INDUSTRY COMMISSION

Regulation

and its Review: 1994-95

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PREFACE

Under the general policy guidelines embodied in the *Industry Commission Act 1989*, the Commission is required, amongst other things, to seek 'to reduce regulation of industry (including regulation by the States and Territories) where this is consistent with the social and economic goals of the Commonwealth Government.' In addition, the Office of Regulation Review (ORR) — within the Commission — has administrative and advisory functions relating to the review of regulation.

In November 1993, the ORR published *Recent developments in regulation and its review*. This current publication, *Regulation and its review: 1994-95*, covers more recent developments in the regulation of industry.

The scope of 'regulation' is wide. As defined in the Commonwealth's Cabinet Handbook, it includes legislation, other policies which require Cabinet approval (but which are not set down in formal legislation), subordinate legislation (such as statutory rules), and executive regulations and policies approved by Ministers and departmental officials.

CONTENTS

ABBREVIATIONS

ACT	Australian Capital Territory
AFIC	Australian Financial Institutions Commission
ANL	Australian National Line
ANZECC	Australian and New Zealand Environment and Conservation Council
ARC	Administrative Review Council
ASC	Australian Securities Commission
ATSIC	Aboriginal and Torres Strait Islander Commission
AUSTRAC	Australian Transactions and Reports Analysis Centre
BRRU	Business Regulation Review Unit
CBA	cost benefit analysis
CFS	Council of Financial Supervisors
COAG	Council of Australian Governments
CSAC	Companies and Securities Advisory Committee
Cth	Commonwealth
EIA	environmental impact assessment
EMDG	Export Market Development Grants
FSC	Food Standards Code
GATT	General Agreement on Tariffs and Trade
HCFC	hydroflurocarbons
IC	Industry Commission
ISC	Insurance and Superannuation Commission
NFA	National Food Authority
NFSC	National Food Standards Council
NICNAS	National Industrial Chemicals Notification and Assessment Scheme
NSW	New South Wales

NT	Northern Territory
OECD	Organisation for Economic Co-operation and Development
OHS	Occupational Health and Safety
ORR	Office of Regulation Review
PSA	Prices Surveillance Authority
PUMA	Public Management Committee (of the Organisation for Economic Co-operation and Development)
QLD	Queensland
QMS	quality management systems
RBA	Reserve Bank of Australia
RIS	regulation impact statement
SA	South Australia
SATC	Structural Adjustment and Trade Committee of Cabinet
SIGMA	Support for Improvement in Governance and Management in Central and Eastern European Countries
SSCRO	Senate Standing Committee on Regulation and Ordinances
SSPs	special service providers
TAS	Tasmania
TRIPS	World Trade Organization Agreement on Trade-Related Aspects of International Property Rights
TTMR	trans-Tasman mutual recognition
UK	United Kingdom
US	United States of America
VEETAC	Vocational Education, Employment and Training Advisory Committee
VIC	Victoria
WA	Western Australia
WTO	World Trade Organization

OVERVIEW

Regulation of a wide range of activities — by way of Acts of Parliament, subordinate instruments and administrative measures — is an important means by which governments endeavour to safeguard or advance the interests of individuals and the community.

If it is to be effective, government regulation needs to be well designed and well managed. That it has typically not been in the past is increasingly accepted throughout the world. Irrespective of their institutional backgrounds or legal underpinnings, many countries are experiencing common problems with the operation of their regulatory systems. Broadly these problems comprise:

- regulations which lack flexibility and often focus on fixing old problems without being sufficiently adaptable to new situations;
- a rapid growth in regulation, much of which was not subject to consistent and objective assessment criteria when implemented; and
- the challenge of balancing a sense of being 'over-regulated' (or inappropriately regulated) with the continued desire of many citizens to use regulations to change economic and social outcomes.

The pressure to improve regulatory review arises not only from these inherent problems but also from major changes in the circumstances in which regulations are formulated. The world economy is more integrated than ever before, with most 'domestic' activities increasingly exposed to developments beyond a country's borders; environmental concerns are growing — some requiring international solutions — and the pace of technological change is challenging the capacity of regulators to apply instruments appropriate for the times.

These developments mean that governments and their constituents have been questioning longstanding regulatory traditions. There is widespread dissatisfaction with the quality, effectiveness and cost of many regulations. There is recognition of the need to improve the structure of regulatory institutions and rationalise multi-layered regulatory systems to ensure that domestic regulations are complementary and do not undermine each other.

