
6 Transport

Key points

- The inconsistent state and territory government regulation surrounding the operation of road and rail freight imposes a considerable regulatory burden on business. This has been acknowledged by Australian Governments and has been a focus of recent government reforms.
- Despite a number of previous attempts, it has been difficult to advance regulatory reforms in road and rail. In particular, the use of model legislation made limited progress in addressing regulatory inconsistency because of the flexibility it provided to jurisdictions. However, all jurisdictions have recently agreed to implement national regulatory frameworks to overcome inconsistencies in these sectors.
- But care should be taken to ensure that a national framework does not impose additional regulatory burdens.
- Inconsistencies across jurisdictions remain in relation to maritime safety regulation and between the Australian and Victorian Governments in regard to ballast water management. A single national maritime safety system is being developed and a national system for ballast water management needs to be developed and implemented as soon as possible.
- Aviation has also been subject to scrutiny as part of the Australian Government's current review of national aviation policy.
- The urgency in implementing a new aviation security regime after September 2001 resulted in a significant increase in the amount of regulation and a number of ensuing problems.
- In some instances, airlines are required to take responsibility for matters that are outside their control and provide information concerning other agencies, or information that is already in the public domain.
 - the use of approved exemptions would shift from a 'one size fits all' approach to aviation security regulation and enable the industry to develop alternative arrangements that satisfy the regulated requirement with lower compliance costs.
 - The existing aviation security advisory forum should be better utilised to provide a focus on consultation with industry to improve regulatory outcomes in this area.
- The long delays in implementing the aviation safety reform program have resulted in two systems of regulation operating side-by-side, adding further complexity to the arrangements. This program needs to be completed in the agreed to time frame.
- The price notification arrangements applying to regional airline services using Sydney Airport should be subject to review on their expiry in 2010.

Australia's overall economic performance is closely linked to the efficiency of its transport sector, particularly because of the long distances between dispersed population and production centres. Improving the regulatory environment in which Australia's transport sector, particularly freight transport, operates has been an ongoing issue for Australian governments over the past decade.

The inconsistent state and territory government regulation surrounding the operation of road and rail transport and aspects of maritime regulation has been the focus of recent COAG reforms. Regulation of the aviation sector, which is mainly the responsibility of the Australian Government, has also been subject to scrutiny as part of the Australian Government's current review of national aviation policy. Despite reform efforts much remains to be done.

6.1 Road transport

The states and territories are largely responsible for the regulation of road transport. Inconsistency in road and vehicle regulation has been an ongoing issue for the road freight industry:

- as early as 1991, Australian Transport Ministers agreed to establish a National Road Transport Commission (NRTC) to develop uniform regulation for the operation of vehicles and consistent charging for vehicle registration
- in 1994, road reform was absorbed into the National Competition Policy
- in 2004, the NRTC was replaced by the National Transport Commission (NTC) which has a broader charter to reform transport regulation.

The most recent attempt to produce a uniform national approach involved the development of 'model' laws whereby individual jurisdictions agreed to model their own legislation, standards and codes of practice on a model document. While this approach enables jurisdictions to adapt the model to suit their individual circumstances, this flexibility, along with jurisdiction specific exemptions, has resulted in differences in the adoption, application, interpretation and enforcement of these model laws. As a result a road transport business operating across state borders still has to comply with multiple, often inconsistent regulations.

Various NTC reviews have found that efforts to achieve uniform or consistent legislative outcomes in this area have not been successful (Department of Infrastructure, Transport, Regional Development and Local Government 2008).

Industry concerns

Inconsistency in road transport regulation

The industry concerns focus on the inconsistency in road transport regulation. This is not surprising as around half of Australia's road freight, on a tonne-kilometres travelled basis, is carried across state borders (ABS 2001). The Australian Trucking Association (ATA) notes:

The scope of existing road transport related laws is broad and housed in multiple layers within multiple governments. There is much overlap and inconsistency. (sub. 3, p. 3)

In quoting a member organisation, NatRoad, it goes on to say:

... there are individual pieces of legislation in every state and territory governing numerous issues that affect the day to day operation of road freight transport businesses, ranging from fatigue (in some States this can be three different pieces of legislation), driving hours, vehicle axle and gross weights, dimensions, road rules, driver licensing, registration, vehicle access, driver behaviour, vehicle roadworthiness, load restraint, vehicle design, combination design, emissions and noise control, to name a few. Each of these matters is duplicated around the country, and none, not one is the same. (sub. 3, p. 5)

The industry comments that previous attempts by Australian Governments at reform have failed to deliver due to the continuance of multiple regulations and regulators. The ATA remarks:

The sad part is we can provide multiple other examples of well-intended national road transport reforms failing to deliver the intended result due to multiple laws and multiple regulators. For example, Higher Mass Limits Reform was agreed in 1999 yet in 2009 it is still not delivering the promised benefits. Performance Based Standards, similarly has not delivered the productivity results promised to COAG by the road agencies. Access for B-double vehicles can be controlled by three different mechanisms in any individual state: a determination under the Federal Interstate Transport Act, a state based notice, or an individual access permit. Competing operators may not enjoy the same access for identical B-double vehicles. (sub. 3, p. 6)

The Victorian Freight and Logistics Council (sub. 8) made a number of comments on the inconsistent regulatory environment in which heavy vehicles operate. In particular it refers to the use of lowest common denominator regulation in respect of vehicle types that can be used in cross border trips, the lack of a national registration system for vehicles and different regulation facing Heavy Mass Limit (HML) vehicles.

The Council also refers to the inconsistent implementation and application of nationally agreed reforms. For example:

September 2008 saw the implementation of new national laws to manage heavy vehicle driver fatigue. ...

However, there were inconsistencies in the adoption of these fatigue laws across the states, particularly in New South Wales where Occupational Health and Safety (OH&S) Long Distance Driver Fatigue Regulation 2005, adds a layer of complexity to OH&S rules and is not wholly consistent with the national fatigue reform package. (sub. 8, p. 3).

Performance Based Standards (PBS) enable high productivity vehicles to be used when they meet certain performance standards as opposed to the more inflexible Australian Design Rules. Despite agreement to implement PBS, the Victorian Freight and Logistics Council notes:

Unfortunately industry has found the implementation and approval process for PBS time-consuming and inconsistent. This has arisen both in the approval of vehicles and the identification and access to state road networks.

Despite a COAG direction for states and territories to classify their road networks into four PBS access levels and also for network maps to be published by December 2007, many are still to be completed. (sub. 8, pp. 4-5)

These cross-border inconsistencies impose significant costs on business. A study for the Australian Logistics Council (ALC) (2008) on the costs imposed by these regulatory inconsistencies on heavy vehicle operators in the Sunraysia, Riverland region of New South Wales, Victoria and South Australia found that there were possible savings of \$250 to \$750 per load if access to higher mass limits were available. Based on the number of cross-border movements, this equated to savings of tens of millions of dollars per year (ALC 2008).

Assessment

Despite efforts to increase regulatory consistency across jurisdictions, progress has been slow. Model legislation has not delivered the desired outcomes of greater uniformity and further regulatory reform is now being considered to achieve national uniformity in road transport regulation (Department of Infrastructure, Transport, Regional Development and Local Government 2008).

In 2008, the Australian Transport Ministers, through the Australian Transport Council (ATC), agreed in principle to a single national regulatory framework for heavy vehicles and a Regulatory Impact Statement (RIS) was prepared to implement such a framework. This framework will consist of a single regulator to administer the laws, a national registration and licensing system and national laws

covering the current regulations concerning mass limits, restricted access, standards, speeding and associated enforcement and compliance activities. The ATC endorsed the RIS in May 2009 and recommended that COAG proceed further to develop arrangements to have a national framework in place by 2013. This was agreed to by COAG in July 2009 (COAG 2009b). However, the ATC recognised that there were many issues of both principle and detail which needed to be worked out to deliver a national regulatory approach (ATC 2009).

The Northern Territory Government (sub. 45) had called for the RIS to adequately examine these reforms to ensure there was sufficient flexibility in approach to meet different jurisdictional circumstances, particularly in the provision of freight services to remote areas. Without such flexibility there was the risk that national regulation would give rise to the Northern Territory's road freight transport industry operating under a regulatory regime more attuned to the needs of more heavily populated areas. It says:

The Northern Territory would in principle support a national regulator for the road transport industry if the supporting policy was to provide for cross border flexibility, particularly in terms of access for heavy freight vehicles to the national road network.

Access is a critical issue for the Northern Territory as heavy vehicles are a principal mode of transport for both intra-Territory and interstate freight movements. ...

In the national effort to standardise access, the main issue for the Northern Territory is the lowest common denominator factor, which results in potential efficiency losses from unnecessary access conditions. (sub. 45, p. 3)

Clearly, differences in circumstances must be recognised. Where variations to national regulation are required they should be based on circumstance rather than jurisdiction. For example, if transport regulation needs to be different in remote areas, regulation should reflect this in a way that ensures remote areas in all jurisdictions are treated in the same way. The problem with each jurisdiction making their own variations is that there is then a plethora of rules for each circumstance.

This reflects the principle underlying the PBS scheme for road access of 'matching roads to vehicles' as opposed to jurisdictions considering access on a case-by-case basis (NTC 2008b).

The industry strongly supports the ATC decision to establish uniform heavy vehicle legislation administered by a single national regulator (sub. 3). The ATA notes:

Road transport is national industry and its efficient regulation is in the nation's interest. It is time to provide for an efficient single national regulator applying a single body of law. (sub. 3, p. 7)

The NTC also supports this approach to deliver national seamless outcomes:

... as a reform body with 17 years experience with both model and template law approaches to developing regulation it is our experience that both model and template approaches face significant challenges to deliver nationally seamless outcomes. While in our experience a model law approach has been more successful than template, national laws administered by national regulators is the best approach to deliver a seamless national economy in the future. (sub. DR58, p. 2)

The RIS explored a number of options as to how this could be achieved including template legislation, complementary legislation or by a referral of power by the states and territories to the Commonwealth. The ATA (sub. 3, p. 7) supports a referral of powers to the Commonwealth to establish a ‘single national regulator applying a single body of law’.

The RIS process is to provide a cost-benefit analysis of the various options. In the Commission’s view, an effective RIS process, including a transparent cost-benefit analysis, is the appropriate mechanism to determine which option should be adopted and the most effective means for its implementation. Once the option with the greatest net benefit to the community is chosen and implemented the effectiveness of these arrangements should be assessed.

In implementing a new regime some key points should not be overlooked:

- Care needs to be taken to ensure that a national regime does not impose any additional regulatory burdens – uniformity is not an end itself, but rather is desired because multiple systems create unnecessary regulatory burdens. As the Northern Territory Government’s submission makes clear, it is possible for a drive to uniformity to increase rather than decrease burdens.
- The position of operators that do not cross jurisdictional boundaries need to be given consideration in the process to ensure they are not asked to adopt a system that imposes greater burdens than they currently face.
- History shows that it is extremely difficult to move beyond commitments to uniformity into actual uniformity on the ground. All jurisdictions need to be vigilant in pursuing the goal of a truly national system right down to the impact at the operator level.

National registration for rental vehicles

The Transport and Tourism Forum (sub. DR76) raises the need for a national registration system for rental vehicles. Car rental companies manage large fleets of vehicles that are often dropped off by tourists in a different location from where the vehicle was collected and is registered. As most jurisdictions require vehicles to be

‘resident’ in the state where they are registered, unless there is demand for a ‘one way’ rental to return the vehicle to the jurisdiction in which it is registered, car rental companies may have to return these vehicles by truck.

