 National Competition Policy (NCP) assessment that the following principles are necessary for effective gatekeeping arrangements.

- All legislation (Acts, enactments, Ordinances and Regulations) that contains nontrivial restrictions on competition should be subject to a formal regulatory impact assessment to determine the most effective and efficient approach to achieving the government's regulatory objective,

including alternatives to regulation. The impact analysis must consider competition impacts explicitly.

- There are mandatory guidelines for the conduct of regulation impact analysis, which all government departments, agencies, statutory authorities and boards that review or make regulations must follow.

- An independent body with relevant expertise:

  – advises agencies on when and how to conduct regulatory impact assessment;

  – is empowered to examine regulatory impact assessments and advise on the adequacy and/or quality of the analysis; and

  – monitors and reports annually on compliance with the regulation impact analysis requirements.

Governments' gatekeeping arrangements

This section assesses governments' new legislation gatekeeping arrangements against the CPA clause 5(5) obligation and considers whether the arrangements meet best practice principles for effective gatekeeping. Table 13.2 summarises and compares jurisdictions' approaches to gatekeeping.

The Commonwealth

The Commonwealth Government made an administrative decision that, subject to limited exceptions, a regulation impact statement (RIS) must be prepared for all new and amended regulation with the potential to restrict competition or impose costs or confer benefits on business.[1] This requirement, endorsed by Cabinet, is set out in the Commonwealth Government endorsed publication *A guide to regulation (second edition)*.

As stated in *A guide to regulation*, the Commonwealth Government's RIS requirements apply to all forms of regulation from primary legislation through to quasi-regulation (see box 13.1) and treaties. All Commonwealth departments and agencies — including statutory authorities and boards that

[1] Preparation of a RIS is not mandatory in a limited number of cases, such as where regulation is of a minor or machinery nature and does not substantially alter existing arrangements, where it is required in the interests of national security or where it reflects a specific election commitment and there is no scope to consider alternative ways of meeting that commitment.

are responsible for making, reviewing and reforming regulations — must adhere to the requirements. The guide specifically outlines requirements under the CPA to ensure departments and agencies comply with Commonwealth obligations under clause 5(5) of the CPA.

The RIS prepared for each regulatory proposal, which triggers the requirements, must clearly identify the problem(s) and relevant policy objectives, and assess the costs and benefits of alternative means of fulfilling the objectives. Where possible, quantitative measures, such as financial and economic costs and benefits, should be identified and compared in support of the assessment of the costs and benefits of regulatory alternatives. The guidelines make clear, however, that the analysis in a RIS should not be restricted to tangible or monetary items. Where applicable, the analysis should also include possible changes in environmental amenity, health and safety outcomes, and other nonmonetary outcomes. The guide also notes that early adoption of the RIS process during policy development and consultation is part of best practice regulation making.

Transparency is an important feature of the Commonwealth Government's gatekeeping process. RISs should be prepared to a standard suitable for publication in parliamentary explanatory material. A RIS for new primary legislation and subordinate legislation (including amendments) must be included in the explanatory memorandum (for primary legislation) and explanatory statement (for tabled subordinate legislation). RISs for treaties must also be tabled in Parliament. There is no mandatory requirement to publish a RIS for nondisallowable subordinate legislation or for new or amended quasi-regulation. Departments and agencies are encouraged, however, to make their RISs available to affected groups and individuals, and to publish them on the Internet.

The Office of Regulation Review oversees the process. It advises Commonwealth departments and agencies on whether a RIS should be prepared. It also is responsible for examining and advising on the adequacy of analysis contained in all RISs prepared, at both the decision-making and transparency stages (for example, when the legislation and accompanying RIS are tabled in Parliament). The office provides guidance and training on the RIS requirements to departments and agencies.

The Office of Regulation Review reports on compliance with the RIS requirements in the annual publication *Regulation and its review* (published by the Productivity Commission). In assessing and reporting on compliance, the office aims to promote the Government's desire to improve the regulatory decision making process by requiring a gradual rise in the standard of analysis required for a RIS to be assessed as 'adequate'. In *Regulation and its Review 2001-02* (PC 2002d), the Office of Regulation Review found that compliance with the RIS requirements had improved on previous years, but tended to be lower for regulatory proposals of a more significant nature, partly because RISs prepared for significant proposals are often undertaken in compressed time frames. This finding suggested that some departments and agencies may be treating the RIS process as an 'add on' task, after a course of action has already been agreed (PC 2002d, p. XVII). Box 13.2

provides examples of where the Commonwealth gatekeeping mechanism contributed to best practice outcomes, and other instances where best practice was not achieved.

Box 13.2: A best practice approach with room for improvement

An effective gatekeeping mechanism can contribute to improved outcomes, but it will not always guarantee this. Below are examples of where the Commonwealth's gatekeeping mechanism helped to identify anticompetitive regulation that is not consistent with the guiding principle and other instances where best practice regulation review and reform was not achieved.

Customs (Prohibited Imports) Amendment Regulations 1999

Implementation of these regulations would have prevented second-hand diesel engines designed for use in road vehicles from being imported unless the engines complied with the current Australian motor vehicle emission standards. The Regulations did not impose this condition on the sale of locally sourced second-hand diesel engines. The Department of Transport and Regional Services worked cooperatively with the Office of Regulation Review to improve the analysis in the RIS that accompanied the regulatory proposal to ensure that issues were discussed in a transparent manner. At the end of the process the office advised that the quality of the analysis was good, but assessed that the RIS was not adequate because it could not satisfy the CPA requirements. The Government introduced the Regulations to Parliament, but the proposed Regulations were disallowed in both the House of Representatives and the Senate. As a result, the Government indicated its intention to introduce more appropriate Regulations, which meet the environmental objectives of the regulation but reduce the unintended impacts on industry.

Third Community Pharmacy Agreement — pharmacy remuneration

The pharmacy remuneration provisions in the *Third Community Pharmacy Agreement* that were implemented through the National Health Amendment Bill (No. 1) 2000 did not follow best practice RIS requirements. The Department of Health and Aged Care prepared a RIS, but the Office of Regulation Review assessed that the RIS for tabling was not of an adequate standard as the remuneration provisions were not made fully transparent. At the decision-making stage the RIS was assessed as meeting the adequacy requirements.

The Interactive Gambling (Moratorium) Bill 2000

The National Office of Information Economy was responsible for preparing a RIS for the Interactive Gambling (Moratorium) Bill 2000. The Bill provided for a moratorium on interactive gambling to slow the expansion of the industry while the Government considers a long-term regulatory response to problem interactive gambling. The merit of the Bill depends on the benefits of limiting the number of problem gamblers outweighing possible damage to the development of the Internet industry in Australia.

The Office of Regulation Review noted that the RIS discussed the social benefits of the moratorium, but that the analysis did not demonstrate that the Government's objectives could be met only by restricting competition or that there was a net benefit to the community from restricting competition as required by the CPA. The office also found that consultation on options was limited. Consequently, it assessed the analysis in the RIS as not meeting the adequacy criteria at the decision-making and tabling stages. The Government implemented this legislation in 2000.

Sources: Jackson and Tapley 2000; PC 2000b, 2001a.

The Commonwealth Government implements hundreds of pieces of legislation (over 1900 pieces of legislation for example were implemented in 2001-02). Typically, only a small number of the regulatory proposals contained in the legislation require preparation of a RIS. Between 1999-2000 and 2002-03, around 140–207 regulatory proposals each year triggered the requirement to

prepare a RIS at the decision-making stage (table 13.1). Compliance with the requirements by Commonwealth departments and agencies — in terms of preparing a RIS judged by the Office of Regulation Review to be of an adequate standard — was generally high at around 81–88 per cent a year over the period 1999-2000 to 2002-03.

Table 13.1 indicates that typically only a few regulatory proposals triggered the RIS requirements because of a potential for the policy proposal to restrict competition. Over the period 1999-2000 to 2002-03, some 7–22 regulatory proposals with the potential to restrict competition required preparation of a RIS. However, with the exception of 2002-03, compliance, in terms of adequacy, with the RIS requirements for proposals with the potential to restrict competition tended to be lower than the overall compliance rate. This compliance rate partly reflects the fact that a higher proportion of the RISs required were not prepared at the decision-making stage.

Table 13.1: RIS compliance for Commonwealth regulatory proposals at the decision-making stage

	Regulatory proposals that triggered the RIS requirements			
	All proposals[a]		*Proposals that restrict competition*[b]	
Year	*Total required (no. prepared)*	*Adequate %*	*Total required (no. prepared)*	*Adequate %*
1999-00	207 (181)	169 82%	15 (9)	8 53%
2000-01	160 (137)	132 83%	7 (6)	2 29%
2001-02	147 (132)	130 88%	12 (9)	8 67%
2002-03	139 (120)	113 81%	22 (19)	18 82%

[a] Subject to limited exceptions, a RIS must be prepared for all new and amended regulations with the potential to restrict competition or impose costs or confer benefits on business. [b] Regulatory proposals that trigger the RIS requirement due to the potential to restrict competition.

Source: Compiled from data supplied by the Productivity Commission.

In 2002, the Office of Regulation Review (PC 2001a) put forward four proposals for improving regulatory outcomes. These included:

1. An adequate early warning system of pending regulatory changes is needed. The Government decided in 1998 that each department and agency would publish annual regulatory plans.

2. Embedding the RIS process into policy development processes helps to ensure the RIS analysis is done relatively early and that the process adds value.

3. Encouraging greater commitment to the RIS process by, for example, encouraging departments and agencies to publish their compliance record in their annual reports.

4. Concentrating analytical resources committed to the RIS process where they can be most effective by, for example, permitting agencies that had demonstrated a commitment to the Government's RIS process to use a self-assessment approach for proposals having relatively minor significance. (The ORR would continue to monitor/audit and report on compliance.)