Australia and many other countries have deregulated particular areas of economic activity, allowing competitive market pressures to determine outcomes. Greater emphasis is now also being given to improving the quality of regulations where there is a valid role for regulation. The aim is to ensure that the most appropriate and effective forms and levels of regulation are adopted. This involves achieving a balance between, on the one hand, maintenance and development of regulatory

regimes to serve society's goals and, on the other, improving their effectiveness and minimising any adverse impacts.

In line with a world trend towards seeking better quality in regulations, Australian governments have:

- established oversight mechanisms to review individual regulations;
- adopted systems of quality assurance against which proposed new regulations must be tested; and
- undertaken commitments to systematic reviews of existing regulation.

It is increasingly understood that Australia needs to reap the benefits of a single domestic market rather than applying regulation on a fragmented, regional basis. Moreover, the nature of the regulatory regime affects the ability of many Australian industries to compete in world markets.

Important regulatory developments

During the last year, a number of important developments in regulatory processes have come to fruition and are now being carried out — at Territory, State, national and Commonwealth levels.

The Council of Australian Governments (COAG), provides an important forum for addressing many national issues, including regulatory review and consistency. Under the auspices of COAG, some ground-breaking developments have marked the landscape of regulatory review at a national level, including:

- the *Competition Policy Reform Act 1995* and the package of related reforms agreed to by COAG. With regard to regulation, the agreement requires that each government develop a program of review (and, where appropriate, reform) of all existing legislation which restricts competition, unless it can be clearly demonstrated to be in the public interest;
- a set of *Principles and Guidelines for National Standard Setting and Regulatory Action.* These principles require Ministerial Councils and national standard-setting bodies to use a nationally consistent assessment process for new regulations, including the completion of a regulation impact statement; and
- discussions to widen the national scheme for mutual recognition to include New Zealand. The current scheme has allowed goods complying with regulations in the jurisdiction of manufacture or importation to be sold throughout Australia without the need to comply with further regulations of other jurisdictions (with equivalent conditions applying to services and occupations).

Australian governments have also taken action to control better the rapid growth of subordinate legislation and administrative regulations in their particular jurisdictions. At the Commonwealth level, the report *Rule Making by Commonwealth Agencies* (1992) documented the vast growth in the volume and diversity of delegated legislative instruments and has resulted in the Legislative Instruments Bill (1994). This is similar to subordinate legislation Acts in the States, which require the preparation and publication of regulation impact statements (RISs).

Improving the quality of regulations

In the process of preparing a RIS — which is commonly used for the review of both primary and subordinate legislation — a proposed regulation is tested against specific criteria. These include:

- the purpose of the regulation;
- alternative ways of achieving the outcome in order to determine which is the most effective mechanism; and
- the costs and benefits of the regulation to demonstrate that its implementation will provide a net gain to society.

Other countries are introducing similar procedures. The OECD recently adopted the first international standard on regulatory quality: *Recommendation on Improving the Quality of Government Regulation.* A crucial part of the Recommendation is the reference checklist for regulatory decision-making which contains ten questions which it proposes should be addressed when developing regulations (see Box 1).

These criteria have much in common with the agreed RIS procedures in Australia.

Box 1: The OECD Regulation Checklist

1 Is the problem correctly defined?
2 Is government action justified?
3 Is regulation the best form of government action?
4 Is there a legal basis for regulation?
5 What is the appropriate level (or levels) of government to take action?
6 Do the benefits of regulation justify the costs?
7 Is the distribution of effects across society transparent?
8 Is the regulation clear, consistent, comprehensive, and accessible to users?
9 Have all interested parties had the opportunity to present their views?
10 How will compliance be achieved?

The focus on improving the quality of regulations has also prompted reflection on the many aspects of regulation. Some of these are discussed in this report, under the following broad groupings:

(1) elements of regulatory design — standards, enforcement, and cost-recovery;

(2) some particular regulatory mechanisms — price surveillance, labelling and occupational licensing; and

(3) changes in the regulatory environment that have occurred in three sectors — finance, environment and food.

Regulatory design

standards

When designing a *standard*, there is often a choice between:

- rules which prescribe how an outcome is to be achieved (the focus is on the methods of operation or inputs);
- performance-based rules which specify a particular outcome without prescribing the method to be used; or
- principle-based goals which indicate the broad intention and rely on agents to meet the 'spirit', rather than the letter, of the law.