Currently, national rental vehicle organisations have to truck cars between states so that fleets meet registration requirements in particular jurisdictions. This situation is cumbersome and costly for businesses and a good example of the inefficiency of multiple road legislations. A single nation road registration system would overcome many of these issues. (sub. DR76, p. 13-14)

Assessment

To date, there have not been widespread calls from business for a national registration system for passenger motor vehicles or discussion by jurisdictions as to the benefits of implementing such arrangements. Nevertheless, such arrangements may need to be considered by the ATC in the future.

The jurisdiction national car rental companies register their vehicles in is likely to be determined by the relative cost of registration and the demand for rental vehicles in that location. There is clearly a cost to rental companies in having to truck a vehicle back to the state in which it is registered in the absence of being able to secure a return rental. While not ideal, rental companies have employed commercial strategies to offset such costs, such as levying a charge for returning a rental vehicle to a different location from where it was collected, and in managing large fleets will take account of the savings available from the different registration fees charged in each jurisdiction.

6.2 Rail transport

As with road freight transport, state and territory based regulation means that rail operators operating across jurisdictions have to contend with regulatory inconsistency and a fragmented regulatory environment.

The Australian rail industry has undergone considerable change since the 1990s. A significant reform has been the privatisation of government owned rail businesses including the Australian Government’s interstate passenger and freight services. The Australian Government’s present involvement in rail transport is through its management of the interstate network and the provision of access to train operators through the Government owned Australian Rail Track Corporation (ARTC).

There have been ongoing efforts by Australian governments to improve the regulatory framework in which rail transport operates. Since the sale of its rail

operations, the Australian Government has sought to create a defined interstate rail network to be operated as a single network by the ARTC to provide seamless access to interstate rail operators.

A major ongoing issue has been the development of a consistent approach to rail safety regulation. As early as 1996 Australian Government and state and territory government transport ministers signed an intergovernmental agreement on rail safety to ensure nationally consistent rail safety regulation. However, different requirements and the lack of mutual recognition by jurisdictions of safety accreditation means that rail operators have to obtain multiple accreditations if they wish to operate across borders.

In 2004, the ATC endorsed the development of model national rail safety legislation, the Rail Safety Bill 2006, with the intention that all jurisdictions would reproduce the model legislation (with scope for individual variations, including in relation to ‘non core’ provisions). Importantly, provisions for the formal mutual recognition of the safety accreditation gained by operators in other jurisdictions were not contained in the model rail safety legislation (NTC 2008a).

In addition to the problems of scope and variation in the model Bill, states have set different dates for its implementation. COAG set a revised deadline for all states to have the provisions of the Bill introduced by December 2008, although Tasmania was granted an extension to the end of 2009 (Webb 2009).

Given these problems, the ATC decided to have the NTC prepare a RIS to develop a single national rail safety and investigation framework. This is discussed further below. Participants to this review also raised concerns with certain aspects of economic and environmental regulation and their impact on rail transport.

Industry concerns

Multiple rail safety regulators and investigators

The existence of multiple rail safety regulators and rail safety investigators is a major concern to participants.

The ARTC notes that:

... the current institutional arrangements for administering rail safety regulation in Australia potentially hinders the capacity of governments and industry to deliver the same high standard of rail safety across the board. Current arrangements also impact on the ability of the industry to operate efficiently, and therefore compete with other modes of transport. (sub. 15, p. 4)

The Australasian Railway Association (ARA) (sub. 22) notes that safety regulation is duplicated as there are safety regulators for each jurisdiction and overlaps between rail safety legislation and OHS legislation.

The ARA, in a survey of its members (Synergies 2008) estimates that the direct cost of complying with this duplicated and overlapping rail safety regulation is \$23 million per year, with an estimated cost of \$42 million for the whole industry. The avoidable component, based on information provided by the respondents to the survey, is between 5 and 75 per cent of total compliance costs.

Assessment

Following the inability of model legislation to deliver the required national rail safety regime, the ATC in July 2008 directed the NTC to prepare a RIS for a single, national rail safety regulatory and investigation framework.

The draft RIS, in evaluating various options, concluded that the option of a single national safety regulator and investigation framework was the superior option and would enable the attraction and more efficient allocation of resources (NTC 2008a). The RIS was endorsed by the ATC in May 2009 and it recommended that COAG proceed to develop a single national rail safety framework (ATC 2009).

However, there appears to be difficulties in including urban rail in the national framework. At its July 2009 meeting, COAG agreed to develop a national rail safety regulatory system with further consideration of the scope and form of the regulator following further consideration of advice from the Standing Committee on Transport. The Committee is to advise as to the scope and form of the regulator, particularly in relation to urban rail systems and the interface with interstate and freight operations (COAG 2009b). This has raised concerns from industry, not only because of the potential to further delay implementing a national rail safety regulatory framework, but also because rail operators may have to continue to deal with a fragmented rail safety system operating under separate national and metropolitan systems (*Australian*, 11-12 July 2009, p. 18).

The ARTC (sub. DR77) viewed this referral for further work from the Standing Committee on Transport as a deferral on any decision to establish a single national rail safety regulator:

ARTC is concerned with this non-committal approach to rail, despite there being wide recognition and agreement that both road and rail require reform in this area. It is unclear why a firm decision on road has been made, but any decision for rail has been deferred. (sub. DR77, p. 3)

Nevertheless, the industry endorses the single national safety regulator and rail safety investigator. The ARA says:

The rail industry recommends an alternative model of regulation based on a national rail safety regulator. A single national regulator and investigator are expected to result in reduced business compliance costs and improve regulatory efficiency and effectiveness. (sub. 22, p. 9)

The ARTC:

... endorses NTC's recommendation that a single national rail safety regulator be created and concludes that a single national regulator will deliver improvements to rail safety and industry efficiency. (sub.15, p. 4)

A single national rail safety regime, which includes urban rail systems, should be pursued without further delay. In pursuing the goal of a national rail safety regime, all jurisdictions need to ensure that these arrangements do not impose any additional regulatory burdens on rail operators, including those currently operating within a single jurisdiction. A significant proportion of rail freight movements, over 80 per cent on a tonne-kilometres travelled basis, are intrastate due to the movement of bulk commodities, such as coal, to ports or processing centres (ABS 2001). The effectiveness of these national arrangements should be assessed once they have been implemented and have had time to take effect.

OHS regulation

Both the ARTC (sub. 15) and the ARA (sub. 22) raise concerns about inconsistencies across the state and territory OHS regimes. The ARA notes:

There are 15 Acts with powers over occupational health and safety (OH&S) nationwide affecting rail operation and 72 different OH&S regulations. ... The duplication of effort and inconsistencies in interpretation involved in adhering to the requirements of this framework across government jurisdiction impose significant compliance costs on multi-state employers and operators. (sub. 22, p. 9)

Assessment

Such inconsistencies in OHS laws have been a long standing concern for firms in all sectors of the economy operating across state borders. In light of this, COAG signed an intergovernmental agreement in July 2008 that formalises the commitment of all governments to adopt model OHS laws. The agreement specified that OHS harmonisation meant national uniformity of the OHS legislative framework in conjunction with a nationally consistent approach to compliance and enforcement. These arrangements for national uniformity are to be implemented by 2011 (PC 2008a). A model OHS Act and the relevant provisions were agreed to by the

Workplace Relations Ministers Council in May 2009 (Workplace Relations Ministers' Council 2009).

Environmental regulation

There have been ongoing concerns surrounding the overlap and duplication between the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the various state and territory environmental assessment and approval processes.

More specifically, and in the context of this review, the ARTC (sub. 15) points out that due to its status as a 'Commonwealth agency' under the EPBC Act ('the Act'), it is subject to assessment and approval processes under the Act as well as under state and territory legislation.

Assessment

Under the EPBC Act, any 'Commonwealth agency' must seek Commonwealth ministerial approval for 'any action that has, will have or is likely to have a significant impact on the environment inside or outside the Australian jurisdiction'.

However, the ARTC is subject to *both* state and Australian Government environmental approval and assessment processes as:

- it is deemed a 'Commonwealth agency' under the Act because all its shares are owned by the Australian Government
- it is a company under the *Corporations Act 2001* and therefore must comply with environment and planning laws in every state and territory (for example *Environmental Planning and Assessment Act 1979 NSW*).

To address this overlap, the ARTC suggests an exclusion from the EPBC Act (sub. 15). The definition of 'Commonwealth agency' in s528 of the Act expressly provides for the exclusion of a particular entity from the definition by means of a regulation. This power was used to prescribe Telstra Corporation in 2001 under clause 19.02 of the Environment Protection and Biodiversity Conservation Regulation 2000. No other entity has been prescribed to date.

An alternative provision, s28(4) of the Act would also remove this overlap, but the Commission notes that it has not been utilised to date. Under this provision, the Minister may make a written declaration that all actions, or a specified class of actions taken by a specific Australian Government agency are exempt from environmental assessment and approval procedures provided the agency complies

with existing state and territory environment protection and conservation legislation.

The use of a Ministerial declaration under s28(4) would provide greater flexibility than the instrument of exclusion under s528 of the EPBC Act as a Ministerial declaration s28(4) can, if desired, be applied to a subset of ARTC actions, rather than a blanket exclusion of all ARTC activities.

These provisions should be explored between the ARTC and the Department of Environment, Water, Heritage and the Arts as a means of alleviating ARTC's duplicative reporting requirements.

More broadly, the ARTC (sub. DR77) also comments on the multitude of environmental regulation which result in overlaps, duplication and inconsistencies across jurisdictions. The ARTC believe that Australian and state and territory government regulators should facilitate and ensure national consistency for both existing and any new legislation.

Some progress has been made in regard to the duplication and overlap between the EPBC Act and state and territory environmental assessment and approval processes. The Australian Government and each state and territory have agreed to bilateral assessment agreements to overcome duplication and overlap in the environmental approval and assessment processes (BRCWG 2009).

In respect of the environmental regulation pertaining to rail operations, such as noise and air pollution regulations, a range of different regulations apply in different jurisdictions. The ARTC (sub. DR77) notes that an inventory of environmental regulation undertaken by the CRC for Rail Innovation identified 151 pieces of environmental legislation. However, as the CRC for Rail Innovation (2009) survey found, rail operators in different states faced different regulatory problems and while certain regulations were stringent in one jurisdiction they could be non-existent in others. As such, it is not clear that consistency is necessary for all environmental regulation applying to the rail industry. The benefit of regulatory consistency is where multiple systems create unnecessary regulatory burdens for those operating across jurisdictions.

Pricing distortions between road and rail

The ARA (sub. 22) is concerned with pricing distortions between road and rail freight transport and proposes that a single consistent pricing regime be developed to ensure efficient competition between the two modes of transport.

The Tourism and Transport Forum (sub. DR76) view is that rail is disadvantaged relative to road transport in relation to long haul freight as, despite recent government investment in rail, the road industry continues to receive a significantly larger proportion of funding.

Assessment

Pricing distortions between road and rail freight have been examined by the Commission in previous reviews. The Commission's inquiry into *Road and Rail Freight Infrastructure Pricing* (PC 2006a) examined the potential causes of inefficiency in road and rail freight arising from pricing regimes and concluded that competitive distortions between road and rail have been limited and were not a significant source of market inefficiency.

Multiplicity of access regimes

The ARA (sub. 22), the ARTC (sub. 15) and the Tourism and Transport Forum (sub. DR76) draw attention to the multiplicity of access regimes covering rail in Australia. Currently there are five state based access regimes and the interstate standard gauge network linking Brisbane and Perth is currently covered by four different access regimes (the ARTC's access regime only covers the interstate network from Kalgoorlie to the Queensland border with separate regimes applying between Perth and Kalgoorlie, the Queensland border and Brisbane and in the Sydney metropolitan area).