In addition, the Government introduced into Parliament the Legislative Instruments Bill 2003,[2] which was read for a second time on 26 June 2003. This Bill establishes a comprehensive regime for the registration, tabling and scrutiny of Commonwealth legislative instruments (laws that are made under a power delegated by Parliament). It introduces, for example, sunset provisions (for automatic repeal of a legislative instrument after 10 years) and new consultation processes that require, subject to limited exceptions, the explanatory statement for each legislative instrument to include a consultation statement. Many provisions contained in the Bill share features with provisions in subordinate legislation Acts operating in other jurisdictions (see the summary in later sections of this chapter). Promotion of consultation within the Bill complements elements of the existing RIS process for legislative instruments.

The Council considers that the Commonwealth Government's gatekeeping arrangements comply with NCP obligations and meet all best practice principles for effective gatekeeping. The Council also supports the Office of Regulation Review's initiatives to improve regulatory outcomes, including the streamlining of administrative processes where this approach would benefit the community. It would, however, be concerned about a significant shift to self-assessment if it would substantially diminish the role of the Office of Regulation Review.

New South Wales

New South Wales uses both legislative and administrative provisions to implement its legislative gatekeeping arrangements. The provisions require all proposals — legislation, regulation and quasi-regulation — to include impact analysis. Moreover, subordinate legislation is subject to regular review requirements.

When Government agencies submit Cabinet minutes that propose a new regulatory control (including primary and subordinate legislation), they must demonstrate that the New South Wales best practice approach — as outlined in *From red tape to results — government regulation: a guide to best practice*

[2] Previous versions of the Bill were introduced to Parliament in 1994, 1996 and 1998.

(Regulation Review Unit 1995) — has been applied in assessing the regulatory impact of the proposal. *From red tape to results* encourages the integration of the RIS process and a consideration of best practice regulation at an early stage; it also specifies what best practice means. While the guide does not explicitly note the CPA guiding principle, it explains that best practice regulatory systems do not restrict competition (see the summary in box 13.2). The guide also notes that RISs must identify alternative options by which stated objectives can be achieved, assess the costs and benefits (including on resource allocation) of the proposed regulation and identify options with the greatest net benefit or least net cost to the community.

Box 13.3: New South Wales guide to best practice for regulatory systems

From red tape to results outlines and describes New South Wales requirements for achieving best practice regulatory systems. It states that the RIS process aims to reduce unnecessary regulation and red tape and identify whether a proposed regulation is the most efficient and effective way of achieving the stated objective. It also states that departments and agencies will be considered to be best practice regulators where their regulatory systems:

- have clear objectives and focus only on fixing identified problems;
- regulate ends not means;
- maximise benefits and minimise costs;
- are integrated with other regulatory systems so the public is presented with requirements that 'make sense' across the Government as a whole;
- minimise the number of Government agencies involved;
- promote certainty (so the assessment of applications for approvals, permits, licences and so on is based on clearly stated criteria and the time that it will take is indicated publicly);
- are simple for users to understand;
- are simple to administer;
- are easy to enforce;
- have a high voluntary compliance rate;
- are subject to regular review;
- do not restrict competition; and
- use commercial incentives rather than command-and-control rules.

Source: Regulation Review Unit 1995.

Under the *Subordinate Legislation Act 1989*, New South Wales government agencies must prepare RISs for proposed principal statutory rules[3] before the rules can be made. Guidance for meeting the requirements of the Subordinate Legislation Act is provided in the *Manual for preparation of legislation* (Parliamentary Counsel's Office 2000) and the guidelines in schedule 1 of the Act. The manual explains that the responsible Minister must certify whether the RIS complies with the provisions of the Subordinate Legislation Act

[3] The Subordinate Legislation Act defines a principal statutory rule to mean a statutory rule that contains provisions apart from direct amendments, repeals and provisions that deal with its citation and commencement.

relating to the proposed statutory rule. Subject to conditions, Ministers may postpone the requirement to prepare a RIS for up to four months.

The manual also explains that the Subordinate Legislation Act provides exemptions to the RIS requirements under limited circumstances. Matters arising under legislation that is uniform with the legislation of the Commonwealth Government or another State or Territory, for example, are exempt from the requirements, as are direct amendments or repeals. The exclusion of direct amendments is not consistent with the CPA clause 5 guiding principle. Moreover, amendments can impose significant restrictions on competition. The Legal Profession Amendment (Personal Injury Advertising) Regulation 2003, for example, imposes an effective prohibition — a severe restriction to competition — on barristers and solicitors advertising personal injury legal services. This direct amendment to the principal statutory rule was implemented without an accompanying RIS or substantial new evidence to demonstrate a net public benefit (for details, see chapter 4, volume 2).

As for the Commonwealth Government, the principles of accountability and transparency are a key feature of New South Wales's legislative gatekeeping arrangements. As noted above, Ministers must certify that a new regulatory proposal complies with the provisions of the Subordinate Legislation Act before it may be made. The Premier issued a memorandum requesting that Ministers table a copy of the RIS in the same sitting week as when Parliament is notified of the making of a new regulation, or as soon as possible thereafter.

No single statutory independent body has responsibility for overseeing the legislative gatekeeping requirements in New South Wales. However, government departments and agencies are required to provide a copy of each RIS prepared to the Cabinet Office, in accordance with the Subordinate Legislation Act. The office is responsible for providing the Premier with independent policy and strategic advice on all Cabinet and other major policy matters. The Inter-Governmental and Regulatory Reform Branch, in particular, coordinates the Government's implementation of NCP and other regulatory reform initiatives (Mr R. B. Wilkins (Cabinet Office), pers. comm., 24 June 2003). Its scrutiny includes subordinate legislation, although this scrutiny is primarily a statutory function of the Legislation Review Committee (formerly the Regulation Review Committee), which is a joint statutory committee, that scrutinises all Bills introduced to Parliament and all Regulations subject to disallowance according to the criteria set out in the *Legislation Review Act 1987*.[4] The Committee's functions include ensuring regulation complies with the provisions of the Subordinate Legislation Act. The committee may report to Parliament on compliance with the RIS requirements. The Government and the committee also monitor the RIS process and consider refinements where required.

[4] The scrutiny of Bills function of the Legislation Review Committee was enacted under the *Legislation Review Amendment Act 2002* and commenced when the New South Wales Parliament resumed for the spring 2003 sitting.

The Council considers that New South Wales' gatekeeping arrangements are not consistent with the guiding principle and therefore do not meet best practice principles for effective gatekeeping. It made this assessment because direct amendments to principal statutory rules are not subject to the gatekeeping requirements, contrary to the requirements of clause 5 of the CPA. The Council does acknowledge, however, that review or repeal of all amendments will occur when the principal statutory rule is due to sunset under the Subordinate Legislation Act. Nevertheless, the New South Wales Government can implement and maintain a restriction on competition for a number of years before a review is triggered.

Victoria

As outlined in the *Regulatory impact statement handbook* (VORR 1995), which details mandatory guidelines for departments and agencies, the Victorian Government requires that:

> … *all new regulatory proposals must not restrict competition unless it can be demonstrated there is a net benefit to the community and the objectives of that proposal can only be achieved by restriction. Assessment of this competition test is to be included in a RIS*.

In January 1996 the Premier of Victoria issued *Guidelines for the application of the competition test to new legislative proposals*, which apply to all proposed Bills, new subordinate legislation proposals, statutory rules and By-laws. These guidelines require departments and agencies, in analysing new (including amendment and replacement) legislation, to:

- identify the restriction on competition;
- show the restriction is necessary to the objective;
- assess the costs to the community caused by the restriction;
- assess the community benefit; and
- assess whether the benefits outweigh the costs.

Cabinet submissions on legislative proposals must include a section with such an NCP impact assessment. Other formal arrangements also apply to subordinate legislation under the Victorian *Subordinate Legislation Act 1994*, which sets out processes for making and scrutinising subordinate legislation.

The Subordinate Legislation Act requires that a RIS be prepared wherever a proposed statutory rule imposes an appreciable economic or social burden on a sector of the public. The Act provides for exceptions and exemptions from this general requirement, such as for fee increases within prescribed limits and for a proposed statutory rule that is of a machinery nature. The Minister responsible for the regulation is responsible for issuing a certificate for the

exception or exemption. Special temporary exemptions from the requirements may also be provided by the Premier.

For those proposals that do not meet the exception or exemption criteria in the Subordinate Legislation Act, and thus for which a RIS must be prepared, the responsible Minister must ensure independent advice is sought to confirm the adequacy of the RIS. This advice can be provided by the Victorian Office of Regulation Reform, a consultant or a unit within the Government that has the necessary expertise and is independent from those developing the policy and the proposed regulation(s). (The Department of Treasury and Finance advises the Treasurer and Cabinet on NCP issues and assists departments with NCP matters.) Based on the assessment and any other relevant advice, the responsible Minister must certify the adequacy of the RIS. Departments and agencies are encouraged to release the RIS as part of an informed public consultation process, and RISs are made public (for example, through tabling in Parliament) before the regulation is made. After the regulation is made, the Scrutiny of Acts and Regulations Committee reviews the regulation and the adequacy of the RIS.

The Office of Regulation Reform plays a key role in the assessment of RISs. It helps departments and agencies determine whether regulation is needed and guides the preparation of a RIS. The office publishes material related to regulation review, including evaluations of existing regulatory tools and benchmarks on the effectiveness of the regulatory environment against other jurisdictions to identify alternative approaches. It also publishes the *Victorian regulation alert* — an annual report on regulations due to sunset in the financial year to improve awareness of forthcoming regulation and to promote better and earlier consultation between Government agencies before regulatory proposals are developed. The Office of Regulation Reform states that its participation in the early stages of RIS development contributes to the high level of compliance with the RIS requirements of the Subordinate Legislation Act (VORR 2003). No comprehensive RIS compliance reporting is undertaken in Victoria, although the Scrutiny of Acts and Regulations Committee reports on legislation made.

The Council considers that Victoria's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping.