No single approach is best in all circumstances. In some cases, the initial certainty of prescriptive rules governing inputs will justify their inflexibility. In other cases, performance-based rules will allow similar certainty in terms of meeting regulatory objectives, but also allow firms the flexibility to meet those objectives at least cost. And in others, given the difficulties of specifying one desired outcome in prescriptive terms for all circumstances and the problems of deadening the incentives for moving 'beyond compliance', principle-based goals will represent a better option.

enforcement regimes

The key issues which arise in designing an *enforcement regime* are:

- clarifying the objectives of the regulations and the implications they have for enforcement efforts;
- enforcement agencies' resources and the need to set priorities for enforcement efforts;
- selecting the most effective instruments (eg fines, education) available to agencies in order to encourage compliance with regulations; and
- formulating effective enforcement strategies for deploying those instruments.

Firstly, the success of any enforcement strategy must be judged against its ultimate objective (such as reducing workplace injury and disease) rather than particular intermediate objectives such as meeting certain work practices.

Secondly, as enforcement agencies often have insufficient resources to ensure full compliance with regulations, priorities must be established as to what will be the most effective way to allocate these resources in pursuing program objectives.

Thirdly, enforcement agencies have an array of instruments to detect breaches of regulations, including market surveys, inspections of business premises and processes, enforcement blitzes, consumer complaints, and reports from competing businesses. There are also several ways by which agencies can rectify specific breaches of regulations, including education or advice on how to avoid repetition of the breach, warnings, fines, licence suspensions, seizures of goods, closure orders, criminal prosecutions, and adverse media publicity.

In choosing which instrument or mix of instruments to adopt, it is advisable to consider the following matters:

- sometimes, enforcement effectiveness can be improved without adding to costs, by improving the mix of instruments used;
- the relative effectiveness of detection systems, such as responding to consumer complaints versus systematic inspections; and
- the adequacy of penalties in deterring breaches of the regulations.

Lastly, the enforcer can choose between adopting a combative or co-operative strategy in dealing with breaches of regulations. Combative strategies generally involve the threat of disciplinary action when a breach is detected. Co-operative strategies focus on changing behaviour in a more congenial manner. Rather than always adopting one or the other strategy, one approach is to escalate the costs of breaches to repeat offenders, so that the enforcement agency becomes progressively more 'combative' if offenders fail to respond to a co-operative approach.

cost recovery for regulatory agencies

There are three broad ways to cover the *costs of regulatory agencies*: from the budget; by levying industry or other groups; or directly charging for services. Which is the most appropriate will be determined by the nature of the activity being regulated, as well as the extent to which benefits are public or accrue privately. In general, where the activity being regulated generates positive public benefits, it is likely to be inefficient to recover fully the costs of the regulatory agency by charging or levying for the services. Where the activity is the source of undesirable public effects, there may be a case for charging those being regulated for the full costs of the regulatory agency. Assessments need to be made on a case-by-case basis.

Regulatory mechanisms

Regulatory authorities can draw from a wide range of fundamentally different regulatory mechanisms. This point is illustrated by three mechanisms — prices surveillance, labelling and occupational licensing — which were investigated in some detail by the Office of Regulation Review and the Industry Commission during 1994-95.

prices surveillance

Concerns within the community that certain market structures allow industries or enterprises to charge excessive prices have been dealt with by governments in part through price surveillance arrangements. In general, the main reason for using price surveillance seems to be to expose to public scrutiny those enterprises which are clearly in a dominant market position with a view to changing their behaviour. As stated by the Prices Surveillance Authority (1995b, p. 16), as competition in the Australian economy intensifies, the need for government vetting of prices declines. Consequently, the Government has progressively reduced the number of companies subject to price surveillance through the PSA. For example, in January 1995, the Assistant Treasurer announced that breakfast cereals and float glass would no longer be subject to price surveillance, but prices would be 'monitored' instead.

labelling regulation

With respect to labelling regulation, it is important to weigh the costs and benefits and assess whether or not it is possible to convey accurately the desired information in a simple message. The nature of and case for special labelling regulation depend on the particular circumstances, as evidenced by recent developments with country-of-origin labelling and standard drink labelling.

Differing consumer views about country-of-origin make it difficult to present in a concise form the information consumers might want about the country-of-origin of a product. For instance, a consumer may want to know where the product gained its 'essential character', or the level of Australian value added, or from where the ingredients came. Some consumers are also concerned about the ownership of the company that produced the good. Discussions concerning country-of-origin labelling are continuing.

