
4 Commonwealth legislation reviews

Allowing for variations made to the Commonwealth's Legislation Review Schedule, the ORR cleared terms of reference for eight of the 16 reviews which were to commence in 1998-99, the third year of the national four-year program of legislation review.

Those terms of reference cleared by the ORR largely met relevant *Competition Principles Agreement* and Commonwealth legislation review requirements.

Chapter 1 discussed the Commonwealth's legislation review obligations under the *Competition Principles Agreement* (CPA). This chapter discusses the status of reviews scheduled to commence in 1998-99 and the ORR's role in clearing terms of reference and providing advice on the composition of review bodies. A detailed list of all reviews on the Commonwealth Schedule and their status is contained in appendix C.

4.1 Status of reviews

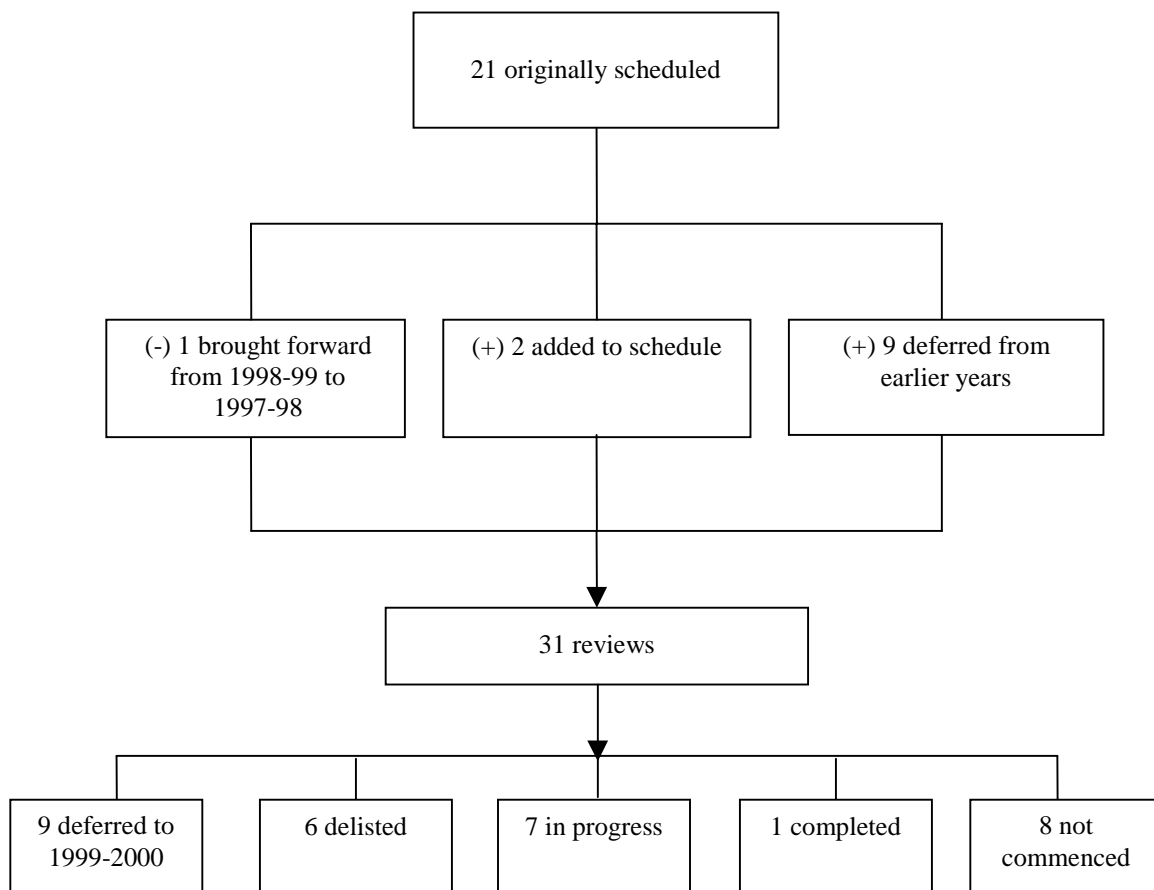
1998-99 was the third year of the national four-year program of review of existing legislation under the CPA.¹ While some 21 reviews were originally scheduled to commence during the year, a number of approved variations were made to the schedule. Figure 4.1 below provides an overview of the status of reviews.

After accounting for the variations to the Schedule, there were 16 reviews which should have commenced by 30 June 1999. The ORR cleared eight terms of reference.²

¹ *Regulation and its Review 1996-97* (IC 1997) detailed the origins of the review program and preparation of the Commonwealth's Legislation Review Schedule.

² The ORR also cleared terms of reference for an additional review of a significant part of the *Migration Act 1958*. That review has not been included in this chapter as it is a continuation of a CPA review of the *Migration Act 1958* completed in 1997.