Queensland

Under the Queensland Government's new legislation gatekeeping arrangements, all new (including amending) legislation that restricts competition must be subjected to a public benefit test before Cabinet considers the policy proposal. The type and scope of each review is determined in accordance with the *Public benefit test guidelines* issued by Queensland Treasury (1999). The guidelines require the public benefit test to identify the nature and incidence of all relevant economic, social and cultural costs and benefits to the community of restricting competition compared to other means

of achieving the Government's objectives. They provide explicit guidance on how agencies should assess legislation for compliance with clause 5 of the CPA when undertaking a public benefit test, and require agencies to liaise with Treasury throughout the assessment process.

In addition, under the *Statutory Instruments Act 1992*, departments and agencies must prepare a RIS before making any proposed subordinate legislation that is likely to impose appreciable costs on the community or a part of the community. The Act also requires agencies to include the RIS in their consultation processes on the proposed statutory instrument. It includes guidelines on matters that must be addressed in the RIS. The guidelines explain that a RIS must include an assessment of the costs and benefits of the proposed legislation; if practical and appropriate, the assessment must quantify the benefits and costs, and compare them with the benefits and costs of any reasonable alternative to the legislation. As a minimum requirement, the RIS must include (1) an assessment of the proposed subordinate legislation against the existing arrangements and (2) a qualitative assessment of the costs and benefits. The Business Regulation Reform Unit administers the section of the Act relating to the conduct of a RIS. The unit has also developed both a qualitative and quantitative cost–benefit method that agencies can use for all types of legislation.

The Queensland Treasury monitors and reports on compliance with the gatekeeping arrangements. In 2002, it reported that 69 Acts and 271 Regulations (excluding Proclamations and significant appointments) were enacted. A RIS or public benefit test was prepared for all but six proposals that imposed an appreciable impact on the community or imposed a restriction on competition. For the remaining six proposals, a formal RIS or public benefit test was not prepared because the restriction was assessed for its impact and found to be justified in the public interest to meet health or social objectives (Queensland Government 2003). An example is the *Building and Other Legislation Amendment Act 2002*, which provides that private building certifiers may not approve building work to upgrade existing budget accommodation buildings. Ensuring budget accommodation buildings comply with the Government's fire safety standards are requirements beyond the certification of building standards, such as a consideration of hardship, possible enforcement action and, in some cases, ongoing inspections. These are not functions that a private provider could undertake, so local government has the role of approving building work for compliance with the legislation (Queensland Government 2003).

The Council considers that Queensland's gatekeeping arrangements comply with NCP obligations and meet best practice principles for effective gatekeeping.

Western Australia

Western Australia's *Public interest guidelines for legislation review* (Competition Policy Unit 2001) set the mandatory requirements for all

reviews. These guidelines supplement the *Legislation review guidelines* (Competition Policy Unit 1997), which specifies that Western Australia's CPA obligations are to review all legislation that restricts competition, including Regulations, rules, proclamations, notices, new legislation, amended legislation and local government By-laws.

The review guidelines require a RIS-type analysis, consistent with NCP requirements, be undertaken to assess the costs and benefits of reform. There is no independent statutory body with responsibility for overseeing the legislative gatekeeping requirements in Western Australia. However, the Competition Policy Unit within 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 the department is formally notified of progress on new legislation, so it can monitor agency compliance. Where the department considers that a proposed new law has the potential to restrict competition, it liaises with the proponent agency to ensure the law is appropriately reviewed.

The Government of Western Australia (2003) advised that the gatekeeping process has identified, since 1996, 80 proposals for new laws with the potential to restrict competition. Reviews for those proposals were conducted as required, except where a proposal was not implemented, was assessed before going to Cabinet as not requiring a CPA clause 5 review, or is still at an early stage of preparation.

The Council considers that Western Australia's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping.

South Australia

South Australia requires proposals for new legislation (including proposed amendments and new Regulations) to be accompanied by evidence that the proposal complies with CPA clause 5 requirements. Agencies are required to produce evidence on the costs and benefits of restrictions, which may be made available via:

- a desktop review report;
- a report from a formal public NCP review or a general review that includes NCP issues;
- reference to the NCP issues in the Cabinet submission seeking approval to draft the amendments; and
- reference to the NCP issues in the second reading speech (Bills) or report to the Legislative Review Committee (Regulations).

South Australia's *Guidelines paper for agencies conducting a legislative review under the COAG Competition Principles Agreement*; *reviewing restrictions on competition in proposed new legislation* (Department of Premier and Cabinet 1998, 2001) states that best practice is to release publicly (subject to Ministerial approval) the evidence of a review. It also recommends that a reference to NCP issues be made in the second reading speech of a Bill, because the issues are then on the public record in an accessible form.

South Australian subordinate legislation lapses at the end of 10 years and must be reviewed before it is remade, ensuring all subordinate legislation is subject to the gatekeeping mechanism.

Agencies are required to provide a copy of the evidence supporting a regulatory proposal to the Department of Premier and Cabinet. The department provides advice and training to agencies on NCP compliance. In addition, South Australia has sought the Council's views on NCP compliance when preparing new legislation.

Any proposal that imposes nontrivial regulations on the community (including all new Acts, Regulations, mandatory standards and codes, and amendments to existing legislation) must be accompanied by a RIS evaluating the proposal's effectiveness and efficiency (in terms of net public benefit) in achieving its objective, compared to nonregulatory means[5]. On 23 April 2002, South Australia introduced a new process requiring all regulatory proposals for consideration by Cabinet to assess potential impacts on the community, small business, the environment, families and regions. A separate regional impact assessment report must be attached to the Cabinet submission if there is a significant regional impact. In July 2003, the government re-issued revised guidelines, *Preparing Cabinet submissions* (Premier and Cabinet Circular no. 19), incorporating this initiative.

South Australia advises that its NCP Implementation Unit provided comments on about 110 regulatory impact statements in draft submissions and about 100 Cabinet submissions from July 2002 to December 2002. South Australia is considering system improvements to enable it to collect annual statistics on legislation considered under its gatekeeping process, to include the information in future annual reports to the Council.

The Council considers that South Australia's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping. The Council notes South Australia's intention to report on compliance with the gatekeeping requirements in future NCP annual reports.

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5 If a proposal is likely to impose significant regional impacts, then a regional impact assessment report must be prepared.

Tasmania

Tasmania's mandatory new legislation gatekeeping requirements are detailed in the *Legislation review program procedures and guidelines manual* (Department of Treasury and Finance 2003). Consistent with the CPA, the requirements apply to all (including new or proposed) primary legislation and all subordinate instruments, including Regulations, rules, By-laws, Orders, proclamations and notices made under the legislation. The CPA guiding principle is also made explicit to help guide the reviews.

As outlined in the manual, Tasmania requires departments and agencies to prepare a RIS for new or proposed primary legislation that has at least one major restriction on competition or will impose a significant negative impact on business. Where proposed primary legislation includes a major restriction on competition or impact on business, a rigorous and transparent assessment process is required to establish whether the restriction is justified in the public interest. A less intensive process is required where the proposed primary legislation includes a minor restriction on competition. The Regulation Review Unit, in consultation with the Government agency responsible for the proposal, determines the need to conduct a major or minor assessment.

A major assessment requires preparation of a RIS and the conduct of a mandatory public consultation process. The RIS should be accessible to the general public and explain the objectives of the legislation, the issues surrounding the restriction(s) on competition or the impact on business, and the benefits and costs that flow from the restriction or impact. Agencies must obtain the Regulation Review Unit's endorsement of the RIS and the proposed public consultation program before publicly releasing the RIS. For proposed minor restrictions on competition, Government agencies are required to prepare a brief assessment commensurate with the relative impact of the legislation. The Regulation Review Unit's endorsement of the assessment is required before the proposal is submitted to Cabinet.

The manual states that for proposed subordinate legislation, agencies must observe the *Subordinate Legislation Act 1992*, which requires the preparation of a RIS for proposed subordinate legislation that imposes a significant cost, burden or disadvantage on any sector of the public. The Regulation Review Unit considers this requirement to include subordinate legislation that restricts competition. The Act also requires agencies to conduct public consultation.

Administered by the Regulation Review Unit, Tasmania's gatekeeping mechanism aims at ensuring Tasmania's statute books reflect contemporary conditions and are free of redundant, unnecessary, ineffective or inefficient legislation. Specific arrangements in the *By-Law making procedures manual* (Department of Premier and Cabinet 1997) also ensure all proposed or existing council By-laws that impose restrictions on competition meet the requirements of the CPA.

The Government of Tasmania (2003) reported that more than 700 primary legislative proposals have been assessed since June 1996 under the gatekeeping provisions, with 19 regulatory impact statements prepared. Included in these proposals were significant pieces of legislation, such as the *Teachers Registration Act 1997*, the *Child Care Act 2001* and amendments to the *Gaming Control Act 1993*, which provides for a new exclusive licence to Federal Hotels to operate casinos, Keno and gaming machines in Tasmania (for details on the review of the latter two Acts, see chapter 9, volume 2).

The Council considers that Tasmania's gatekeeping arrangements comply with NCP obligations and meet best practice principles for effective gatekeeping.

The ACT

Once the ACT Government became subject to the provisions of clause 5(5) of the CPA, it introduced requirements for Government agencies to prepare a RIS for proposals that restrict competition. The requirements apply to both primary and subordinate legislation.

In accordance with Cabinet requirements, Government agencies must prepare a RIS for all new and amended primary legislation that restricts competition. This RIS must be attached to relevant Cabinet submissions and identify the problem or issues being addressed, objectives, viable options (regulatory and nonregulatory) for achieving the objectives, an assessment of the costs and benefits, and a strategy for implementing and reviewing the preferred option.