Labelling alcoholic drinks with the number of standard drinks does not encounter such difficulties. It is a simple way of expressing alcohol content and a standard drink can be objectively defined. In conjunction with simple education campaigns, standard drink content is information which can easily be understood by consumers.

occupational licensing

Occupational licensing is often implemented on the grounds that it will raise standards and provide a better guarantee to users of a service. This can be especially important when consumers are infrequent participants in a market, and so may have inadequate information about the market.

Another reason to license some occupations is that it may be better to exclude incompetent or dishonest practitioners before they do some damage rather than deal with the consequences of their actions later — as in the case of road users who could be hurt as a consequence of shoddy repairs to a vehicle.

These benefits from occupational licensing should be weighed against the possible costs, including:

- restrictions on entry which reduce the number of potential providers and weaken competition;
- restrictions on the degree and nature of the services provided by the licensed occupations, which may operate against the interests of the more efficient providers;
- requirements for licensed providers to satisfy a minimum level of expertise (eg. in some jurisdictions conveyancing can only be provided by lawyers) which restrict the supply of services and raises their prices; and
- the administrative costs involved in establishing and running a licensing scheme.

Each of these costs can operate to the detriment of consumers.

A central issue in assessing the advisability of occupational licensing is the extent to which the resultant higher quality *and* higher costs reflect the preferences of

consumers or whether, on balance, they would prefer to have the option of choosing the lower quality but cheaper services.

Some sectoral changes in regulation

The financial, environmental and food sectors have experienced significant changes in their regulatory environments and there are pressures to increase the amount of regulation they face.

The financial sector has experienced: increased regulation of derivatives and of financial/securities advisers; some changes to the requirements to report to the Australian Transaction and Reports Analysis Centre; enhanced disclosure regimes and changes to fund-raising provisions through changes to the *Corporate Law Reform Act 1994*; and the Attorney-General announced that in the near future credit unions and building societies will be able to issue cheques under their own names.

Important developments in the environmental sector include finalisation of arrangements for a National Environment Protection Council and continuing assessments of: environmental impact assessment policies and procedures; 'State of the Environment' reporting requirements; 'community right-to-know' legislation; the role and nature of a national pollutant inventory; international trade in hazardous wastes; and a hydrofluorocarbons reduction strategy.

In the food sector, the National Food Authority (NFA) has commenced a 'standard-by-standard' review of the entire Food Standards Code, is reviewing its risk assessment and management procedures and is negotiating with the States and Territories about national coordination of food surveillance activities. It has also been working with the Office of Regulation Review (ORR) to implement formal RIS procedures.

The role of the ORR

The ORR — within the Industry Commission — has administrative and advisory functions, specified by Cabinet, relating to the review of regulation. These include functions internal to government, such as vetting RISs and advising Cabinet on particular regulations, and functions external to government

such as commenting publicly on regulatory matters.

As part of the 'Working Nation' initiatives aimed at better addressing business regulation issues, the Government announced expanded resources and new roles for the ORR. It is to provide secretariat support for the Council on Business Regulation, which will be headed by the Chairman of the Industry Commission.

Initially, the Council will provide advice to the Government on priorities for reviewing regulations which affect business costs and on reforms needed to make sure regulations are serving the public interest. The ORR will also provide advice to Commonwealth agencies on their programs of review of existing legislation and to Ministerial Councils on RISs; and assist agencies to ensure they meet the requirements of Cabinet and of the Legislative Instruments Bill, when regulations are proposed or reviewed.

1 THE REGULATORY ENVIRONMENT

1.1 Changing views of regulation

Most developed nations have complex regulatory regimes to serve and balance the social and economic goals of their societies, but few are satisfied with their quality, effectiveness and cost. Faced with a more integrated world economy, environmental concerns, consumer interests (particularly in the area of health and safety), demands for more accessible processes for regulation decision-making, and a growing recognition of the costs of regulation, governments have been questioning longstanding regulatory traditions. They have begun to seek increased quality in regulations, and their harmony with other policies and with other countries (OECD 1992).

Regulatory developments, which are closely related to institutional and political structures, can differ markedly between countries. (Appendix A provides details for a few selected countries — the United States of America, the United Kingdom, Canada and Japan.)

Yet it is possible to discern three broad themes.

Firstly, many countries have established oversight mechanisms to provide day-to-day review of individual regulations and to monitor regulatory activity generally. Some have systems for registering existing regulations and for planning new ones which are useful for identifying and co-ordinating regulations as well as for increasing transparency (SIGMA 1994, p. 20).