The ARA (sub. 22) notes that this multiplicity of regulators and the different pricing regimes has the potential for transactions costs to be incurred by rail operators in dealing with regulators and inconsistencies in the manner in which access prices are set. This could give rise to the inefficient use of, and investment in, the rail industry. The ARTC (sub. 15) comments that access regulation should not necessarily be uniform across all rail infrastructure, but consistent as to the way prices are set.

Assessment

The Bureau of Transport and Resource Economics (BTRE) (2006) study, *Optimising Harmonisation in the Australian Rail Industry*, found that some pricing diversity in the provision of access was desirable to reflect a number of factors such as competition in the freight market for the goods the train is carrying, the ability to price discriminate across users to improve cost recovery, to reflect the different levels of wear and tear on the track from different types of locomotives and rolling stock using the track and the level of congestion on the track. It concluded that

although pricing levels and structures needed to be flexible, it was unnecessary for charges for similar services and financial structures to vary across jurisdictions.

In recognising the inconsistency in the access pricing principles and regulation across jurisdictions, COAG (2006a), as part of the Competition and Infrastructure Reform Agreement (CIRA), agreed to implement a simpler and consistent national system of access regulation for nationally significant railways based on the ARTC access undertaking covering the interstate network.

However, progress in achieving consistent access arrangements has been slow. The agreement to implement a nationally consistent system of rail access regulation was subject to certain conditions which have delayed the program.

On parts of the standard gauge interstate network the implementation of an access regime based on the ARTC model was subject to the outcome of commercial negotiations with the relevant track managers. This is because the interstate rail network between Perth and Kalgoorlie and between the New South Wales border and Brisbane is not operated by the ARTC. The Perth to Kalgoorlie interstate track is operated by WestNet under a long term lease arrangement with the Western Australian Government and the track between the New South Wales Border and Brisbane is owned by the Queensland Government and operated by Queensland Rail and subject to their respective state rail access regimes.

As to intrastate rail track, the CIRA only required the ARTC access model to be applied on major freight corridors on a case-by-case basis depending on a cost-benefit analysis of including these corridors under the ARTC model. There are few intrastate rail networks where issues of market power and/or vertical integration are significant and accordingly there is little benefit to be gained by introducing access regulation. The Productivity Commission (2006a) found that where rail was competing with road there was not a strong case for access regulation, apart from those lines carrying coal in New South Wales and Queensland and other areas of the bulk freight market where there could be a case for retaining such regulation.

In 2008, the COAG Reform Council (CRC) (2008) in its report on implementing the National Reform Agenda noted that progress had stalled and recommended that COAG ask the BRCWG to consider how to best progress the national system of rail access.

The BRCWG (Business Regulation and Competition Working Group) recommended that for the interstate track between the New South Wales border and Brisbane, the ARTC model would apply - although, there may need to be some variations to meet contractual obligations.

For the interstate track between Kalgoorlie and Perth, the BRCWG considered it was not worthwhile to implement an ARTC model at present as the costs would exceed the benefits of changing from the current access arrangements. This is because WestNet with over 40 years remaining on its lease of the track was likely to seek compensation were a new access regime to be adopted. Under the lease, WestNet is entitled to seek compensation from the Western Australian Government for any material changes to the access regime. The ARTC model in utilising a different asset valuation methodology from the Western Australian rail access regime could reduce the value of WestNet's asset base and therefore the access prices it could charge for using the asset. Consequently, the Western Australian Government is unlikely to consider implementing the ARTC access model given the issue of compensation to the lessee of the track.

As to intrastate rail networks, the BRCWG recommended that governments should continue to apply their own rail regimes where they exist and seek certification of those regimes under the National Access regime under Part IIIA of the Trade Practices Act as agreed to under the CIRA to provide a simpler and consistent approach to regulation (CRC 2009a).

The CRC (2009), in its 2009 report to COAG on implementing the National Reform Agenda, concluded that the task of establishing a national rail access regime had not been completed. The CRC also highlighted that the review of the CIRA due to commence in 2011 may need to reconsider if and how a national access regime is to be achieved. In response, COAG noted the approach recommended by the BRCWG was consistent with the CIRA commitment and that CIRA was to be reviewed in 2011 (CRC 2009b).

The process to date suggests a new approach beyond the current CIRA commitment is warranted if progress is to be made in implementing a nationally consistent system of rail access regulation. However, the parties to the current CIRA agreement will have to determine if there are benefits in having a simpler and nationally consistent system of rail access regulation and how such a system should be achieved, including the issue of compensation surrounding the interstate track in Western Australia.

Access pricing for passenger services

The Tourism and Transport Forum (sub. DR76) raises the issue of rail passenger services being priced at a rate comparatively higher than for freight rail services despite the differences between the two in terms of speed and weight and the subsequent wear and tear on the track. It is claimed that the failure of rail track infrastructure operators to differentiate between freight and passenger services in

their pricing structures is an impediment to the viability of long distance passenger operations (sub. DR76).

Assessment

Such pricing arrangements are not inconsistent with the pricing principles contained in Part IIIA of the TPA and clause 6 of the Competition Principles relating to access pricing. The legislation provides for access price structures to allow multi-part pricing and price discrimination when it aids efficiency (Section 44ZZCA, *Trade Practices Act 1974*). Charging higher rates for passenger service may reflect factors other than wear and tear on the track, such as congestion, the amount of track being used by the service, the extent to which other operators use the line and the ability to charge different prices across users to improve cost recovery (BTRE 2006).

A single national access regulator

The ARTC (sub. 15) comments that having two separate regulatory bodies, the National Competition Council (NCC) and the Australian Competition and Consumer Commission (ACCC) adjudicating on access regimes is inefficient and that the ACCC should be the single regulator of national infrastructure. In commenting on the draft report, the ARTC (sub. DR77) clarified its position and proposed that the ACCC take on the certification role of the NCC whereby state and territory governments can seek to have access regimes certified as effective by the NCC. Once a regime is certified as effective it is provided immunity from the declaration provisions under Part IIIA of the Trade Practices Act (TPA).

Assessment

The institutional arrangements surrounding the role of the NCC and the ACCC were comprehensively examined through the Commission's review of Part IIIA of the TPA dealing with the national access regime. The Commission (2001) concluded that there were sound public policy arguments for retaining the separation of responsibility for assessing whether the regime should apply (the role of the NCC) from the responsibility for the regulation of services that are covered (the role of the ACCC). Under a single regulator model, conflicts of interest may emerge, as the body with the power to regulate an activity would also have the power to determine whether the activity should be placed under the regulatory framework.

The certification of state and territory access regimes by the NCC involves assessing whether the access regime should apply to a particular service. As such,

the Commission considers that the certification of state and territory access regimes should remain with the NCC.

Part IIIA of the Trade Practices, is scheduled for an independent review in 2011 and this is the most appropriate forum to assess the operation of, and changes to, the national access regime.

Other concerns

Land use planning and controls

The ARA (sub. 22) proposes the integration of land use and transport planning in jurisdictions across Australia. The ARA says while planning professionals had agreed in principle to the integration of these functions, integration was rarely practiced, apart from Western Australia where these functions were co-located in the Department for Planning and Infrastructure. The ARA contends that failure to integrate land use and transport planning results in inefficiencies in both functions (sub. 22).

The Transport and Tourism Forum (sub. DR76) is also concerned that in many jurisdictions there is a lack of coordination between land use and transport planning leading to inefficiencies and excessive costs.

The ARA (sub. 22) also recommends that government planning protect land for future transport infrastructure use, including the necessary land for rail corridors and intermodal terminals.

Assessment

State government institutional arrangements regarding land use planning and the security of land tenure are important to the rail sector. However, such broader issues are primarily matters for state and territory governments and extend beyond the scope of this review.

6.3 Water transport

Participants' concerns in this area focused on maritime transport, in particular coastal shipping. Australia's coastal shipping industry operates under a complex regulatory structure which has been subject to considerable scrutiny over the past two decades. The focus of many of these reviews and subsequent reforms has been

to improve the efficiency of the industry through reducing crew sizes, investing in more modern vessels and the introduction of more flexible work practices.

A particular focus of these reviews has been the licensing or cabotage arrangements under Part VI of the *Navigation Act 1912*. These provisions require foreign flagged vessels to obtain a licence and employ crew under Australian pay and conditions when operating in Australian waters. Although the cost impact of these arrangements on business has been ameliorated to some extent through the increased provision of permits to unlicensed vessels, the licensing arrangements limit access to potentially more cost-effective coastal shipping services and reduce the competitiveness of Australian firms relying on coastal shipping.

These permits also provide a further regulatory layer, as they can only be issued for single or continuing voyages where no licensed vessel is available to meet the needs of shippers or the service provided by the licensed vessel is inadequate and it is in the public interest to grant the permit.

These arrangements were recently examined in a broader review of Australia's coastal shipping industry by the House of Representatives Review (2008).

Industry concerns

The Australian Shipowners Association (ASA) is concerned that the prior reporting requirements for domestic ballast water in Victoria is a significant, onerous and unnecessary burden on ships' captains and officers, 'whose attention is better utilised in ensuring the safe navigation of the vessel under their command' (sub. 10, p. 4). Further, these prior reporting requirements are inconsistent with the current Australian international ballast water management requirements, which are administered by the Australian Quarantine and Inspection Service (AQIS) (sub. 10, p.4).

Assessment

Domestic ballast water refers to water sourced from Australia's territorial sea, and its management is the responsibility of the states. Conversely, international ballast water is regulated throughout Australia by AQIS.

Victoria has administered a system for the management of domestic ballast water alongside the AQIS system since 2004 — to date, Victoria is the only jurisdiction with a domestic ballast water management system in place. Victoria's reasons for

introducing this system of domestic ballast water management are given in the policy impact statement:

Given that the majority (83 per cent) of ship visits to Victoria are from a domestic last port of call, further delays in the development of an effective national system for ballast water and marine pest management will have significant potential to result in harmful impacts to Victoria's marine uses and values.

Therefore, it is important that the issue of domestic ballast water management is addressed in Victoria. (EPA Victoria 2006, p. 12)

Under this Victorian system, every ship that visits a Victorian port must submit a 'ballast water report form' to the Environmental Protection Authority of Victoria (EPA Victoria). If the ship has domestic ballast water on board, it must also submit a 'ballast water log'. Both these forms must be submitted to the EPA *prior* to entering Victorian waters, preferably 24 hours before. If the ship intends to discharge the domestic ballast water, it must then receive approval, in writing, from the EPA prior to the discharge of any domestic ballast water into Victorian waters.

In addition, it is mandatory for ships' masters to assess the risk status of any domestic ballast water using an online risk assessment system which classifies ballast water as 'high-risk' or 'low-risk'. Upon entering information into the risk assessment tool, the master receives a risk assessment number which must then be entered on the ballast water report form. Victoria then uses these risk assessment results to approve or prohibit the discharge of domestic ballast water. EPA Victoria's assessment differs from that made by the online risk-assessment tool only in 'exceptional circumstances', where the risk assessment tool does not reflect current data (EPA Victoria 2008, p. 8).

Conversely, under the AQIS system monitoring international shipping, ballast logs with information about uptake ports, ocean exchanges and intended Australian discharge locations, are not normally required to be sent to AQIS pre-arrival. Instead, AQIS officers examine it during their physical attendance on board each vessel. The EPA Victoria and AQIS schemes for management of ballast water are otherwise consistent.

The rationale for this prior reporting requirement in the Victorian system is to provide certainty to ships' masters as to whether their domestic ballast water requires management. Under the AQIS system, all non-Australian sourced ballast water which has not already been subject to ballast water management options is deemed to be 'high-risk', and therefore requires management using one of several approved 'management options'. However, this assessment is not as clear for domestic ballast water, since ballast water from different Australian ports have different risk-assessments (e.g. ballast water from the Port of Brisbane is

considered low risk whereas ballast water from Sydney area ports is considered high-risk).