Figure 4.1 Status of 1998-99 reviews



As illustrated in figure 4.1, the other eight reviews did not commence as scheduled and the appropriate approval, for varying the Schedule, had not been sought before 30 June 1999. A number of circumstances contributed to this, including:

- following the election in 1998, there were a number of changes to portfolios and their responsibilities and it was not always clear to departments that they had inherited CPA review obligations;
- in a couple of cases, departments have conducted internal reviews of the relevant legislation and are in the process of determining whether these reviews will satisfy CPA requirements;
- other reforms implemented by the Government have had a bearing on some legislation on the Commonwealth's Schedule and departments are assessing the feasibility of delisting or deferring those reviews;

-
- there is still some lack of understanding of the Government’s requirements and the processes which have been put in place for CPA reviews; and
 - some agencies do not see the reviews as a priority, either in terms of their functions or allocation of resources.

Notwithstanding these explanations, in a number of cases departments could have consulted earlier to determine whether a review was still required and, in other cases, departments have simply underestimated the time needed to obtain approval to amend the schedule.

4.2 Clearance of terms of reference

The Government requires the ORR to advise the Minister for Financial Services and Regulation and the responsible portfolio Minister on the draft terms of reference for legislation reviews.

The suggested minimum three month consultation period was observed for six of the eight reviews and proved in those cases to be sufficient time to resolve any concerns with terms of reference. While consultation occurred less than three months prior to planned commencement in two cases, satisfactory terms of reference were developed. The three month consultation period has contributed to good outcomes and will continue to be encouraged. (see appendix C, table C.2.)

Adequacy of terms of reference

The ORR advised that the draft terms of reference largely met the requirements for all eight reviews. The terms of reference must:

- recognise the guiding principle under the CPA; and
- have an analytical framework centred around cost-benefit analysis, such as those provided by the RIS guidelines or clause 5(9) of the CPA.

In most cases the ORR’s template terms of reference was used. Where the template was not used or where the guiding principle was not specifically recognised, the terms of reference noted that the CPA requirements would need to be met.

Other desirable features in terms of reference include, the intention to publish a report, reporting dates for review bodies and processes for a response by government.

A reporting date was included in the terms of reference for all eight reviews in 1998-99, while five of the eight reviews' terms of reference included a government response process.

As part of the legislation review process, it was the Government's intention that reports be made publicly available. To facilitate this, the ORR encouraged departments to note in the terms of reference the intention to publish a report. All eight terms of reference for reviews in 1998-99 complied.

4.3 Composition of review bodies

While the ORR does not have a formal clearance role on the composition of review bodies it is often consulted by departments.

In setting up the Legislation Review Schedule, the Government identified eight types of review body (modalities), ranging from an independent committee for major reviews to an intradepartmental committee for very minor reviews. The Government acknowledged that it would not be cost effective to expect the same standard of review for all legislation.

The Commonwealth has agreed that the legislation reviews should be conducted in public and allow for consultation. The appropriate level of consultation will vary according to the significance of the review. For major reviews of legislation, extensive external consultation will be warranted. Trade-offs must also be made in relation to quantitative versus qualitative assessments and the time allocated for the review.

For 1998-99 reviews, the review body was in most cases as specified by the Government. However, one issue which has been gaining prominence, is the appropriateness of having industry and other stakeholder groups represented on review committees.

While it is appropriate that regulatory agencies participate in reviews (for example, by providing information), with the exception of very minor matters, they should not review their own legislation unless provision is made for some independent external scrutiny or oversight — for example, by regulatory review units.

Reviews conducted in-house by departments are likely to have certain advantages for less significant reviews. Departments have the most detailed knowledge of the regulations they administer and internal reviews may be able to be conducted in a short time frame and at low cost. In addition, recommendations are more likely to have support. Conversely, there are serious risks that internal reviews will not be

conducted with the same impartiality, openness and transparency as independent reviews.

Industry groups potentially affected by a review must have an opportunity to present their views, but caution should be exercised when considering direct industry representation on review bodies. The National Competition Council (NCC) expressed the following concerns in its 1997-98 annual report:

Because there is almost inevitably conflict between some views, independence is particularly important in engendering confidence that all information and views presented to a panel are objectively considered. ... The Council considers that the best means of incorporating input from industry representatives is through submissions and providing information to review panels. Ideally, however, so that reviews are objective and aimed at genuine reform opportunities, the Council considers that there should not be industry representation on review panels themselves. (NCC 1998, pp. 98–9)

If, nevertheless, industry is represented on a committee of review, there is an argument for appointing other ‘interest’ groups to maintain balance. However, experience suggests that committees with a wide range of interests represented can have difficulty in presenting a unanimous report with rigorous analysis of the relevant issues and recommendations for significant reform.

For such reasons, when representation by industry or other groups is considered desirable, it would be preferable to have their interests represented on a ‘reference group’ rather than on the review committee. This group could assist the review committee, but it would not be directly responsible for recommendations to the Government.