The ACT strengthened its gatekeeping requirements applying to subordinate legislation (which includes Regulations and codes of practice) with the commencement of the *Legislation Act 2001*. The *Guide to regulation in the ACT* (ACT Government 2000) outlines best practice methods for designing regulation that meets the requirements of the Act, including the ACT's CPA clause 5(5) obligations. The RIS requirements are triggered when a subordinate law is likely to impose appreciable costs on the community or part of the community. A RIS for subordinate legislation must meet the same requirements applied to primary legislation.

Consultation with stakeholders is a vital part of the RIS process. Consequently, departments and agencies are required to include details on all consultation undertaken with potentially affected individuals and groups in their RISs. The guide suggests that the first point of consultation should be with the Microeconomic Reform Section of the Department of Treasury, which has responsibility for assisting departments and agencies in the preparation of a RIS.

For transparency and accountability purposes, the RIS for proposed subordinate legislation is tabled in the Legislative Assembly, along with the explanatory statement for the regulation. RISs for primary legislation that

form part of the Cabinet submission are subject to Cabinet-in-Confidence provisions. Accordingly, they are not released to the wider public. In most circumstances, however, a discussion paper would have been released for consultation, to assist with the development of the policy proposal put to Cabinet.

The ACT Treasury oversees Government departments' compliance with the RIS requirements.

The ACT Government (2003) advised 24 pieces of draft legislation have been reviewed since July 2001 for their potential regulatory impact. Each regulatory proposal was assessed as meeting the CPA clause 5 guiding principle. The RIS assessment process is ongoing because ACT legislation is subject to sunset clauses and some legislation may contain a specific review timetable.

The Council considers that the ACT's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping. To improve transparency, however, the Council considers that an expurgated version of the final RIS subject to Cabinet-in-Confidence provisions should, at a minimum, be made available publicly.

The Northern Territory

On 20 June 2003, the Northern Territory endorsed the establishment of a new process — to be known as competition impact analysis (CIA) — to scrutinise the competition policy implications of new and amended legislation. The Northern Territory subjects all new legislation proposals (new Acts, amendments to existing Acts and new or amended Regulations) that may restrict competition or confer significant costs on business to a CIA. Exceptions to the CIA requirement apply where the regulatory impact on the economy or the community is likely to be small and it is clear that the benefits of regulation outweigh the costs. The process provides for a consideration of the legislation's competition impacts, in keeping with the guiding principle of clause 5 of the CPA.

The Northern Territory published *Competition impact analysis principles and guidelines 2003*, which explain Government agencies' obligations when preparing legislation that may restrict competition. The guidelines provide information to help agencies determine whether a CIA must be prepared. They also set out the principles and characteristics of good regulation. Agencies are required to conduct a seven-stage analysis.

1. Identify the problem being addressed and the need for Government involvement.

2. Identify objectives that the Government seeks to attain to correct the problem.

3. Provide a statement of the proposed regulation to explain why legislation is the most appropriate approach.

4. Assess the impact of the proposed regulation by outlining the costs and benefits of the proposed legislation, including direct and indirect economic and social costs and benefits.

5. Provide a statement of consultation, detailing who has or will be consulted, the views expressed by those consulted, and the means of addressing their concerns.

6. Outline how the legislation will be implemented and enforced.

7. Provide a process for review detailing how the legislation will be monitored and how the ongoing effectiveness and efficiency of the legislation will be assessed.

The guidelines also encourage Government agencies to make their CIAs available to the public.

The Northern Territory does not have a single statutory independent body responsible for oversight of the gatekeeping process. Instead the Department of the Chief Minister has prime responsibility for oversight of the competition impact analysis process. To assist in this task it has established an inter-departmental committee comprising representatives from within the department and from the Department of Justice and the Treasury. The Department of Business, Industry and Resource Development is also represented on the committee when it has responsibility for regulatory proposals with the potential to restrict competition. The committee reviews the initial decision to prepare a CIA and coordinates feedback to the agency on the adequacy of the draft analysis. The Department of the Chief Minister provides a statement on whether or not the CIA process has been adequately completed. The statement and CIA must be submitted along with draft legislation/regulation when seeking Cabinet or Executive Council approval. From 2004, the unit will report bi-annually to the Chief Minister, the Treasurer and Chief Executives on agencies' compliance with the CIA process.

The Council considers that the Northern Territory's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping. It notes that the Northern Territory intends to commence in 2004 reporting on compliance with the arrangements.

Gatekeeping — an ongoing process

The CPA requires all new and amended legislation that restricts competition to be consistent with the guiding principle. It therefore requires governments to have in place an effective gatekeeping mechanism to continue to meet this

commitment. All governments — Commonwealth, State and Territory — have put in place legislative gatekeeping arrangements.

The Commonwealth Government's gatekeeping procedures represent best practice because they require an impact assessment of all regulatory proposals (for primary and subordinate legislation, quasi-regulation and treaties) and are underpinned by detailed guidelines on the conduct of an impact analysis. An independent Office of Regulation Review is empowered to examine agencies' regulatory impact assessments and to advise on the adequacy of the analysis at the decision-making and tabling/transparency stages. It also monitors and reports annually on compliance with the regulation impact analysis guidelines. All other jurisdictions, except New South Wales, subject all primary and subordinate legislation to their gatekeeping requirements. On other aspects, there is more divergence between the models adopted by each jurisdiction: for example, many jurisdictions use Cabinet processes to implement gatekeeping mechanisms for primary legislation, so therefore may not require the final RIS be made available publicly. Monitoring and reporting also vary considerably across the States and Territories.

Moreover, despite the efficacy of the gatekeeping system, governments have implemented some legislation that restricts competition even where it has not been demonstrated that the legislation provides a net benefit to the community and/or the objectives of the legislation could have been achieved without restricting competition. This outcome indicates that an effective gatekeeping mechanism is necessary to achieving good regulatory outcomes, but it will not always be sufficient. The system needs to be supported by the Government and the departments and agencies responsible for undertaking the regulatory impact analysis. Ongoing scrutiny is also important. Over time, experience may highlight deficiencies in the gatekeeping system that need to be addressed, or improvements that could be made to produce more effective and efficient regulatory and administrative outcomes. Responsibility for scrutinising the gatekeeping systems rests with all governments. Consequently, the Council will continue to monitor the new legislation gatekeeping arrangements to ensure governments continue to strive for best practice regulation.

Table 13.2: Gatekeeping arrangements for new legislation

Jurisdiction	*Formal regulatory impact assessment of new and amended primary legislation (Bills)*	*Formal regulatory impact assessment of subordinate legislation*	*Published guidelines for the assessment of the regulatory impact of new regulation*	*Guidelines embody the CPA Clause 5 guiding principle*	*Independent oversight and reporting of gatekeeper arrangements*
Commonwealth	A RIS must be prepared for all proposals that have a direct effect on business, have a significant indirect effect on business or restrict competition.	The requirements that apply to primary legislation also apply to subordinate legislation, quasi-regulation and treaties.	A *Guide to Regulation* (second edition) published by the Office of Regulation Review in 1998 contains guidelines.	The CPA clause 5 requirements are specified in *a Guide to regulation*.	The Office of Regulation Review provides training and guidance to departments and agencies on the RIS requirements. It reports annually on compliance.
New South Wales	Cabinet submissions for new Bills must meet best practice requirements.	Under the *Subordinate Legislation Act 1989*, a RIS is required for all new principal statutory rules, but not for any direct amendments to those rules.	From Red tape to results contains best practice guidelines, and the *Manual for preparation of legislation* details the requirements of the Subordinate Legislation Act.	*From Red Tape to Results* does not contain an explicit statement of the guiding principle, but it states that best practice requires that regulatory systems not restrict competition	No single statutory independent body has responsibility for overseeing the gatekeeping requirements. The Inter-Governmental and Regulatory Reform Branch in the Cabinet Office coordinates implementation of NCP and other regulatory reform initiatives. The Legislation Review Committee provides some scrutiny of Bills and subordinate legislation subject to disallowance according to the criteria set out in the *Legislation Review Act 1987*.
Victoria	Cabinet submissions on legislative proposals must include an NCP impact assessment.	Under the *Subordinate Legislation Act 1994*, a RIS is required for all regulation that imposes an appreciable economic or social burden on any sector of the public.	In 1996, Victoria issued *Guidelines for the application of the competition test to new legislative proposals*.	Victorian guidelines specify the CPA clause 5 requirements.	Ministers must obtain independent (public or private sector) expert advice to confirm the adequacy of a RIS before a regulation can be made. The Office of Regulation Reform advises agencies on the preparation of a RIS and publishes on regulation review matters.

(*continued*)

Table 13.2 continued

Jurisdiction	*Formal regulatory impact assessment of new and amended primary legislation (Bills)*	*Formal regulatory impact assessment of subordinate legislation*	*Published guidelines for the assessment of the regulatory impact of new regulation*	*Guidelines embody the CPA Clause 5 guiding principle*	*Independent oversight and reporting of gatekeeper arrangements*
Queensland	All new primary legislation is subject to a public benefit test to ensure it complies with the CPA Clause 5 guiding principle.	A RIS is required for all new or amended subordinate legislation that is likely to impose 'appreciable costs on business and/or the community'.	Queensland Treasury publishes public benefit test guidelines.	The public benefit test explicitly considers the CPA guiding principle.	The BRRU provides assistance and training to agencies on RIS requirements
Western Australia	All legislation that restricts competition must be reviewed.	All legislation that restricts competition must be reviewed. This includes Regulations, rules, proclamations, notices, new legislation, amended legislation and local government by-laws	West Australia's *Legislation review guidelines* and *public interest guidelines for legislation review* set out the mandatory requirements for reviews of existing, new and amending regulation.	The guidelines make clear Western Australia's CPA obligations.	The Department of Treasury and Finance advises agencies on NCP obligations and must be formally informed of progress on new legislation. The department 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 proposals for new and amending legislation must be accompanied by evidence that the proposal complies with CPA clause 5 requirements.	All proposals for new and amending regulations must be accompanied by evidence that the proposal complies with CPA clause 5 requirements.	South Australia has guidelines for primary and subordinate legislation.	The guidelines make clear South Australia's CPA obligations.	The Department of Premier and Cabinet provides advice and training to agencies on NCP compliance.