Secondly, OECD member countries commonly have systems of quality assurance against which proposed new regulations must be tested. The principal features of these systems are reflected in the OECD's *Recommendation on Improving the Quality of Government Regulation*, the first international standard on regulatory quality (see section 3.3). The recommendation encourages member countries to review their political and administrative processes for developing, implementing and revising regulations. A crucial part is a checklist of ten questions, reflecting principles of sound regulatory decision-making, that should be asked when developing regulations. Cost-benefit analysis is an important element of the recommended approach.

Thirdly, there are systematic reviews of existing regulation on a rolling basis, which typically allow for consultation with affected groups and the public more generally. Of ten countries studied in 1994 by the OECD (and chosen for their wide variety of administrative styles), eight had review/consultation policies.

These global developments make it all the more important that Australia strive for effective regulatory regimes. Increasingly, a country's regulatory environment is regarded as a crucial factor in overall assessments of international productivity, and it can affect Australia's success in keeping and attracting industries that are able to locate in the country most advantageous to them.

In line with world trends, all Australian governments have been putting increased effort into ensuring that new regulation is kept to a minimum and is soundly based. There is a nation-wide commitment to apply specific tests to new regulation, and to review existing regulations and rescind those judged unnecessary.

Most States have subordinate legislation Acts which require the preparation and publication of Regulation Impact Statements (RISs) which apply specific tests to each proposal. Automatic sunset clauses are common which ensure that new regulations have a limited life — typically ten years (see section 3.2). Staged repeal of existing regulations is used in some States — this led in NSW to a reduction in the stock of subordinate legislation from 976 in 1990 to 646 in 1994.

At the national level, important developments include:

- discussions to widen the national scheme for mutual recognition to include New Zealand. The current scheme has allowed goods complying with regulations in the jurisdiction of manufacture or importation to be sold throughout Australia without the need to comply with further regulations of other jurisdictions (with equivalent conditions applying to services and occupations);
- the signing by the Council of Australian Governments (COAG) in April 1995 of a Competition Principles Agreement, as part of the response to the report *National Competition Policy* (Hilmer 1993), in which governments agreed (inter alia) to develop a timetable by June 1996 for the review and, where appropriate, reform by the year 2000 of all existing legislation which restricts competition, unless it can be clearly demonstrated to be in the public interest; and
- the endorsement by COAG of a set of *Principles and Guidelines for National Standard Setting and Regulatory Action* which specify that all national standards which require agreement by Ministerial Councils or national standard setting bodies must be assessed via Regulatory Impact Statements.

Measures taken by the Commonwealth Government include a Legislative Instruments Bill similar in intent to the States' subordinate legislation Acts.

Further information on such State, national and Commonwealth developments is provided in Chapter 3.

1.2 Types of regulation and trends

Regulation can be classified into three groups—primary legislation, subordinate regulation, and administrative decisions and instruments—on the basis of the legal mechanism by which it is made. The following comments apply to the Commonwealth. Similar arrangements exist in the States and Territories.

Primary legislation consists of Acts of Parliament. In bicameral parliaments, this form of regulation receives scrutiny and passage by two separately elected houses of Parliament.

Subordinate legislation comprises all rules or instruments which have the force of law but which have been made by an authority to which Parliament has delegated part of its legislative power. There are three main types:

- statutory rules which must be approved by the Governor-General in Council and are subject to review by the Senate Standing Committee on Regulation and Ordinances (SSCRO) and possible disallowance by Parliament;
- disallowable instruments which are made by Ministers or government agencies and are subject to review by the SSCRO and possible disallowance by Parliament; and
- other subordinate legislation which is not subject to parliamentary scrutiny.

Administrative decisions and instruments are generally made by public officials and involve the application of legislation to particular circumstances. While not legislative in character, they can affect the way business pursues its commercial interests. Unfortunately, data on levels and trends in this form of regulation are not available.

With respect to *primary legislation*, 164 Acts were enacted by the Commonwealth in 1994-95. Of these, seven were Acts relating to supply or appropriation, 44 were new Acts and the balance, 113 Acts, involved amendments to existing legislation. The Office of Regulation Review (ORR) estimates that at least 55 Acts can be characterised as mainly business regulation.[1] Many of these deal with minor amendments or procedural matters. The Acts involving more substantive amendments or new regulation which affects business are listed in Table 1.1 (in general Acts relating to levies and charges have not been included). In quantitative terms, the number of Acts enacted by the Commonwealth has been steady. Without more detailed information (such as will be provided in the future with RISs), it is difficult to

[1] Business regulation refers to government actions which, either by direct control or financial inducement, encourage business entities to alter their commercial behaviour (see BRRU 1986).

determine the significance of the impact on business of the legislation passed during the year.