The potential problem of the online risk–assessment tool not reflecting current data appears to be low, since this occurs only in ‘exceptional circumstances’. Further, the online system could be modified to instruct ships’ masters to prior report only in cases where pest information is changing, new, or unclear, and has not been updated in the system. The same outcome of protecting Victoria’s waters from marine pest incursions could therefore be achieved without an unnecessary reporting burden on ships’ masters and provide certainty as to whether their domestic ballast water required further management.

The Commission also notes that efforts are currently underway to implement a unified national ballast water regulation system, including both domestic and international ballast water. This process began in 1999, with the creation of the National Taskforce on the Prevention and Management of Marine Pest Incursions. In April 2005, an Intergovernmental Agreement on a National System for the Prevention and Management of Marine Pest Incursions was signed by the appropriate states and territories, with model legislation due to be in place within 12 months, alongside detailed implementation plans to be in place by October 2006.

However, to date, there is no national system in place, and no timeframe for its implementation. Undoubtedly, this inconsistency between the AQIS and Victorian Government ballast water regimes has been prolonged by the delays in implementing this national system. The implementation of a national system, with Victorian participation, would eliminate any inconsistencies, including prior reporting.

RECOMMENDATION 6.1

The Australian Government, through COAG, should expedite the development and implementation of the National System for the Prevention and Management of Marine Pest Incursions.

Inconsistency and duplication between Australian and state government vessel survey requirements

The Australian Shipowners Association (sub. 10) is concerned that larger vessels subject to Australian Government survey under SOLAS (Safety of Life At Sea) conventions are not in alignment with Universal Shipping Laws (USL) which cover smaller vessels subject to state government survey. As a result, where a SOLAS surveyed vessel engages in intra-state voyages a further state government survey in

line with the USL is required, resulting in significant costs and time to the vessel owner. Moreover, the requirements under SOLAS in most, if not all areas, exceed the USL requirements. The Australian Shipowners Association (sub. 10) concluded with the expectation that the implementation of the single national maritime safety system would alleviate this inconsistency and any subsequent duplication of vessel survey.

Assessment

The ATC has recently endorsed a RIS to establish a single national system of maritime safety under the Australian Maritime Safety Authority for all commercial vessels operating in Australian waters. COAG agreed to these reforms in July 2009 and the ATC is to report to COAG in 2010 as to the way forward to implement this national system for it to come into effect in 2012 (ATC 2009) (COAG 2009b). The proposed single national maritime safety system should address the overlap of the SOLAS and USL systems to minimise regulatory burdens.

Pilot exemptions in Queensland

The Australian Shipowners Association (sub. 10) raises concerns with the Queensland Government requirements for pilots to be used on vessels transiting the Great Barrier Reef. Under the Queensland Transport Operations (Maritime Safety) Regulations, masters of vessels registered in Australia do not require a pilot whereas the same master when commanding a foreign registered vessel is required to use a pilot.

Assessment

Although the pilot exemptions for Australian registered vessels transiting the Great Barrier Reef appear to create an anomaly between foreign and Australian registered vessels, being a Queensland Government regulation, it is outside the scope of this review.

Fast tracking of ACCC authorisations under Trade Practices Act

Shipping Australia (sub. 11) raises the issue of fast tracking authorisations to undertake anti-competitive conduct under the TPA similar to the approach used under Part X of the Act. Part X provides international liner shipping services to and from Australia with exemptions from the TPA 30 days after registration of the arrangements. Shipping Australia (sub. 11) raises the prospect of fast tracking the

authorisation of anti-competitive arrangements relating to sea and air freight where there are clear national benefits. It says:

Perhaps fast tracking the registration and authorisation of such arrangements by the Australian Competition and Consumer Commission could have substantial productivity benefits for trade related industries that have a direct connection with sea or air freight. (sub. 11, p. 3)

Shipping Australia is also critical of the existing authorisation process under Part VII of the TPA:

The current authorisation process under the Trade Practice Act is long, costly and uncertain and this suggestion is put forward as a possible remedy where clear national interests and trade facilitation objectives are involved. (sub. 11, pp. 3-4)

Assessment

Part X of the TPA is not an ideal model through which to provide exemptions from the TPA. In its review of Part X of the TPA, the Commission (PC 2005b) highlighted that for all practical purposes Part X provided automatic registration of all carrier agreements, reflecting the judgement that all agreements provided a net public benefit. In addition, agreements were allowed to operate until sufficient complaints by shippers initiated an ACCC investigation and that investigation concluded that the agreements should be deregistered. Importantly, this presumption of net public benefit ran counter to the general provisions of the TPA where the onus of proof was on those seeking exemptions for anti-competitive agreements to demonstrate a net public benefit before an exemption was provided. In light of this, the Commission's preferred option was to repeal Part X and have liner shipping services subject to the general authorisation provisions under Part VII of the TPA.

These general provisions under Part VII of the TPA provide for the ACCC to authorise anti-competitive behaviour where there are net public benefits associated with that behaviour. At present, the ACCC has a time limit of 6 months in which to consider the application of a non-merger application for authorisation. This time limit was introduced following concerns raised with the 2003 Dawson review of the TPA (Dawson et al. 2003) surrounding the time taken by the ACCC to consider an application.

An authorisation provided under the Act involves an important process which requires the ACCC to balance the public interest against any lessening of competition from the restrictive arrangements. As such, an adequate time frame is required to assess these matters and ensure all relevant interests are fully considered. Whether or not the current time limit is adequate is an issue that would need to be considered in a broader review of the TPA.

In summary, the Commission has previously recommended that Part X of the TPA be repealed and liner shipping services be subject to the general authorisation provisions of the TPA and would not support fast tracking authorisations to undertake anti-competitive conduct for sea and air freight under the TPA.

Other water transport issues

The Tourism and Transport Forum (sub. DR76) raises the problem of states not automatically recognising the maritime qualifications granted in another state and different standards for commercial boat building.

The arrangements surrounding the mutual recognition of occupations were examined by the Productivity Commission in its *Review of Mutual Recognition Schemes* (2009) which found that although mutual recognition arrangements had served Australia well there was scope for improvement. To this end, the Commission (PC 2009) made a number of recommendations designed to strengthen governance arrangements, raise awareness and reduce uncertainty to improve the operation of the schemes. As for commercial boat building standards, the National Maritime Safety Committee (NMSC), consisting of all state and territory maritime authorities, is working towards the introduction of uniform design and construction standards in the commercial boating sector. The Committee has revised the Uniform Shipping Laws (USL) which are being introduced into the *Navigation Act 1912* as the first step towards the introduction of National Standards for Commercial Vessels (NMSC 2009).

The Tourism and Transport Forum (sub. DR76) also notes that swine flu events on board a cruise ship in 2009 highlighted the lack of harmonisation between Australian Government and state government health authorities. Clearly, there are benefits in a coordinated approach to dealing with outbreaks of infectious disease, but developing a more effective response to such matters is outside the scope of this review.

6.4 Air transport

The regulation of airline and airport operations is primarily the responsibility of the Australian Government — in addition to regulating aviation, in the past it also owned and operated airlines and Australia's major airports. However, there have been a number of important changes to the regulatory framework surrounding the aviation sector over the past decade resulting from:

- long term leasing of the major passenger airports

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- the sale of the general aviation aerodromes to private operators
 - the impact of airport development and operations on their surrounding communities
 - the upgrading of aviation security in response to increased security threats.

Much of the focus of participants in the aviation industry to this review is on the aviation security regulations. This reflects the changed regulatory environment following the events of September 2001 and the implementation of a new aviation security framework through the *Aviation Transport Security Act 2004* (ATSA) and the associated Aviation Transport Security Regulations 2005 (ATSR). The Act and the associated regulations are overseen by the Office of Transport Security (OTS) located in the Department of Infrastructure, Transport, Regional Development and Local Government (the Department). There are now approximately 275 security based regulations compared to 125 under the previous arrangements (sub. 46).

Other main concerns raised related to:

- certain aspects of safety regulation
- aviation safety regulation
- airport regulation
- advanced passenger processing
- the passenger movement charge
- slot compliance at Sydney Airport
- possible conflicts between aviation regulation and disability discrimination legislation.

Against this backdrop, the Australian Government is currently conducting a major review of national aviation policy and regulation with a Green Paper released in December 2008 and a White Paper to follow in the second half of 2009.

Concerns with aviation security

Regulations that have no security outcome and are outside the control of an airline

In commenting on a number of regulations contained in the ATSA and ATSR Qantas notes:

... there are a number of regulations that have no security outcome or with which compliance is impractical, but nonetheless places an obligation on us. (sub. 46, p. 4)

For example, Qantas is required to provide details to the OTS as to the roles and responsibilities of other Commonwealth, state and territory agencies in respect of airport security as part of its Transport Security Program. Such information is already known to the OTS as airport operators are required to provide this information (sub. 46). Qantas also has to provide the OTS with information that is already in the public domain or already known to the OTS. This includes information on the roles and responsibilities of Commonwealth agencies and details of the operators aircraft, type and number (sub. 46).

In other instances, regulation applies to Qantas, but is outside its control. For example, Qantas (sub. 46, p. 4) is required to, ‘deter and detect unauthorised access into airside areas, by people aircraft vehicles and things’. However, access to airside areas by aircraft is handled by air traffic control and personal access is inferred, but not authorised, by displaying a valid Aviation Security Identification Card (ASIC). Similarly, although regulation requires Qantas to ensure that checked baggage is not accessible to unauthorised persons from the time it is checked in until it is available for collection, baggage at international terminals and some domestic airports is, for varying periods of time, the responsibility of the airport operator’s baggage system and outside the control of Qantas (sub. 46).

Inconsistencies and lack of harmonisation/mutual recognition of overseas security regulation

A further issue in security regulation is the inconsistency with international security requirements. In this regard, Qantas (sub. 46) comments that the International Civil Aviation Organisation’s (ICAO) list of items prohibited in the cabin of aircraft had been amended by the Australian Government resulting in a number of inconsistencies.

Consequently, the United States Transport Security Agency permits knitting needles in the cabin whereas Australian Government regulations do not. Similarly, under the Liquid, Aerosols and Gels (LAGS) requirements, passengers carrying oversized duty free arriving from overseas in Sydney could continue on to Melbourne on domestic flights whereas if the same passenger were to transfer to a Qantas international flight from Sydney to Melbourne the duty free LAGS would be confiscated.

Similarly, the Tourism and Transport Forum (sub. DR76) points to the inconsistency on the bans on metal cutlery under Australian regulation where a passenger flying from Australia to the United States will be given plastic knives on the international flight and then metal knives on the domestic flights in the United

States. It went on to call for a more risk-based approach to passenger screening to bring Australia into line with international standards.

Qantas also comments that as the Transport Security Program required under the ATSA regulations is not aligned with international practices, Qantas is required to submit an ICAO equivalent document in other jurisdictions (sub. 46).

Nevertheless, Qantas (sub. 46) believes that such issues could be resolved via agreements with overseas regulators and through the application of mutual recognition.

Sydney Airports (sub. DR56) also endorses the need to harmonise international security measures through stronger ties with aviation security agencies in the United States, Canada and the European Union.

Assessment

With increased threats to aviation security since 2001, the Australian Government developed security arrangements to meet the wider community concerns and perceptions of such threats. The rapid growth in security measures to protect the travelling public created an expansion of regulations with a number of ensuing problems.