(*continued*)

Table 13.2 continued

Jurisdiction	*Formal regulatory impact assessment of new and amended primary legislation (Bills)*	*Formal regulatory impact assessment of subordinate legislation*	*Published guidelines for the assessment of the regulatory impact of new regulation*	*Guidelines embody the CPA Clause 5 guiding principle*	*Independent oversight and reporting of gatekeeper arrangements*
Tasmania	A RIS is required for new Bills assessed by the RRU to contain a major restriction on competition.	A RIS is required for subordinate legislation that imposes a significant cost, burden or disadvantage on any sector of the public.	Tasmania's guidelines are in the *Legislation review program procedures and guidelines manual* (Chapter 3.2).	The manual requires agencies to apply the NCP tests.	The Regulation Review Unit assesses all proposed legislation. It provides training and advice to agencies and annually reports on compliance.
ACT	A RIS must be attached to Cabinet submissions for all legislative proposals to restrict competition.	A RIS must be prepared for all subordinate legislation that imposes an appreciable burden on business.	The *Guide to Regulation in the ACT*	The guide refers agencies to the NCP tests.	The Microeconomic Reform Section of the Department of Treasury has responsibility for assisting departments and agencies in the preparation of a RIS.
Northern Territory	All draft Bills must be accompanied by a competition impact analysis.	All draft regulations must be accompanied by a competition impact analysis.	Department of the Chief Minister publishes the *Competition impact analysis principles and guidelines 2003*.	The guidelines refer agencies to the CPA tests as principles of good regulation.	There is no independent statutory authority responsible for oversight of the competition impact analysis process. The Department of the Chief Minister has prime responsibility for the gatekeeping arrangements. It is assisted by an interdepartmental Committee comprising representatives from within the Department and from the Department of Justice and the Treasury. The Department of Business, Industry and Resource Development is also represented on the committee when it has responsibility for regulatory proposals with the potential to restrict competition.

14 National legislation review and reform matters

This chapter discusses legislation review and reform activity that is being conducted on an interjurisdictional basis or that presents issues for which all governments have a collective responsibility to achieve compliance with National Competition Policy (NCP) obligations. 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 must consider whether the review should be undertaken on a national (interjurisdictional) basis. If a government considers a national approach to be appropriate, then 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.

Progress with national reviews

Delays in completing national review and reform activity often arise as a result of protracted interjurisdictional consultation. Further, review and reform activity by each State and Territory must sometimes await the conclusion of the national review process, which can significantly delay relevant State/Territory reform. The National Competition Council acknowledges, however, the importance of thoroughly investigating relevant issues and adequately consulting affected governments. It accepts that there has been useful progress in the review of several significant regulation issues and that the national focus has improved the consistency of regulation among jurisdictions.

National reviews are not exempt from the Council of Australian Governments (CoAG) requirement that all jurisdictions complete all legislation reviews and implement appropriate reforms by 30 June 2002. The Council accepts that meeting this deadline may not be possible where national reviews are still in progress, but it would be concerned if the current national processes are not concluded within a reasonable period to enable the reform of State and Territory legislation. It considers that all governments have a collective responsibility to ensure the completion of national reviews and the

implementation of resulting policy recommendations. The following sections summarise the status of the review and reform activity for each of the national reviews.

Review of the *Agricultural Chemicals Act 1994* and related Acts

This review (see chapter 1, volume 2) covers the legislation that created the National Registration Scheme for Agricultural and Veterinary Chemicals and the legislation controlling the use of agricultural and veterinary chemicals in Victoria, Queensland, Western Australia and Tasmania. Separate to this review, 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 final review report was presented on 13 January 1999. On 3 March 1999, the Standing Committee on Agricultural Resource Management (SCARM) publicly released the report and established an interjurisdictional 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 CoAG Committee on Regulatory Reform cleared the response, which accepted some recommendations and established interjurisdictional working groups and task groups to consider the other issues.

A task force, for example, examined review recommendations on the regulation of low risk chemicals, and the Commonwealth Government subsequently introduced the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2002. This legislation was passed by the Commonwealth Parliament in March 2003 and received assent in April 2003.

Three working groups examined the review recommendations on manufacturing licensing, cost recovery by the National Registration Authority and a review of alternative assessment providers respectively. These working groups have finalised their reports. The Primary Industries Standing Committee, which serves the Primary Industries Ministerial Council, endorsed the reports of the latter two working groups in late 2002. The working group on manufacturing licensing sent its report to the standing committee in June 2003. Following the standing committee's endorsement of the three working groups' recommendations, Commonwealth, State and Territory governments will make any necessary changes to their legislation and regulations.

The intergovernmental response was to retain the National Registration Authority's capacity to assess the truthfulness and appropriateness of the efficacy claims by suppliers of chemicals.

Review of the Mutual Recognition Agreement and the *Mutual Recognition (Commonwealth) Act 1992*

This review was conducted in 1997-98 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 made 30 recommendations addressing the operation of the Act and recommended that jurisdictions endorse the Act's continued operation.

The review found that the scheme is generally working well to minimise the impediments to the 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. The review recommended retaining all existing (potentially anticompetitive) exceptions to the Mutual Recognition Agreement.

Jurisdictions generally supported the review's recommendations. Queensland had concerns about recommendations 17 (pornographic material), 23 (manner of sale of goods) and 27 (packaging and labelling requirements for transport, storage and handling). Victoria expressed concerns about recommendation 24 (packaging and labelling for drugs and poisons).

On 8 January 2003, the Parliamentary Secretary to the Commonwealth Treasurer requested that the Productivity Commission undertake a further review of the Mutual Recognition Agreement (and the Trans Tasman Mutual Recognition Arrangement). Under the terms of reference of the review, the Productivity Commission must report on the efficiency and effectiveness of the Mutual Recognition Agreement, whether any changes are required to improve its operation and whether its scope should be broadened. The Commonwealth requires the PC report by 8 October 2003, after which the report will be provided to Australian jurisdictions and New Zealand within approximately three months.

Review of the *Petroleum (Submerged Lands) Acts*

The Commonwealth, State and Northern Territory Acts regulate exploration for, and development of, undersea petroleum resources. This legislation forms part of a national scheme.

The Australia and New Zealand Minerals and Energy Council commissioned a national review (see chapter 8, volume 1) by a committee of Commonwealth, State and Northern Territory officials. This committee engaged an independent consultant which reported to the committee in April 2000. In response to its report, the committee reported to the Australia and New Zealand Minerals and Energy Council on 25 August 2000 that the legislation is essentially pro-competitive and that any restrictions on competition (for example, in relation to safety, the environment and resource management) are appropriate given the net benefits to the community. The Australia and New Zealand Minerals and Energy Council endorsed the report at that meeting. The final report was made public on 27 March 2001, following consideration by the CoAG Committee on Regulation Reform.

Two specific legislative amendments flowed from the review. One addressed potential compliance costs associated with retention leases and the other expedited the rate at which exploration acreage can be made available. These amendments were incorporated in the Commonwealth's *Petroleum (Submerged Lands) Legislation Amendment Act 2002*. A third recommendation was for the *Commonwealth Petroleum (Submerged Lands) Act 1967* to be rewritten. Commonwealth authorities have been preparing this rewrite for some months and may submit the amended legislation to Federal Parliament late in 2003. Amendments and rewrites of the counterpart State and Northern Territory legislation will follow. Some jurisdictions are unlikely to complete this process until 2004.

Review of legislation regulating drugs, poisons and controlled substances legislation

The State, Territory and Commonwealth governments commissioned a review (the Galbally Review — see chapter 3, volume 2) to examine legislation and regulation that control access to, and the supply of, drugs, poisons and controlled substances. The legislation seeks to prevent poisoning, medical misadventure and the diversion of substances to the illicit drug market. The review report was 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 its comments. The final report was publicly released in January 2001.

The review concluded that there are sound reasons for Australia to have legislative controls that regulate drugs, poisons and controlled substances. It found that enhancing uniformity across jurisdictions and the interface between pieces of legislation could improve the efficiency and administration of the regulations.

The health Ministers referred the review report to the Australian Health Ministers' Advisory Council, which established a working party to develop a draft response to the review recommendations for CoAG's consideration.

The working party's draft response has been endorsed by the Australian Health Ministers' Advisory Council and referred to the Primary Industries Ministerial Council (which has an interest because implementation of the review's recommendations would affect the management of agricultural and veterinary chemicals). The Primary Industries Ministerial Council provided its comments in November 2002, allowing the working party's draft response to be revised. The Australian Health Ministers Conference expects to provide this response and the Galbally Report to CoAG in the second half of 2003.

Following this process, individual governments will need to respond to the report and, where appropriate, initiate legislative change. New South Wales has already implemented some of the recommendations by regulation, and does not have to make any NCP-related amendments. Western Australia has also introduced some of the Galbally Report recommendations. Tasmania is drafting a new Poisons Bill. Other jurisdictions are awaiting completion of the national decision-making process.

Review of food Acts

The objectives of the food Acts in each Australian State and Territory and New Zealand are to ensure compliance and enforce food standards in each jurisdiction. The Australia New Zealand Food Standards Council established a review (see chapter 1, volume 2) of this legislation in 1996. The Australia New Zealand Food Authority coordinated the review and included representatives of the jurisdictions on the review panel.

The authority released the review report in May 1999. The review recommended removing some restrictive provisions of the food Acts (for example, opening up food inspections to third party auditors), but retaining certain exclusive powers where government enforcement is appropriate.

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 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 to their respective Parliaments by November 2001. Victoria, Queensland, South Australia, Tasmania and the ACT modified their food legislation in 2001. New South Wales introduced its Food Bill in late 2002 and re-introduced it in 2003. The Northern Territory intends to introduce the legislation in 2003. Western Australia is preparing drafting instructions for its Food Bill.