The Wheeler Review (2005) into airport security and policing noted that the *Australian Transport Security Act 2004* and its regulations were developed with less than optimal consultation in order to expedite their introduction by March 2005. The Australian Government's Aviation Review Green Paper (2008b) recognised that the post-2001 expansion of security measures had not always been smooth, creating a series of anomalies which needed to be addressed.

In certain instances, aviation security regulation was not subject to the RIS process or failed the process prior to implementation. For example, the RIS relating to increased air cargo security on international passenger transport aircraft was considered inadequate by the Office of Regulation Review (ORR) as it failed to demonstrate that the proposed regulation provided a net benefit to the community. The RIS for this matter was not tabled with the Bill (PC 2006d). Other regulation, such as that specifying the items and quantities of LAGS that can be taken through screening points, was granted an exceptional circumstances exemption from the RIS process. Under these arrangements, regulations granted such an exemption are required to be subjected to a post-implementation review within 1 to 2 years (OBPR 2007).

The Australian Government, through the Aviation Review Green Paper (Australian Government 2008b), has indicated that it will review a number of security arrangements including passenger and aircraft screening, the identity checking regime, the aviation security training program and examine the greater use of technology in providing aviation security. It also indicated that it would take steps to address a number of findings in the Wheeler Review (2005).

In the area of international consistency, the Australian Government has indicated that regulators will visit overseas last port of call airports to discuss security measures and provide reciprocal arrangements for foreign regulators to review Australia's security arrangements (Australian Government 2008b). That said, securing international consistency will continue to be problematic in areas where the Australian Government requires a higher standard of security than that in place in overseas airports providing last port of call services to Australia.

The Aviation Review Green Paper (Australian Government 2008b) also noted that the Australian Government intends to implement a prohibited items regime in line with the ICAO's prohibited item list following the ICAO review of prohibited items. This will remove certain regulatory anomalies surrounding what can be carried into the aircraft cabin.

While the Australian Government's review of aviation policy and regulation intends to address a number of broader regulatory issues in aviation security as well as some of the specific concerns raised with this review, there are certain measures that could lessen the regulatory burden on airlines with respect to existing regulation and in the implementation of future regulations.

For example, Qantas (sub. 46) suggests exemptions, variations and alternative procedures should be granted by the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government on the advice of the OTS. Such an approach, similar to the CASA regime in which exemptions can be provided to a regulation, would overcome a 'one size fits all' approach to regulation (box 6.1).

The use of exemptions, variations or alternative procedures to the existing regulation would enable individual businesses greater flexibility in meeting, or even exceeding, the desired regulatory outcome. Allowing for such exemptions and variations would also better reflect the suggested approach of the Wheeler Review (2005) into aviation security which recommended that each organisation take a risk-based approach, tailoring measures to meet the assessed risk as opposed to following prescriptive measures.

The Aviation Transport Security Act 2004 should be amended to enable the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government, on the advice of the Office of Transport Security, to grant exemptions, variations and alternative procedures to the existing aviation security regulations that would meet the required regulatory outcome.

Box 6.1 CASA Exemptions

Businesses can apply under section 308(1) of the Civil Aviation Regulations 1988 to be exempt from specified provisions of the regulations. Parties must, in their application, provide reasons in support of the requested exemption. Exemptions can also arise from industry discussions, CASA internal research, or be given as an interim measure pending changes in legislation.

In assessing the merits of an exemption, CASA must take into account any relevant considerations relating to the interests of safety. If approved, exemptions are issued through a legislative instrument, and usually for a limited time.

Some examples of these exemptions include exemptions from the display of national colours for some aircraft, exemptions from staff number restrictions and exemptions from restrictions in night acrobatic flights for pilots in air shows.

Source: CASA (2009a).

Turning to more specific concerns raised by participants, regulation should not require business to take responsibility for matters over which it has no control or require business to provide information concerning other agencies or information that is already in the public domain. Improving communication between the regulator and the industry prior to implementing aviation security regulations could improve alignment of the regulation with the required outcomes and lessen the risk of implementing unnecessary or unachievable regulatory requirements.

The Aviation Security Advisory Forum (ASAF) is the Department's consultative body and comprises senior departmental officials and senior industry representatives. The Forum should consult with industry as to the objective of proposed regulation and the required outcome. This forum could also be used to raise, discuss and address industry concerns regarding existing regulations, such as any unnecessary information requirements or unachievable regulatory requirements placed on industry.

Such an approach, as well as the use of exemptions and variations discussed above, was supported by Qantas (sub. DR61) in its response to the draft report as it would

generate more efficient and effective outcomes in regard to aviation security regulation.

However, BARA (Board of Airline Representatives of Australia) (sub. DR53), in responding to the draft report, is highly sceptical of utilising the ASAF to improve consultation with industry in regard to proposed regulation due to:

... how poorly ASAF has performed in the past in consulting with industry stakeholders about the actual wording of new aviation security legislation. (sub. DR53, p. 2)

BARA (sub. DR53) supported the Qantas (sub. 46) proposal in implementing a more formal consultation process, whereby a proposed or draft regulation would be released for public consultation (using a process similar to the notice of proposed rule making (NPRM) ¹ used by CASA in regard to aviation safety regulation). BARA's view is that:

... a formalised consultative process in relation to aviation security regulations, based on the NPRM model, would improve the transparency of the process and ultimately deliver a more targeted regulatory regime that does not unnecessarily interfere with the efficiency of airline and airport operations. (sub. DR53, p. 2)

Although such a process would enable formal consultations between the regulator and industry, it would also duplicate certain aspects of the RIS process and increase the complexity in implementing certain regulations. It is not clear that creating an additional consultative mechanism and layer of administrative process is required to improve consultation with industry in regard to proposed aviation security regulation. Moreover, the changes proposed by the Commission to the RIS process would improve the consultation process and increase transparency. These changes are discussed further in chapter 9.

The Commission considers that the ASAF provides the necessary framework to improve the consultation process with industry in regard to aviation security regulation. The more effective use of the ASAF in conjunction with the proposed changes to the RIS process would provide a more efficient approach to enhance consultation between the regulator and industry to improve regulatory outcomes.

RECOMMENDATION 6.3

The Aviation Security Advisory Forum should provide a greater focus on consultation with industry with regard to existing and proposed aviation security regulation.

¹ This system provides for consultation with industry in developing regulation. Although somewhat similar, it was in use prior to the adoption of the RIS process and provides a draft of the proposed changes for comment including options for change, and depending on the nature of the regulation, a cost-benefits analysis. A drafted regulation is then released for further comment prior to the finalisation of the regulation.

Inconsistent security requirements for domestic and international passengers

Perth Airport (sub. DR85) calls for consistent security requirements for international and domestic passengers. This would allow Perth Airport to implement a common departure lounge within the same terminal as outlined in its Master Plan and reduce duplication of facilities, operating and maintenance costs and provide greater flexibility in meeting changes in the aviation market. In turn this would benefit passengers from lower cost and ultimately better facilities.

Assessment

The different security requirements for passengers on domestic and international flights reflect the different security issues, such as the LAGs requirements, and international obligations relating to security on international flights. Furthermore, there is nothing in the Aviation Transport Security Act or Regulations that requires separate departure lounges or terminals for domestic and international services.

Airports in Australia, such as Adelaide and Darwin, do operate international and domestic services through a common departure lounge within the same terminal. At these airports, all passengers will go through the normal screening process, and the international passengers are separately screened for LAGs around the same time as they undergo outgoing migration, customs and quarantine processes.

Concerns with aviation safety regulation

Virgin Blue (sub. 51) is concerned that much of the aviation safety and operational regulation is rigid, overly prescriptive and lagging behind new generation technology and international best practice. Also, despite many years of review and reform, progress in implementing performance-based regulation remains slow.

For example, Virgin Blue points to the Civil Aviation Order under the Civil Aviation Regulations detailing the ratio of cabin crew to passengers. To obtain approval to operate a B737 aircraft with four cabin crew it was required to demonstrate that safety would not be adversely affected. Having demonstrated the ability to operate with a reduced cabin crew of four, a Disallowable Instrument had to be tabled in the Senate by CASA to provide an exemption from the Civil Aviation Order. Although this approach to crew ratios has been adopted by all major airlines operating in Australia through exemptions, the legislation relating to these Orders remains in place (sub. 51).

A further example of the rigidity in the regulation and the costs imposed on airlines was the process faced by Virgin Blue to obtain an Australian air operators certificate for an aircraft already operating in New Zealand through a related airline:

... [for] Pacific Blue to be able operate one of our Australian registered B737-800 aircraft on their network, they were required themselves to hold a full Australian issued Air Operators Certificate and go through an entire entry control process with CASA. This is despite the fact that they were already approved to operate the identical aircraft on their New Zealand issued operating certificate. This whole process consumed many months of work and cost tens of thousands of dollars. (sub. 51, p. 4)

In light of such rigidities, the Australian and New Zealand Governments made the necessary legislative amendments in 2006 to provide for mutual recognition of an Air Operators Certificate issued by the other country's aviation safety authority. These arrangements came into effect in March 2007 (CASA 2009b).

The complexity of the regulation is also a concern to Virgin Blue (sub. 51). This is often exacerbated by the frequently different interpretations by CASA staff of the technical requirements, which in an audit situation, often results in one officer refuting the work of another. Moreover, the complexity of the regulation requires considerable research into often obscure documents which may not reflect modern aviation technology.

Qantas (sub. 46) notes that although CASA's stated policy is not to impose unnecessary costs on business this was not always the case. For example, a certified hard copy of the Air Operators Certificate (AOC) must be carried onboard all international flights which requires Qantas to reissue its eight-page AOC 10 to 12 times per year to some 150 aircraft.

Qantas (sub. 46) refers to the Safety Management System (SMS) in place for aviation safety, under which AOC holders are responsible for effectively managing their own risks. Although supportive of the SMS, Qantas notes that it is costly and complex to develop and introduce systems to comply with new regulation for an airline operating a variety of aircraft type in a number of locations. For example, the introduction of the SMS involved two days of human factors training which was estimated by CASA to cost business around \$175 000, but for a large organisation such as Qantas these estimated costs were only around 10 per cent of the actual costs incurred.

Qantas contends that due consideration of these costs in the RIS process would help overcome many of the problems associated with unnecessary or inappropriately costed regulatory burdens.

Virgin Blue (sub. 51) also refers to the costs imposed on airlines in regard to safety regulation. In particular, it refers to the direct and indirect costs to Virgin to obtain the required approvals to launch its trans-Pacific carrier, V-Australia:

The genesis of these costs is related to the complex nature of the aircraft and the proposed operations that relied on the application of relatively new operational safety standards dealing with Extended Diversion Time Operations (EDTO). While this was understood and accepted as part of the overall process, CASA had no documented standards under which such an application was to be managed and as a result cost overruns were experienced. (sub. 51, p. 4)

Virgin Blue further notes that in such circumstances where airlines are undertaking large investments there needs to be a higher degree of certainty and predictability than provided by the current arrangements (sub. 51).

Assessment

CASA is undertaking a regulatory reform program which involves the consolidation of regulations and orders and the introduction of performance-based regulation to enable industry to use the most appropriate systems and procedures to meet the required safety outcomes. This regulatory framework comprises:

- outcome-based regulation
- technical standards outside the regulation to provide additional clarity
- acceptable means of compliance which sets out methods of demonstrating compliance with the regulation
- guidance material to provide suggestions and explanations to meet the intent of the regulations.

However, there have been ongoing concerns, including from participants to this review, that the regulatory reform program has not been achieving the required outcomes in a reasonable time frame. Such concerns are not surprising given the reform program commenced in 1996 and is still not completed. For example, the Tourism and Transport Forum says:

Despite many years of review and reform, the implementation of performance-based regulation is still incomplete. (sub. DR76, p. 5)

Similarly, Perth Airport comments:

The aviation safety and operation regulations are rigid, overly prescriptive and lagging behind new technology and international best practice and despite many years of review and reform the implementation of performance based regulation is incomplete. (sub. DR85, p. 2)

In recognition of the concerns of industry, an Aviation Regulation Review Taskforce (the Taskforce), chaired by Allan Hawke was established in 2007 to determine how best to complete the regulatory reform program (Aviation Regulation Review Taskforce 2007). The Taskforce found that inadequate resources in the Office of Legislative Drafting and Publishing (OLDP) in the Attorney-General's Department had caused significant delays in completing the program. This involves replacing the Civil Aviation Regulations 1988, which are supplemented by the Civil Aviation Orders, with the Civil Aviation Safety Regulations 1998. These delays had resulted in two systems of regulation operating side-by-side adding further complexity to the arrangements.

The Taskforce requested that CASA develop a timeframe for completion of the regulatory reform program and recommended that the Minister and CASA commit to submitting all drafting instructions to the OLDP by the end of 2008 for implementation by 2011 and that additional resources be provided to the OLDP solely for the purpose of drafting CASA regulations to assist with completion of the program. To this end, CASA and the Department of Infrastructure have provided funding to engage additional drafting resources in OLDP to work exclusively on CASA regulations (CASA 2008). The Taskforce also recommended that CASA continue a one-year post implementation review for each regulatory part after the reform program has been completed.

The Government in its Aviation Green Paper signalled a further commitment to the Taskforce's key recommendation of ensuring the regulatory reform program is completed by 2010-11 (Australian Government 2008b).

As the regulatory reform program has not been completed, the Commission is unable to comment on the overall effectiveness of these arrangements. Nevertheless, the use of performance-based regulation should address industry concerns surrounding the rigidity and prescriptive nature of aviation safety regulation and provide for greater recognition of appropriate international standards. For example, the more recently implemented Civil Aviation Safety Regulations refer to overseas safety regulation including the United States Federal Aviation Regulations and the European Joint Aviation Requirements in regard to meeting airworthiness standards.

The Department of Infrastructure, Transport, Regional Development and Local Government and CASA need to ensure that the reform program is completed in the agreed to time frame to remove the current complex arrangements whereby the industry is operating under two sets of regulatory arrangements. In addition, the regulatory arrangements should be reviewed following implementation to assess their effectiveness.

In assessing the impact of new regulations, the actual costs of implementation need to be considered when businesses are being asked to carry that cost under regulatory arrangements based on the self-management of risk such as the Safety Management System.

Concerns with airport regulation

Price regulation of regional aviation at Sydney Airport

Special charging and access arrangements apply at Sydney Airport for regional airlines. This is to provide regional airlines and passengers from regional centres ‘affordable’ access to Sydney Airport. As part of these arrangements, the provision of aeronautical services to regional airlines at Sydney Airport is subject to price controls which requires Sydney Airport to notify the ACCC of any proposed changes in charges for services provided to regional airlines.

SACL (sub. DR56) calls for the current price regulation arrangements to be reviewed on their expiry in 2010 and before any further arrangements are implemented. SACL’s view (sub. DR56) is that normal commercial arrangements under which prices are directly negotiated between regional airlines and the airport should apply.

Assessment

The special arrangements for regional airlines, including the prices notification arrangements, in regard to Sydney Airport were discussed in detail by the Commission in the most recent review of price regulation of airport services (PC 2006e). In its summary, the Commission found that it was not clear if there would be a need for price protection for regional airlines following the adoption of stronger processes for investigating any significant misuse of market power. It concluded that if price notification for regional airlines using Sydney Airport were to continue, its impact should be kept under review.

In accordance with good regulatory practice, the price notification arrangements applying to regional airlines using Sydney Airport should be subject to an independent review on their expiry in 2010.

RECOMMENDATION 6.4

The price notification arrangements applying to regional airlines using Sydney Airport should be subject to independent review on their expiry in 2010.

Airport curfews

The Tourism and Transport Forum (sub. DR76) points to a number of changes to improve the operation of airport curfews, particularly in regard to Sydney Airport. These involve:

- recognising the noise implication of diverting aircraft that are on their final approach as refusing dispensation increases noise and carbon emission and imposes costs on airlines
- taking into account aircraft type when granting curfew dispensation
- aligning the Sydney Airport Curfew regulations which allow for a maximum of 24 aircraft arrivals per week in the 5.00 am to 6.00 am shoulder period of the curfew with the *Sydney Airport Curfew Act 1995* which allows up to 35 aircraft arrivals per week
- reserving these additional slots in the shoulder period for quieter aircraft such as the A380 and soon to be introduced aircraft.

The Tourism and Transport Forum considers that aligning the regulations with the Act would make Sydney more accessible for long haul airlines and international visitors (sub. DR76).

Assessment

At present, there are curfews in place at Sydney, Adelaide, Essendon and Gold Coast airports which restrict aircraft movements at these airports between 11.00 pm and 6.00 am. Sydney airport is subject to the *Sydney Airport Curfew Act 1995*, Adelaide to the *Adelaide Airport Curfew Act 2000* and the curfews in place at Essendon and the Gold Coast Airport operate under the *Air Navigation Regulations 1999*.

The legislation and regulations governing the curfew arrangements are based on blanket restrictions on passenger carrying aircraft, outside of emergencies. Some curfew arrangements provide for specific exemptions for certain aircraft that meet a specified noise standard and are under a specified weight. For example, at Sydney and Adelaide airports, specified freight aircraft and other specified aircraft less than 34 tonnes that meet noise standards are exempt from the curfew.

Aligning the Sydney Airport curfew regulations with the Act would allow additional aircraft to utilise the shoulder period between 5.00 and 6.00 am. Nevertheless, performance based regulation based on a permissible level of noise for all aircraft using the airport between certain hours could provide a more

effective means of protecting the amenity of surrounding airport communities than the current prescriptive arrangements. This would ensure that a specified noise level was met during the late evening/ early morning hours, provide an incentive for the operation of lower noise aircraft and remove the anomalies in the current arrangements.

However, given the diversity of stakeholder interests surrounding these curfews, full consideration of these issues would require extensive consultation as part of a wider review of the arrangements. In the case of this review, the issue of the curfew arrangements at Sydney Airport were only raised following the release of the draft report which truncated the time available to adequately examine and consult on this issue and the wider issue of using curfews to address aircraft noise.

Moreover, the curfew arrangements have been examined as part of the Australian Government's Aviation Policy Review (2008b) and the Government has proposed that the curfew arrangements at Sydney, Adelaide, Gold Coast and Essendon airports remain in place.

Quality of service reporting by the Australian Competition and Consumer Commission (ACCC)

The *Airports Act 1996* provides for the ACCC to undertake quality of service monitoring of those airports subject to price monitoring. This quality of service monitoring acts as a complement to price monitoring by identifying if airport operators are improving profitability by reducing service standards or running down assets. It also assists in placing price movements in relation to changes in quality, particularly where quality improvements sought by customers have necessitated new investment.

Sydney Airport Corporation Limited (SACL) (sub. DR 56) is concerned that the current monitoring regime used by the ACCC suffers from a number of problems which affects its validity and usefulness. This includes assessing the performance of an airport on matters over which it has little or no control, such as the length of time passengers wait at check-in counters and inbound passengers wait at Customs and AQIS inspection points.

In addition, SACL raises a possible conflict of interest in surveying airlines as to the performance of an airport:

The conflict of interest that exists in asking a commercially motivated organisation (an airline) for its views on one of its commercial counterparts and suppliers (an airline operator) is obvious. Airlines have a clear commercial interest in talking down the performance of an airport as they seek to gain a commercial advantage to employ in the

course of significant commercial negotiations. It is naïve to consider otherwise (sub. DR56, p. 4).

SACL (sub. DR56) further comments that although passenger survey results are used to compare performance across airports, the passenger surveys undertaken by airport operators for the ACCC do not require a consistent methodology to measure quality of service. As airport operators undertake their own passenger surveys, different questions are asked at different airports, different sample sizes are used, the surveys do not specify how representative these samples are of passengers and do not take into account the views of non-English speaking passengers. Moreover, the current quality of service monitoring arrangements require Sydney Airport to allocate significant staff resources to collate and collect information and check reports.

In contrast, the Tourism and Transport Forum (sub. DR76) questions the need for a rigid monitoring regime given that the significant levels of investment by airports to improve passenger terminals and facilities would ensure high quality services standards and facilities at Australian airports.

Assessment

Quality of service monitoring was examined by the Productivity Commission (2006e) in its *Review of Price Regulation of Airport Services*. The Commission recommended that quality of service monitoring be retained, but improved and streamlined.

The PC (2006e) and the ACCC (2008a), in its quality of service monitoring guidelines, recognised that there are few services totally under the direct control of an airport operator and the provision of airport services is undertaken by a number of entities including the airport operator, sub-lessees, government and the airlines. Given this, the ACCC survey, as required under the *Airports Act 1996*, focuses on those facilities and services provided by the airport operator, or by an entity with an agreement with the airport operator to provide those services.

The passenger surveys undertaken at each airport differ in their coverage and detail, but are required to provide information on specific airport services such as passenger check-in, baggage processing, toilets, gate lounges, trolleys, signage, car parking and airport access in accordance with the regulations under the *Airports Act 1996*. Surveys at most airports ask respondents as to their satisfaction with the services on scale of 1, very poor, to 5, excellent. The passenger survey is only one input used to produce the overall performance ratings which compare service quality across airports. Other inputs include the airline survey, the Australian

Customs Service whole of government survey and other indicators for each airport and a weighting of these scores by the number of observations in each category (ACCC 2008b).

At present, airport operators are able choose the lowest cost means of surveying their passengers to provide the required information. Requiring airport operators to utilise similar methodologies in preparing their passenger surveys would enable more consistent comparisons across airports in this area, but it would require more prescriptive regulation and may impose additional costs on airport operators.

An airline ‘talking down’ the performance of an airport in a quality of monitoring survey to gain an advantage in negotiations with an airport operator is likely to be part and parcel of the commercial negotiations between these parties.

The quality of airport service monitoring is currently being reviewed by the Department in conjunction with the Australian Government’s Aviation Review. A discussion paper was released in March 2009 calling for submissions and the findings of the review will form part of the Aviation Review White Paper to be released in the latter half of 2009 (Department of Infrastructure, Transport, Regional Development and Local Government 2009). The Commission considers that this review process is the most appropriate process to consider the overall validity and usefulness of these arrangements in complementing the price monitoring arrangements.

Modelling future noise exposure

Under the provisions of the *Airports Act 1996*, Sydney Airport is required to prepare a Master Plan for the airport which includes an Australian Noise Exposure Forecast (ANEF). The ANEF is an aircraft noise exposure index used in Australia and is based on the United States Federal Aviation Administration’s (USFAA) noise exposure forecast system. The Integrated Noise Model (INM) used in the preparation of the ANEF was developed by the USFAA and is the standard for noise modelling worldwide.

SACL (sub. DR56) comments that the methodology used in modelling the future noise exposure is flawed as it uses existing aircraft and it does not take into account technological change, in that new aircraft are quieter than existing aircraft.

It is a methodology that pretends that technological change over the next 20 years will not assist in reducing noise impacts of aircraft — even though the evidence to the contrary in the form of the A380 already flies from Sydney Airport several times everyday. (sub. DR56, p. 6)

According to SACL (sub. DR56), because of this the ANEF in the Sydney Airport Master Plan knowingly overestimates Sydney Airport's future noise footprint. As such, the noise contours provided in the ANEF map as part of Sydney Airport's Master Plan were further away from the airport than they should be and more land was affected by zoning and development constraints.