Review of pharmacy regulation

The National Review of Pharmacy Regulation (the Wilkinson Review — see chapter 3, volume 2) 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 of individual jurisdictions). The review also recommended maintaining existing ownership restrictions and removing business licensing restrictions.

CoAG referred the Wilkinson Review to a senior officials' working party headed by Mr David Borthwick of the Commonwealth Department of Health and Aged Care, and with representatives from States and Territories. The Prime Minister released the working party's report on 2 August 2002. The report suggested that CoAG coordinate a response to the Wilkinson Review. Several States and Territories are considering legislative change in the second half of 2003, whereby they will account for CoAG's position on the Wilkinson recommendations.

Review of legislation regulating the architectural profession

In November 1999, the Productivity Commission commenced a nine-month review (see chapter 10, volume 2) of the legislation regulating the architectural profession. This inquiry served as a national review of participating States and Territories' legislation.

The Productivity Commission completed the review on 4 August 2000 and the Commonwealth Government released the final report on 16 November 2000. The recommended approach was to repeal State and Territory architects Acts after an appropriate (two-year) notification period to allow the profession to develop a national, nonstatutory certification and course accreditation system that 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, but rejected the review's recommended approach as not being in the public interest. It recommended, instead, adopting the alternative approach — namely, 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 group. The Queensland Parliament passed amending legislation in 2002, while other States and Territories are introducing changes during 2003.

Review of radiation protection legislation

In December 1998, CoAG agreed to conduct a single joint national NCP review of radiation protection legislation. The Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) coordinated 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. Comprising officers from the Commonwealth, State and Territory radiation protection agencies, the panel is the Steering Committee for the NCP review.

ARPANSA released an issues paper and a draft report for public comment during 2000 and 2001, and the final report on 8 May 2001. The review found the current legislative framework for radiation protection to be appropriate. ARPANSA considered that retaining a generally prescriptive regulatory approach is necessary to protect public health and safety and the environment from the harmful effects of radiation. The review report thus recommended retaining most of the existing restrictions on net public benefit grounds. The exception relates to advertising and promotional activities (in Western Australia only). The report included recommendations for further action to improve the efficiency of the legislation.

In August 2001, ARPANSA presented jurisdictions' responses to the report recommendations to the Australian Health Ministers' Advisory Council, which approved the final list of recommendations on 30 May 2002 and also an implementation plan for 12 projects to be undertaken by various jurisdictions. States and Territories expect to complete their legislative and regulatory changes in 2003 or 2004.

Review of trustee corporations legislation

The Standing Committee of Attorneys-General (SCAG) is conducting an NCP review of the regulation of trustee companies, with a view to replacing the current State regulation with a national scheme of complementary laws. SCAG released a consultation paper on a draft uniform Bill in May 2001. The consultation paper discusses the key features of the trustee corporations industry, the main provisions of the draft Bill and alternative options for future regulation of the industry. 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.

Underpinning the NCP report and the draft Bill is the assumption that the Commonwealth Government, through the Australian Prudential Regulatory Authority, would undertake the prudential supervision of trustee companies. New South Wales' Attorney-General's department, which provides the secretariat to SCAG, informed the Council in May 2003, however, that the Commonwealth Government had recently advised that the authority will not provide this supervision. This Commonwealth decision means that the States and Territories will have to consider alternative supervisory arrangements, which may have major implications for the draft uniform Bill.

Review of travel agents legislation

The Ministerial Council on Consumer Affairs commissioned the Centre for International Economics, overseen by a working party, to review legislation regulating travel agents (see chapter 5, volume 2). The Ministerial council released the review report for public comment in August 2000. The report recommended removing entry qualifications for travel agents, maintaining compulsory insurance and dropping the requirement for agents to hold membership of the Travel Compensation Fund (the compulsory insurance scheme). It preferred a competitive insurance system, whereby private insurers compete with the Travel Compensation Fund.

The Western Australian Department of Consumer and Employment Protection coordinated the preparation of a review response to the working party in liaison with CoAG's Committee on Regulatory Reform. The working party reported to Ministers in August 2002. It recommended that Ministers not accept two key recommendations in the Centre for International Economics report: (1) a competitive insurance model and (2) the removal of mandatory training qualification requirements. The working party supported the option to retain the Travel Compensation Fund, but advised reviewing contribution arrangements to establish a risk-based premium structure and make prudential and reporting arrangements more equitable. The Ministerial council endorsed the working party's recommendations in November 2002, and the Standing Committee of Officials of Consumer Affairs will oversee their implementation.

Review of 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 came into effect in November 1996, replacing various State and Territory statutes governing credit, money lending and aspects of hire-purchase.

The code was enacted by template legislation, with Queensland being the lead legislator. All jurisdictions except Western Australia and Tasmania enacted legislation applying the Consumer Credit Code as in force in Queensland. Western Australia enacted alternative consistent legislation which, until recently, has required amendment by the Western Australian Parliament to remain consistent when the code is amended. On 30 June 2003, however, Western Australia adopted the template legislation system favoured by all other States and Territories except Tasmania. Tasmania enacted a modified template system.

State and Territory governments jointly undertook an NCP review (see chapter 8, volume 2) 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. The 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 post-implementation review of the code preceded the national review, being completed in late 1999.

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 term sales 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 endorsed the final report in 2002 and referred it to the Uniform Consumer Credit Code Management Committee, which is facilitating the resolution of certain issues (for example, credit issues relating to solicitors, electronic commerce and general disclosure provisions), following which Queensland will enact template legislation. Automatic updating of relevant legislation will then occur in all other States and Territories except Tasmania, which will enact legislation that is consistent with the template legislation. Changes to the legislation are occurring on an iterative basis. The full range of changes to the Consumer Credit Code arising from the post-implementation review and the national review are unlikely to be completed until 2004.

Chapter 6 of volume 1 (on national standard-setting obligations) notes that the Commonwealth's Office of Regulation Review reported that a CoAG regulatory impact statement was not prepared before the April 2002 introduction of mandatory comparison rate amendments to the uniform consumer credit code.

Review of trade measurement legislation

Each State and Territory has legislation that regulates weighing and measuring instruments used in trade, along with controls for pre-packaged and non-prepackaged 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 (see chapter 8, volume 2). Some jurisdictions intend to review the Acts administering the national scheme, in addition to those applying it.

A scoping paper for the national NCP 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 restrictions on the

sale of non-prepacked meat. A draft report on such meat was circulated to jurisdictions during February 2002, and the review's working group has finalised the report. The working group consulted with meat sellers and associations, consumer associations, advocate groups and other stakeholders in early 2003, then reported to the Standing Committee of Officials on Consumer Affairs in mid-2003. The standing committee is expected to subsequently report to the Ministerial Council on Consumer Affairs on a proposed approach to the non-prepacked meat issue. If the Ministerial council agrees to the suggested national approach to trade measurement, then implementation of the agreed approach is expected to follow. This process is likely to be finalised in the second half of 2003 or early 2004.

Assessment

Most of the national reviews are now finalised. In the case of the Mutual Recognition Agreement, however, the Commonwealth has requested a further review by the Productivity Commission. In the case of the review of trustee corporation legislation, the Standing Committee of Attorneys-General is likely to revise the draft Bill following the Commonwealth's recent decision not to allow the Australian Prudential Regulatory Authority to supervise such corporations. The review of trade measurement legislation will not be completed until late 2003 or early 2004 because States and Territories are still working towards a common approach to non-prepacked meat.

In most cases where reviews have been completed, the jurisdictions have agreed on an implementation strategy but not all have completed the legislative changes arising from the reviews. In some cases, however, jurisdictions requested further work by working parties on the implications of the review recommendations and have not yet decided upon their reform strategy. This is the situation in the instances of the review of drugs, poisons and substances legislation and pharmacy regulation.

Where national reviews are not complete, or the reform strategy has not been decided, governments are yet to comply with CPA clause 5 obligations.

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.

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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 2002 — 31 March 2003*. The Office of Regulation Review provided this report to the Council on 19 June 2003.

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 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 Ministerial councils and other national standard setting bodies for comment. The office also provided the draft report to the Department of the Prime Minister and Cabinet, competition policy units and regulatory review 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 6 of volume 1.

1. Background to the Office of Regulation Review's (ORR's) report

1.1 Council of Australian Governments requirements

In April 1995, the Council of Australian Governments (COAG) agreed to apply a nationally consistent assessment process to proposals of a regulatory nature considered by Ministerial Councils and national standard-setting bodies (NSSBs). The agreement arose from concerns about the negative impacts of regulations and standards on business and the community. The agreed assessment process is set out in the COAG *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 preparation of Regulatory Impact Statements (RISs). A RIS considers and documents alternative approaches to resolve identified problems, and assesses the impacts of each option on different groups and the community as a whole.

A COAG RIS needs to be prepared for proposals having a national dimension which, when implemented by jurisdictions, would result in regulatory impacts. It is used as part of community consultation and as an aid to the decision making bodies.

1.2 The role of the Office of Regulation Review (ORR)

The Office of Regulation Review (ORR) advises decision makers on the application of the COAG *Principles and Guidelines* and monitors and reports on compliance with these requirements. This includes assessing RISs prepared for Ministerial Councils and NSSBs. The ORR assesses the RISs at two stages: before they are distributed for consultation and again just prior to a decision being made. At each stage it advises the decision making body of its assessment. The ORR's assessment considers:

- whether the 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 COAG *Principles and Guidelines* state that 'public consultation is an important part of any regulatory development process' and a COAG RIS is required for consultation. However, the COAG requirements make it clear that the depth of analysis in the consultation RIS need not be as great as in the final document for decision makers. In contrast, the final RIS should reflect the additional information and views collected from those consulted, and provide a more complete analysis.

In assessing whether the COAG requirements have been met, the ORR has taken into account the requirement for an adequate RIS at both the consultation and final decision stages in its overall assessment of compliance.