SACL (sub. DR56) acknowledges that this is a complex issue and difficult to resolve, but suggests that some reasonable allowance be made to the ANEF methodology to take account of the new generation of quieter aircraft that would be in use in 2029. This in turn, would provide more accurate ANEFs to inform planning and development decisions.

Assessment

The development of the ANEF noise contour map showing the forecast of aircraft noise levels expected in the future is the responsibility of the airport operator and the endorsement of the technical accuracy of the ANEF is carried out by Airservices Australia. In deciding whether to endorse an ANEF, Airservices Australia must be satisfied with the input data the airport has used in regard to aircraft types, that the runway usage and flight path data used as an input are operationally suitable, the forecast number of aircraft movements and type of aircraft operating are in line with the physical capacity of the airport, the contours have been modelled correctly and that the proponent has demonstrated that it has paid due regard to all issues raised by state and local government authorities in relation to the ANEF (Information provided by Airservices Australia).

The INM uses a large data base of existing certified aircraft. Modifications can be made to the noise and performance of aircraft databases already in the INM to provide an indicative noise level for future aircraft types. Such modifications need to be substantiated by supporting noise and performance data, such as that provided by the aircraft manufacturer, and then considered to be technically accurate by Airservices Australia.

Also, as major airports are required to update their Master Plan every five years, the use of new aircraft technology will be reflected through updates to the ANEF.

The more accurate predictions of future noise impacts are on areas surrounding airport operations, the more helpful they will be in informing planning and development decisions. The current arrangements and methodology used in preparing ANEFs are able to make allowances for the use of new and quieter aircraft. Whether or not modifications are required to these arrangements and to the methodology to take greater account of changes in technology is outside the scope of this review.

Conflicts between environmental and aviation safety regulation at airports

Perth Airport raises the issue of conflicting environmental and aviation safety legislation stating:

Where there is a conflict between environmental legislation and aviation safety legislation then aviation safety should take precedence. Carnaby's Black Cockatoo is an issue at Perth Airport and it is not possible to comply with both environmental and aircraft safety requirements. (sub. DR86, p. 3)

Assessment

The EPBC Act provides for protection of the environment, especially where matters are likely to be of national environmental significance. Under the legislation, an entity must not take action that has, or will have, a significant impact on matters of national environmental significance without approval from the Minister for the Environment. Perth Airport is subject to the provisions of the EPBC Act as it operates on Commonwealth land and in relation to Carnaby's Black Cockatoo given its status as a threatened species.

At the same time, Perth Airport in accordance with aviation safety regulation must ensure that the operational environment around the airport does not pose hazards to aircraft — for example through potential bird strike.

If the activities of Perth Airport are likely to have an impact on Carnaby's Black Cockatoo — for example, clearing their habitation as part of wildlife hazard controls or in the process of airport development — Perth Airport is required to refer this matter to the Department of the Environment, Water, Heritage and the Arts to formally assess whether Ministerial approval is required. This may occur, for example, when airports complete their master plan, which is released once every five years and details the future operations and development of the airport.

There does not appear to be any direct conflict between the EBPC Act and the aviation safety regulations as wildlife hazard controls are not explicitly forbidden by the EBPC Act, but may require Ministerial approval. Although the Ministerial referral processes contained in the EBPC Act do place some burden on business, they nonetheless provide the means to provide for the safety of aircraft and passengers and the protection of the environment in regard to airport operations and future airport development.

Compliance with Disability Discrimination Legislation

Qantas (sub. 46) raises the issue that in complying with aviation safety, aviation security and OHS regulations it could be in breach of disability discrimination legislation. It says:

Compliance with other legislation imposes requirements that at times conflict with the terms of the disability discrimination legislation, and this conflict places a significant burden on Qantas. (sub. 46, p. 17)

It provides a number of examples of possible conflicts.

- *Exit row seating.* A problem could arise were a passenger with a disability to request an exit row seat. Under the civil aviation safety regulations the airline operator is required to ensure disabled persons are not seated to obstruct access to an emergency exit. However, the person refused such seating due to their disability could then proceed to take action under the disability discrimination legislation.
- *Carriage of assistance animals.* Carriers are not to carry assistance animals other than a dog for a sight or hearing impaired person without CASA approval and may still refuse carriage on safety grounds. It is difficult for the carrier to determine the level of training the animal has received and how it will behave during the flight. There is also an increasing number of requests from passengers to travel with ‘comfort animals’ that assist the passenger to cope with stressful or other specific situations. Refusal to carry such an animal poses the risk of breaching disability discrimination legislation.
- *Screening of mobility aids.* Mobility aids carried in the hold of an aircraft are required to be security screened to re-enter the secure area to be ready for collection at the arrival gate. This is in accordance with the Aviation Transport Security Transport Regulations. However, this has resulted in complaints from passengers for the delay in picking up their mobility aids.
- *Carriage of mobility aids.* The increasing size and weight of mobility aids such as electric scooters and some wheelchairs means that such aids do not fit through the doors of baggage holds and limitations have to be placed on this equipment. However, Qantas (sub. 46) is comfortable in defending any such action brought under disability discrimination legislation in regard to this issue.
- *Manual Handling.* Lifting required by airline staff to assist passengers from their own wheelchair into airline wheelchairs and the manual transfer of these passengers into the aircraft seat. This creates potential conflict between an airline’s OHS obligation to its staff and passengers with disabilities.

Assessment

Where there is the possibility of conflict between disability discrimination legislation and other legislation, Qantas (sub. 46) points to the defences available to defend claims brought against it under disability discrimination legislation:

The Group considers that it can rely on the unjustifiable hardship defence where it is required to comply with competing legislation, in circumstances where it is not possible to comply with both pieces of legislation simultaneously. (sub. 46, p. 17)

Nevertheless, from Qantas's perspective it would be preferable not to have to defend any such claims arising from conflicts between disability discrimination legislation and aviation related legislation. Good regulatory practice should, in any case, ensure businesses are not put in the position of having to breach one regulation to meet another.

In respect of exit row seating issues, the Aviation Access Working Group is developing changes to the civil aviation safety regulations to avoid conflict with disability discrimination legislation. This group was formed in 2009 to develop practical measures to improve access to air transport. It is chaired by the Department and comprises representatives from all major Australian airlines, CASA, airports, certain government agencies, disability advocacy groups and the Australian Human Rights Commission. Amendments have been made to the Civil Aviation Order (CAO) 20.16.3 which requires airlines to ensure that passengers seated in an aircraft exit row are fully able and willing to assist with access through emergency exits in the event of an emergency. These amendments came into effect on 1 August 2009. To provide greater certainty, the CAO is being prescribed so that an aircraft operator acting in direct compliance with the CAO will be protected from the complaint of unlawful discrimination under the *Disability Discrimination Act 1992* (DDA). This is expected to take effect in the latter part of 2009.

The issue of assistance animals, in particular what constitutes such an animal, has been an issue for a range of businesses. Retailers, transport operators and local governments have all raised concerns that the DDA does not provide an adequate definition of an assistance animal and could provide recognition to animals other than trained guide or hearing dogs (PC 2008a). This leaves such businesses open to actions under the DDA were they to refuse entry or boarding to people with pets or other animals claimed to be an assistance animal in order to comply with other regulations relating to transport safety or food safety.

Following a review by HREOC (HREOC 2003) a recommendation was made to amend the DDA. These proposed amendments more clearly defined what constitutes an assistance animal and excluded those animals or pets used for

companionship or reassurance in social situations. These amendments, contained in the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, will come into effect in August 2009.

The screening of mobility aids to re-enter the secure area to be at the arrival gate for use by passengers clearly does cause delays. However, all items, including mobility aids for people with disabilities, entering or re-entering a sterile area are required to be screened under the Aviation Transport Security Regulations 2005. Indeed, delays at airports in order to meet security requirements are not uncommon and represent the trade-off between meeting travelling convenience and public safety. Airlines, like other transport operators, have to deal with oversized goods on a regular basis. However, the Commission has been advised that the Aviation Access Working Group, referred to above, is examining the screening and carriage of mobility aids.

As to the manual handling issue, the Aviation Access Working Group referred to above is best placed to examine any potential conflict between assisting disabled passengers and an airline's OHS obligation to its staff. This issue is also being examined by the Aviation Access Working Group.

The issues discussed above highlight the difficulty in attempting to regulate or provide exemptions for each and every possibility. Qantas (sub. 46) suggests that the Disability Standards for Accessible Public Transport 2002 should contain a clear exemption in relation to compliance with civil aviation safety, transport security and OHS legislation. This approach is supported by the Transport and Tourism Forum (sub. DR76) and BARA (sub. DR53).

Considering such a broad exemption raises the wider issue of whether safety, security and OHS legislation applying to other transport industries should also be exempted from these Standards. Moreover, the Disability Standards for Accessible Public Transport 2002 are currently under review. These Standards, made under the DDA as subordinate regulations, establish minimum accessibility requirements to be met by the provider and operators of public transport and public transport infrastructure. The Standards set out requirements in relation to issues such as access paths, manoeuvring areas, ramps and boarding devices, allocated spaces, handrails, doorways, controls, symbols and signs, the payment of fares and the provision of information. The review, undertaken by the Allen Consulting Group, released a draft report for comment in 2008 with a final report yet to be released. The Standards do provide for exemptions and are subject to a regular five year review. Any exemptions to the Standards should be considered through these mechanisms.

Nevertheless, there are particular Standards which clearly do impact on aviation safety. For example, the Standards (section 5.1) require that there must be resting points for passengers along an access path where the distance between the services or facilities exceeds 60 metres. As Perth Airport (sub. DR85) notes, such resting points for passengers cannot be installed on the airport apron between the terminal building and the parked aircraft without compromising the safety of aircraft operations. Until the outcome of the review is known, such issues should be handled by the Aviation Access Working Group.

Other concerns

Advanced Passenger Processing — compliance threshold for fines

Under the Advanced Passenger Processing (APP) arrangements airlines are required to provide the Department of Immigration and Citizenship (DIAC) with biographic information on all passengers and crew travelling to Australia. The Government's objective with the APP system, as set out in the *Migration Act 1958*, is to have airlines report on each passenger and crew member entering Australia. This information is collected at check-in and transmitted to DIAC where it is cross-checked against immigration data bases for use by border agencies prior to the arrival of the aircraft.

Advanced reporting was introduced in 1998 on a voluntary basis and the mandatory APP system was introduced in 2003 requiring airlines to provide APP on *all* passengers and crew entering Australia.

Qantas (sub. 46) is concerned that the Australian Government has recently amended the regulations to impose fines on carriers who fail to provide this data from 1 July 2009. At present, under the *Migration Act 1958*, airlines are liable for financial penalties of \$5000 for each passenger they carry into Australia without adequate documentation.

Under the infringement regime, airlines achieving a 99.8 per cent or higher reporting rate in one month will not be fined for any passengers or crew not reported through in the following month. This threshold is based on the current reporting average of the airline industry. Each offence carries a penalty of 10 points or \$1100 and this could be levied in addition to the \$5000 penalty for carrying passengers without adequate documentation (sub. 46).

Qantas (sub. 46) estimates that it could be facing fines of \$4 million per year under the proposed infringement regime. To avoid these fines and ensure the requirements

of the legislation were met, Qantas would need to modify its operations resulting in increased costs and passenger inconvenience. For example, Qantas would have to intercept passengers checked in by partner airlines at United States domestic airports travelling to Australia at Los Angeles international airport to collect and transmit their APP details. BARA (sub. DR53, p. 3), in commenting on the draft report, notes that having to identify such passengers not captured by partner airlines to collect and transmit their APP data ‘is labour intensive, costly and can compromise the scheduled departure of aircraft’.

BARA (sub. DR53) is also concerned that the system is not ‘failsafe’ and were a system failure to occur in any one month, an airline would be fined for each and every passenger and crew not reported on in the following month.

Qantas called for the APP regime to be reviewed to revise the compliance requirements in line with risk management principles (sub. 46). In responding to the draft report, Qantas (sub. DR61) again called for the regime to be reviewed due to the substantial burden it places on airlines.

Assessment

The APP system has provided a number of benefits. The ANAO (2006) in its report on the APP system noted that along with improved border security and passenger immigration processing, the APP had dramatically reduced the fines levied on airlines for carrying inadmissible or inadequately documented passengers into Australia from around \$23 million in 2001-02 to around \$3 million in 2006-07. Nevertheless, there are a number of concerns surrounding the recent introduction of infringement regime relating to APP reporting requirements. These are discussed below.

- *Compliance costs.* The reporting framework and systems are in place and have been used by airlines since the introduction of mandatory APP reporting in 2003. The preliminary regulation assessment undertaken by DIAC at the request of the Office of Best Practice Regulation determined that the compliance costs placed on business from the introduction of financial penalties would be low as airlines and ship operators already had the necessary reporting framework in place (DIAC 2009). The current average reporting compliance rate is 99.93 per cent which is in excess of the required reporting requirement and the level of compliance is expected to increase following the introduction of the infringement regime (information provided by DIAC).
- *Passengers checked in by partner airlines in other countries.* Airlines carrying passengers to Australia currently have systems in place to transmit the APP details of passengers checked in by partner airlines at overseas airports. Also, in

most cases the commercial arrangements in place between these airlines mean that any fine levied on the international carrier from the check-in procedures performed by the partner airline at an overseas domestic airport are passed back to the partner airline.

- *Fines for the same passenger for different offences.* The introduction of fines for the non-reporting of passengers means that an airline could be fined twice in relation to the same passenger — for the separate offences of failing to meet the APP reporting requirements and for carrying the passenger into Australia without adequate documentation. As use of the APP would indentify any inadequately documented passenger, an airline would had to have failed to meet APP reporting requirements for a passenger with inadequate or inadmissible documents for this to occur.
- *System failures.* The APP includes ‘system down procedures’ and were a system failure to occur it would not count negatively towards an airline’s overall compliance (information provided by DIAC). To avoid receiving infringement notices in the event of the APP reporting systems becoming unavailable, airlines are required to notify the Australian Entry Operations centre and follow the appropriate procedures (DIAC 2008).
- *APP and risk management.* The APP of itself is not an instrument to target ‘high risk’ passengers travelling to Australia, rather it provides the information that assists border control agencies to assess which passengers present an immigration or security risk to Australia prior to their arrival.

Provided significant costs are not shifted on to airlines to maintain and operate the system and they are not fined twice in relation to the same passenger (for the separate offences of failing to meet APP reporting requirements and for carrying the passenger or crew into Australia with inadequate or inadmissible documents), the reporting of all passengers and crew entering Australia through the APP is appropriate in meeting the policy objective. Nevertheless, in keeping with good regulatory practice, the infringement regime applying to APP reporting should be reviewed after it has been in operation for a suitable period of time.

Security costs at regional airports

The Northern Territory Government (sub. 45) notes that implementing the airport security arrangements and the aviation rescue and fire fighting arrangements imposes large costs on regional airports. This cost is due to the combination of the large proportion of fixed costs of providing these services and the lower passenger volumes at regional airports. As a result, security charges at Darwin and Alice Springs airports are considerably higher than at other major airports.

It suggests the introduction of network pricing, to equalise costs, or direct funding assistance from the Australian Government to alleviate the cost of providing these services at airports such as Darwin and Alice Springs.

The Tourism and Transport forum (sub. DR76) suggests that, rather than network pricing, the Government should investigate the adoption of a direct support scheme to apply in cases where security costs are impeding airports as facilitators of regional development.

The funding arrangements for the provision of these services is a policy matter for the Australian Government and are outside the scope of this review.

The Tourism and Transport forum (sub. DR76) is concerned that including Alice Springs as Counter Terrorism First Response (CTFR) airport with the capital city and regional international airports is an anomaly given its low volume of passenger traffic. As such, it is inappropriate that Alice Springs Airport has to meet the costs of the CTFR obligations.

The Wheeler Review (2005) recommended that CTFR and non-CTFR airports be reviewed on a regular basis to determine whether their classification was appropriate. The categorisation of airports is being examined as part of the Government's Aviation Policy review.

Whether or not an airport should be designated as a CTFR airport is outside the scope of this review. However, the Commission understands that Alice Springs Airport is designated as a CTFR airport due to its proximity to the Joint Defence Facility at Pine Gap.

Reporting on slot compliance at Sydney Airport

Qantas (sub. 46) is concerned with the costs associated with its reporting requirement on slot usage at Sydney Airport. The Slot Management Scheme operated by Airport Co-ordination Australia (ACA) provides specified aircraft movement at a specified time on a specified day. This operates under the *Sydney Airport Demand Management Act 1997* to limit aircraft movements and balance the needs of airport users and the impact of aircraft operation on surrounding residential areas. To this end, it provides a cap of 80 aircraft movements per hour and a curfew for specific passenger aircraft between 11.00 pm and 6.00 am.

At present, the ACA monitors usage of the slots on a weekly basis and airlines are required to provide reasons to the Slot Compliance Committee, chaired by the Department, as to why services operated outside of their slot. The Committee then

determines whether the reasons provided by the airline for the inability or delay in meeting a specific slot were outside the control of the airline.

Qantas (sub. 46) notes that the standard of reporting required by the Committee requires a Qantas employee to spend 1.5 days per week preparing the reports. This requires the employee to review a considerable amount of data in a seven day turn around period. However, this process had no influence on Qantas's on-time performance and did not provide for penalties for those airlines that failed to meet their slot. It noted that no fines had been levied on an airline since the inception of the scheme (sub. 46).

The slot management scheme was recently reviewed by the ANAO (2007) in its audit report on the implementation of the *Sydney Airport Demand Management Act 1997*. The ANAO (2007) found that the slot compliance scheme was not operating as intended. It also noted that no infringement notices or other penalties had been applied since the inception of the scheme. A number of recommendations were made to improve the operation of the slot management scheme including changes to the collection and evaluation of movement data and a graduated system of penalties for off-slot movements including an increase in fines for persistent offenders (ANAO 2007).

In response to the ANAO report, the Department has indicated that changes to the arrangements are to be finalised by mid-2009. As such, it would be premature for the Commission to comment on these arrangements.

Passenger movement charge

The Northern Territory Government (sub. 45) notes that the passenger movement charge (PMC) had originally been intended as a cost recovery instrument for immigration, customs and quarantine services, but over time has transformed into a general revenue raising instrument (carriers can claim the administration costs associated with the collection and remittance of the PMC). It goes on to say that the PMC is a tax on tourism and a cost to the airlines and calls for the PMC to revert to a cost recovery charge and for timely annual statements of PMC collections to be provided to the aviation and tourism industries (sub. 45).

The Transport and Tourism Forum (sub. DR76) is also concerned about the impact the PMC has on inbound tourism and is opposed to any further increase in the PMC, particularly to fund additional biosecurity measures:

Industry is united in the belief that the PMC is a flawed and ill-defined tax, having a negative impact on tourism demand with little clear relationship to any defined outcomes in relation to its stated purpose. (sub. DR76, p. 8)

It also points out that the PMC does not operate on a cost recovery basis:

... it is widely understood that the PMC over-collects relative to the costs it is purported to recover, although this is difficult to verify because its receipts are not hypothecated or pegged against any specific, costed Government activities (as the Green Paper points out). (sub. DR76, p. 8)

Whether the PMC operates on a cost recovery basis or as a general revenue raising instrument is an issue for the Australian Government and outside the scope of this review.

6.5 Other transport issues

Public transport accessibility

The Government of South Australia (sub. 49) raises a number of concerns with the Disability Standards for Accessible Public Transport 2002 — as noted above these standards establish minimum accessibility requirements to be met by the providers and operators of public transport and public transport infrastructure.

These concerns focus on the difficulties faced by business in interpreting and complying with the Standards. The Government of South Australia points to the costs imposed on business in meeting the 100 per cent compliance in the time frames required by the Standards. For example, the level of lighting required in external public transport infrastructure is leading to a considerable increase in operating costs. Some other requirements were unrealistic, such as having disabled taxis meet the required response times of other taxis. Consequently, the implementation and compliance costs contained in the RIS undertaken prior to the introduction of the Standards appear to have been underestimated (sub. 49).

The Government of South Australia (sub. 49) continues that although the introduction of the Standards was meant to create certainty for both providers and users of public transport, it is still unclear in many cases as to what actually constitutes compliance:

Ambiguity and confusion related to what constitutes compliance have slowed progress and with delays come increased costs. (sub. 49, p. 7)

To improve compliance with the Standards and provide greater certainty, the Government of South Australia suggested the development of a co-regulatory model under the DDA to give legislative force to a formally developed code of practice developed in conjunction with industry and the disability sector.

As noted above, the Disability Standards for Accessible Public Transport 2002 are currently under review. The draft report released in early 2008 noted that in regard to compliance there was a lack of authoritative sources of guidance for transport providers where requirements were ambiguous or where there was conflict with other regulations. Also, there was no ‘sign-off’ process to assure providers that what they were proposing would be compliant with the Standards prior to making any investment.

To address these concerns, the review put forward a number of options with the preferred approach being to develop mode specific guidelines under the Standards. Following comments from stakeholders, a final report was expected to be provided to the Minister in late 2008 (Allen Consulting Group 2008). A final report is yet to be delivered to the Government.

As these issues are being examined as part of a comprehensive review of the Standards they are not being addressed further in this report.

Security identity cards

The Government of South Australia (sub. 49) refers to the duplication of security clearances required by workers to obtain a Maritime Security Identification Card (MSIC) and an Aviation Security Identification Card (ASIC):

Both cards require an extensive series of background checks and involve an extended timeframe from application to receiving the Card. In addition, where an operator may require access to both air and sea terminals, both security clearances are required including duplication of the background check. (sub. 49, p. 5)

To remove such duplication, the Government of South Australia (sub. 49) suggests a single transport security identification card. However, the Commission understands that given the different risk profiles of maritime facilities and airports and the different levels of checking required, the introduction of a single identification card is unlikely to be feasible.

In regard to the duplication of security clearances, the Australian Government has established a centralised background checking agency, Auscheck, in the Attorney-General’s Department to undertake background checks of those applying for MSICs and ASICs and to reduce duplication and improve consistency in background checking (Attorney-General’s Department 2009).

Carbon Pollution Reduction Scheme (CPRS) and fringe benefits tax

The Tourism and Transport Forum (sub. DR76) raises the issue of the proposed CPRS distorting the market for urban transport by increasing the cost for public transport users while protecting motorists from increased petrol prices.

It also raises the issue of the fringe benefits tax arrangements relating to salary packaged vehicles which provides the incentive to drive further to lower the fringe benefits tax payable. This also creates a distortion relative to public transport use.

The CPRS is yet to be implemented and it is unclear as to how it will be implemented. The issue of fringe benefits tax on salary packaged vehicles is outside the scope of this review and is being examined by the Review of Australia's Future Tax System.

NTC and passenger transport

The Tourism and Transport Forum (sub. DR76) proposes that the NTC be provided with additional funding to take on the additional task of regulatory reform in passenger transport.

Widening the role of the NTC is a policy matter for Government.