Another role for the ORR in relation to Ministerial Councils and NSSBs stems from the COAG *Agreement to Implement the National Competition Policy and Related Reforms* (COAG 1995). This requires that, when considering the conditions and amounts of competition payments from the Commonwealth to the States and Territories, the NCC take account of advice from the ORR on compliance with the COAG *Principles and Guidelines*.

This report addresses this obligation for the period 1 April 2002 – 31 March 2003. It is the third report by the ORR to the NCC dealing with regulation making by Ministerial Councils and NSSBs.

2. The focus and scope of the ORR's report

In its reports to the NCC, the ORR excludes two categories of decisions made by Ministerial Councils or national standard-setting bodies, because a COAG RIS is considered not to be necessary. The first category involves decisions which have a low significance in terms of the scope and magnitude of community impacts and, as a consequence, the RIS process would add little additional value. The second category comprises decisions that are more of an administrative than of a regulatory nature. These decisions are essentially about applying an existing regulatory framework to a new set of circumstances without consideration of other regulatory options.

In most of the remaining cases, there is general consensus between the ORR and the relevant decision makers on the types of regulatory decisions and agreements covered — and not covered — by the COAG *Principles and Guidelines*. Furthermore, there is usually agreement regarding how the COAG RIS requirements should be applied. However, the application of the COAG requirements is not always clear cut. Some explanation of these complex areas, and their relevance to the ORR's report, is provided below.

2.1 Scope of decisions covered by the COAG requirements

The COAG *Principles and Guidelines* cover regulatory decisions that ' … would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done' (COAG P&Gs, p. 4). While noting that Ministerial Councils and other regulatory bodies commonly reach agreement on standards or main elements of a regulatory approach which are then given force through principal or subordinate legislation, COAG went further by defining regulation to include:

> … *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.* (COAG P&Gs, p. 4)

As such, the scope of decisions covered by COAG's requirements is wide, and includes agreements on regulatory approaches, standards and measures of a quasi-regulatory nature.

2.2 Decision making groups covered by the COAG requirements

The COAG *Principles and Guidelines* state that they 'apply to decisions of Ministerial Councils and inter-governmental standard-setting bodies, however they are constituted, and include bodies established statutorily or administratively by government to deal with national regulatory problems' (COAG P&Gs, p. 4).

On occasion ad hoc bodies of Commonwealth, state and territory Ministers (and sometimes delegated senior officials) — rather than standing Councils of Ministers or national standard-setting bodies — are established to address and resolve regulatory issues considered to have a national dimension. These ad hoc bodies can be tasked with making decisions that will result in significant regulatory impacts.

In view of COAG's broad definition of what constitutes an inter-governmental body for the purposes of the COAG requirements, the ORR has advised such bodies of the need to comply with the COAG *Principles and Guidelines*.

Further, from time to time COAG itself makes decisions dealing with national regulatory problems. While COAG is not bound by the *COAG Principles and Guidelines*, it would expect, when considering regulatory proposals put to it for endorsement, that its requirements for good regulatory practice have been met. Accordingly, the responsibility for compliance with the COAG requirements rests with the body putting the regulatory proposals to COAG.

2.3 Decisions leading to possible duplication of RIS processes

In relation to decisions requiring national implementation, the subsequent development of legislation in each jurisdiction may require the development of state or territory specific RISs to meet the RIS requirements of individual jurisdictions. This raises the question as to whether the preparation of a COAG RIS is duplicative and therefore unwarranted.

The COAG *Principles and Guidelines* do not include an exemption from the COAG RIS requirements in such situations. As stated in the ORR's second report to the NCC, preparation of an adequate COAG RIS provides a solid analytical base with a nationwide perspective for (what might be described as) the overarching decision taken by the inter-governmental body and, if required, for the later preparation of a more focused RIS at the state or territory level. Moreover, a COAG RIS can guide the legislative reforms undertaken in each jurisdiction from a carefully analysed starting point. It is also the case that states and territories may, where applicable, forgo their own RIS requirements if an adequate COAG RIS has been prepared.

3. Matters for which COAG's requirements were met

Table B.1 documents the 24 decisions made during the period 1 April 2002 – 31 March 2003 where the COAG RIS requirements apply and were met. This table includes a brief description of the regulatory measure, the decision making body and the date of the decision.

Table B.1: Cases where COAG RIS requirements were met

Measure	Body responsible	Date of decision
Ban on human cloning and other 'unacceptable practices', and regulation of the use of excess human embryos for stem cell and related research	Australian Health Ministers' Conference (AHMC)[1]	5 April 2002
Adoption in the Food Standards Code of a new standard for infant formula	Australia New Zealand Food Standards Council (ANZFSC)[2]	May 2002
Update the provisions for residential buildings used for the accommodation of the aged to align with the Commonwealth Aged Care Act 1997	Australian Building Codes Board (ABCB)	1 May 2002
Agreement to manage risks associated with GM crops to agricultural production and trade through industry self-regulation supplemented by government monitoring	Primary Industries Ministerial Council (PIMC)	2 May 2002
Australian Standard for the Hygienic Rendering of Animal Products	PIMC	2 May 2002
Model code of practice for the welfare of animals (domestic poultry)	PIMC	2 May 2002
Track, Civil and Infrastructure Code (Volume 4 of the Code of Practice for the Defined Interstate Network)	Australian Transport Council (ATC)	6 May 2002
Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields - 3kHz to 300GHz	Australian Radiation Protection and Nuclear Safety Agency (ARPANSA)	7 May 2002
National Standards for Group Training Companies	Australian National Training Authority (ANTA) Ministerial Council	24 May 2002
National Standard for Commercial Vessels - Part B General Requirements	ATC/National Marine Safety Authority	Out-of-session decision; process completed by July 2002
National Standard for Commercial Vessels - Part C Section 5 (Engineering)	ATC/National Marine Safety Authority	Out-of-session decision; process completed by July 2002
National Standard for Commercial Vessels (NSCV) - Part F Subsection 1A and 1B - Category F1 Fast Craft	ATC/National Marine Safety Authority	Out-of-session decision; process completed by July 2002
Requirements for labelling statements for certain milk products	Australia and New Zealand Food Regulation Ministerial Council (ANZFRMC)	30 August 2002
Endorsement of recommendations arising from the NCP review of Radiation Protection Legislation	AHMC	10 October 2002
Model code of practice for the welfare of animals (the farming of ostriches)	PIMC	10 October 2002

(*continued*)

Table B.1 continued

Energy efficiency measures in housing provisions of the Code	ABCB	1 November 2002
Nationally consistent legislative framework for key aspects of the national vocational education & training (VET) system ('model clauses')	ANTA Ministerial Council	15 November 2002
Permission in the Food Standards Code for the importation of raw milk very hard cooked-curd cheeses	ANZFRMC	6 December 2002
Requirements for certain warning statements for products containing royal jelly, bee pollen and propolis	ANZFRMC	9 December 2002
Australian Design Rule for fuel consumption labelling	ATC	September 2002
Freight Loading Manual (Component of Volume 5 of the Code of Practice for the Defined Interstate Network)	ATC	20 December 2002
Review of Australian Design Rules for vehicle noise	ATC	February 2003
Technical Review Recommendations for the Draft Disability Standards for Accessible Transport	ATC	6 March 2003
Compulsory vaccination of poultry for Newcastle disease	PIMC	13 March 2003

1. The RIS was prepared for final consideration of the proposal by the Australian Health Ministers' Conference. This was overtaken by COAG's decision on the proposal on 5 April 2002.

2. On 1 July 2002 the Australia New Zealand Food Standards Council was replaced by the Australia and New Zealand Food Regulation Ministerial Council.

4. Matters for which COAG's requirements were not met

Table B.2 indicates that, during the period 1 April 2002 – 31 March 2003, the COAG RIS requirements were not met in 3 cases. It also includes a brief description of the regulatory measure, the decision making body and the date of the decision. Commentary on the individual decisions, including the reasons why the decisions are considered to be non-compliant, is provided below the table.

Table B.2: Cases where COAG RIS requirements were not met

Measure	Body responsible	Date of decision
Uniform consumer credit code – mandatory comparison of interest rates	Ministerial Council on Consumer Affairs	April 2002
Public liability and the Review of the Law of Negligence	Insurance Ministers	15 November 2002
National reform of hand gun laws	Australasian Police Ministers' Council[1]	28 November 2002

1. The regulatory proposals were agreed by the Australasian Police Ministers' Council on 28 November 2002 and most were endorsed by COAG on 6 December 2002.

Commentary on non-compliant decisions

Uniform consumer credit code - mandatory comparison of interest rates

In April 2002, under the auspices of the Ministerial Council on Consumer Affairs (MCCA), mandatory comparison rates amendments were adopted into the Uniform Consumer Credit Code (UCCC).[1] The amendments introduced two key concepts: any advertisement that includes an interest rate must also include the comparison rate[2]; and a schedule of comparison rates must be displayed and made available to consumers. The amendments also prescribe the precise content and manner in which the comparison rate can be calculated and displayed.

1 *Consumer Credit Code (Queensland) Amendment Act 2002.*

2 The comparison rate is a method of reducing the total cost of a loan, including interest and all fees and charges, to a single percentage rate.

In August 2001, the ORR advised the MCCA and the COAG Committee on Regulatory Reform (CRR) — prior to the Council's decision — that the COAG *Principles and Guidelines* should be followed and a RIS should be prepared. The ORR confirmed its advice in September 2001. This advice reflected on the NCP Review of the Consumer Credit Code which stated, on page 105, that:

> *If there is to be mandatory disclosure, it should be directed at key information that consumers are likely to use. Further research is required to ascertain what information the consumer actually finds useful and also to determine the best method of delivering that information to the consumer.*

While an extensive amount of preparatory work was undertaken in the development of the proposal, no COAG RIS on the mandatory comparison rates issue was distributed for consultation, nor was one presented to the MCCA.

Public liability and the Review of the Law of Negligence

Insurance Ministers held a number of meetings on public liability and public liability insurance during 2002. The Ministerial group progressing reforms in this area comprises relevant Commonwealth, state and territory Ministers and the President/senior Vice President of the Australian Local Government Association. It has been described by COAG senior Ministers as a Commonwealth-State group of Ministers and COAG senior Ministers have endorsed outcomes from its meetings.

During 2002, the group released a number of communiqués citing discussion or agreement on regulatory approaches in the area and the Commonwealth Minister, as chair, issued a number of press releases along the same lines. For example, the Ministers announced in their Communiqué of 27 March 2002 that:

> *Many of the issues are complex and cross-jurisdictional, requiring collective action from governments and industry in the immediate and long term.*

Decisions from this Ministerial group include the acceptance of key recommendations from the Review of the Law of Negligence (the Ipp Report). Its recommendations covered:

- limiting the liability of defendants to only foreseeable, not insignificant, risk;
- allowing findings of 100 per cent contributory negligence by plaintiffs;
- increasing public authority defences to damages claims and limiting claims for mental harm;

- abolishing or limiting legal costs orders for low level damages awards, caps on damages payouts and thresholds to remove small claims from courts; and

- amendments to the *Trade Practices Act 1974* (Cwth) to protect community groups and risky sporting enterprises, as well as preventing the circumvention of national negligence reforms.

The Ministers' Joint Communiqué of 15 November 2002 stated that:

> *Ministers agreed on a package of reforms implementing key recommendations of the Ipp Report. They agreed that the key Ipp recommendations that go to establishing liability should be implemented on a nationally consistent basis and each jurisdiction agreed to introduce the necessary legislation as a matter of priority.*

While the Ipp Report provided a range of options for reform, it did not provide a cost/benefit assessment of its proposals. The RIS requirements were not followed as no RIS was prepared. Accordingly, the policy development process for this agreement was not consistent with the COAG guidelines.

National reform of hand gun laws

In October 2002, the Australasian Police Ministers Council (APMC) was asked by COAG senior Ministers to develop detailed proposals for a national approach to handgun control measures. On 5 November 2002, the APMC reached broad agreement to progress further measures to restrict the availability and use of handguns. Following the consideration of proposals by a Senior Officers' Group, the APMC, at a special meeting on firearms on 28 November 2002, agreed to put forward 19 resolutions for consideration by COAG. On 6 December 2002, these measures were discussed and, in the main, endorsed by COAG.

The proposals developed and considered by the APMC were varied and extensive and included a ban on the importation, sale and ownership of certain sporting hand guns; graduated access to hand guns and minimum participation rates for sporting club members; reporting requirements for sporting clubs concerning members' behaviour and expulsion; and the inclusion of historical gun collectors in the hand gun ban, accreditation and reporting requirements.

The proposals put forward by the APMC for COAG endorsement affect both businesses and individuals. Under the COAG guidelines, the assessment and development by the APMC of the handgun reform proposals should have been the subject of a COAG RIS. The ORR notes the tight timeframe within which the proposals were developed.

5. Compliance in cases of emergency

National regulatory decisions are occasionally made as an urgent matter, for example, when there is a significant and imminent risk to public health and safety. Such cases are rare. They are specifically recognised in the COAG *Principles and Guidelines*, which allows an exemption from the RIS process in an emergency. The exemption must be formally requested from the Prime Minister, and a RIS must be prepared within twelve months of the regulation being made, to ensure that the regulation is justified on the basis of a fully considered analysis. The exemption does not apply where those responsible for meeting the COAG requirements have left the preparation of a RIS until late in the process of developing the proposal.

In July 2001, the predecessor of the Australia and New Zealand Food Regulation Ministerial Council — the Australia New Zealand Food Standards Council — decided to adopt into the *Food Standards Code* provisions relating to bovine spongiform encephalopathy (BSE). This decision was taken as an emergency measure, and was reported in the ORR's second report to the NCC. A RIS has subsequently been prepared which justifies the approach taken.

6. Trends in compliance with COAG RIS requirements

Of the 27 decisions reported during the year to 31 March 2003 (the ORR's third report to the NCC), compliance with COAG's requirements was 89 per cent. This compares unfavourably to the compliance rate for decisions made during the previous reporting period of 97 per cent (the ORR's second report to the NCC). However, it is considerably better than the compliance rate of 71 per cent for the ORR's first report to the NCC covering the period 1 July 2000 – 31 May 2001.

As discussed in the ORR's second report to the NCC, 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. The criteria for classification are 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.

Classifying decisions in this way 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 27 regulatory decisions reported here, 6 were assessed by the ORR as of greater significance according to these criteria. They are as follows:

- COAG's decision to ban human cloning and other defined 'unacceptable practices', and to regulate the use of stem cell and related research on excess embryos created by assisted reproductive technology;

- the decision by the Australian Transport Council to adopt a Code of Practice for the Defined Interstate Rail Network (Volume 4) setting out nationally consistent principles, recommendations and requirements for the management of Australia's 8000 kilometres of standard gauge rail track and associated civil and electrical infrastructure to reduce inefficiencies and improve transit times;

- ARPANSA's decision to adopt a radiation protection standard for maximum exposure levels to radiofrequency (RF) fields — 3kHz to 300 GHz — to address risks to human health from public and occupational exposure to RF radiation in the telecommunications and radiocommunications industries and various industries that use RF heating and welding;

- the decision by the Primary Industries Ministerial Council that the risks to agricultural production and sustainability of farming systems, and risks to trade in differentiated agrifood products, posed by genetically modified (GM) crops be managed through industry self-regulation supplemented by government monitoring;

- the decision by the Ministerial Council on Consumer Affairs to adopt into the Consumer Credit Code the mandatory requirement for comparison of interest rates; and

- the decisions by the Insurance Ministers on public liability and professional indemnity insurance, responding to the Review of the Law of Negligence (Ipp Report). These propose to substantially alter the operation of the common law throughout all Australian jurisdictions.

The RISs for the first four of these decisions were compliant with COAG's requirements and contained a level of analysis commensurate with the significance and impact of the proposal. For the remaining two decisions, the COAG *Principles and Guidelines* were not followed.

In summary, the compliance result for matters of 'greater significance' for the year to 31 March 2003 is therefore 67 per cent. In contrast, compliance for matters of significance was 100 per cent in the period covered by the ORR's second report to the NCC and 56 per cent for the ORR's first report to the NCC.

Table B.3 summarises compliance results over the periods covered by the three reports.

Table B.3: COAG RIS compliance for regulatory decisions made by Ministerial Councils and NSSBs, 2000-01 to 2002-03[3]

	2000-01	2001-02	2002-03
All proposals	15/21 (71%)	23/24 (96%)	24/27 (89%)
Significant regulatory proposals	5/9 (56%)	6/6 (100%)	4/6 (67%)

7. Compliance issues

The lack of a sustained upwards trend in compliance with COAG's RIS requirements is likely to be due to a number of factors.

First, the allocation of decision making power to ad hoc groups or committees would appear to involve a risk that these decision making processes do not follow best practice, because such groups are not aware of COAG's requirements. The lack of a well-defined secretariat providing support for these ad hoc groups or committees, and an imbued sense of urgency, makes this matter difficult to address.

It also appears that some established Ministerial Councils are not aware of COAG's requirements, even though they have been in place for a considerable period of time. The secretariat function for some Councils alternates among participating jurisdictions and knowledge of the requirements can be lost in the transfer of responsibility. In limited instances, lack of awareness may be due primarily to the creation of new Councils to replace existing Councils.

A third factor is a lack of awareness of the wide scope of regulation covered by the requirements. A number of decision making bodies are not aware that the requirements extend beyond decisions implemented via legislation to include decisions implemented through other means, and to decisions with an indirect regulatory impact on business through the impact on the community as a whole.

[3] Data for 2000-01 relate to 1 July 2000 - 31 May 2001. Data for 2001-02 relate to 1 April 2001 - 31 March 2002. Data for 2002-03 relate to 1 April 2002 - 31 March 2003. Therefore, there is some overlap between the reporting period for the first two reports. However, all decisions covered in both reports (including one on a significant matter) were compliant with COAG's requirements. Therefore, this modest overlap is not seen as significant for the purposes of comparing compliance between the first two periods.

A fourth factor appears to be a mistaken belief held at either the Ministerial or secretariat level that a COAG RIS is not required where decisions are taken on a broad national approach, requiring a regulatory response at the state and territory jurisdictional level.

These factors do not explain all cases of non–compliance reported in this third report to the NCC. Fundamentally, it remains the case that in some instances the RIS requirements have been known and understood, but decisions were still taken without regard to the requirements.

8. Improving compliance

There is clearly a need for improved awareness of the scope of the COAG RIS requirements, the required level of analysis and the role of the ORR. Several secretariats have addressed this during the reporting period.

One case is the agreement between Foods Standards Australia New Zealand (FSANZ) and the ORR to a Protocol to apply to the COAG requirements. This Protocol sets out the obligations of FSANZ and the ORR in respect of the application of the requirements to the work of FSANZ. This allows for a greater focus on regulatory matters of significance, and ensures timely contact between the ORR and FSANZ as regulatory proposals are being developed. The Protocol is expected to improve the quality of regulatory impact assessment over time.

Another case is of a new Council — the Gene Technology Ministerial Council — that has sought to embed the COAG requirements for regulatory impact assessment in its own standard operating procedures for regulatory decision making. In doing this, the Secretariat to the Council drew on the experience of the Australian Health Ministers' Conference that had previously adopted similar procedural arrangements.

Furthermore, in the year to 31 March 2003 the ORR provided training in COAG RIS requirements to approximately 50 relevant government officials.

There may be scope moving forward to increase the use of such arrangements and training, where they enhance and strengthen compliance with the COAG RIS requirements.

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