Over the next few years, reviews of core legal areas will be completed including: the Corporations Law, the Income Tax Assessment Act, and the Copyright Act.

Much of the primary legislation in 1994-95 which had an impact on business derived from implementing the Uruguay Agreements. As shown in Table 1.1, a number of World Trade Organization Acts were passed by the Commonwealth Parliament in order to meet these Agreements. They cover intellectual property, anti-dumping, tariffs and other areas.

The main social regulation has been: the classification of computer software and games; relaxing the existing ban on advertising to allow tobacco companies to join in the public debate on issues of government policy; and a number of environmental changes.

Table 1.1

Selected Commonwealth primary business legislation, 1994–95

Primary legislation	*Main features*
Air Services Act 1995	Establishes Airservices Australia as a government business enterprise responsible for the commercial operations of the previous Civil Aviation Authority.
ANL Guarantee Act 1994	Provides for the Commonwealth to guarantee loans to ANL Ltd to enable it to continue to trade effectively and restructure its business interests (if necessary).

Table 1.1 (continued)

Primary legislation	*Main features*
Classification (Publications, Films and Computer Games) Act 1995	Provides for the classification of publications, films and computer games for the ACT. This Act is intended to form part of a Commonwealth/State/Territory classification and enforcement scheme.
Communications and the Arts Legislation Amendment Act (No 1) 1995	Modifies Australian drama content requirements under the *Broadcasting Services Act 1992* and the regulation of apparatus licences.
Copyright (World Trade Organization Amendments) Act 1994	To bring Australia into line with the TRIPS Agreement, added a rental right for sound recordings and computer programs, extended protection from 20 to 50 years for sound recordings, granted performers protection in relation to commercial exploitation of existing unauthorised recordings made in the preceding 50 years; and extended copyright-owner initiated Customs seizure.
Corporations Legislation Amendment Act 1994	Relates to financial institutions, corporations and securities panels, and corporations law.
Customs Legislation (World Trade Organization Amendments) Act 1994 and *Customs Tariff (Anti-Dumping) (World Trade Organization Amendments) Act 1994*	These acts bring Australian anti-dumping law and oversight into line with the GATT requirements
Customs Tariff Amendment Act 1995	Updates Custom tariff schedule amendments.
Customs Tariff (World Trade Organization Amendments) Act 1994	This Act amends Australia's tariff schedule to enable Australia to accept the Agreement Establishing the WTO.
Dairy Produce Amendment Act 1995	Abolishes the Market Support Fund and establishes the Domestic Market Support Find.
Dairy Produce (World Trade Organization Amendments) Act 1994	Winds up the Market Support Fund and enables Australia to accept the Agreement Establishing the WTO.
Drought Relief Payment Act 1994	Provides relief payments to primary producers who are in exceptional circumstances due to extreme drought.
Employment Services Act 1994 & Employment Services (Consequential Amendments) Act 1994	Re-establishes the Commonwealth Employment Service and significantly extends case management services and opens those services and their provision up to competition. Establishes a new regulatory body, the Employment Services Regulatory Authority and establishes Employment Assistance Australia as a separate organisation within the Department of Employment Education and Training.

Table 1.1 (continued)

Primary legislation	*Main features*
Environment, Sport and Territories Amendment Act 1995	Principally covers matters concerning the Great Barrier Reef Marine Park.
Export Market Development Grants Amendment Act 1994	Relates to accreditation of consultants and investigation, duration and cancellation of approvals of trading houses, joint ventures and consortia.
Export Market Development Grants Amendment Act 1995	Makes amendments to the schedule relating to grants for the purpose of providing incentives for the development of export markets. This includes extending the EMDG scheme from 4 to 8 years.
Health Legislation (Private Health Insurance Reform) Amendment Act 1995	Gives effect to the government's package of reforms to private health insurance. These reforms focus on consumer rights and are intended to provide: value for money in private health insurance; a wider choice of products achieved by enabling health funds to make contracts with hospitals and doctors; and efficiency measures and equitable access.
Housing Legislation Amendment Act 1995	Amends legislation relating to savings grants, first home owners and housing assistance.
Human Services & Health Legislation Amendment Act No 2 1994	Amends legislation relating to pathology services and human services and health industries generally.
Industrial Relations Legislation Agreement Act (No. 2) 1994	Reforms the arrangements for the prevention and settlement of disputes in the coal mining industry as well as amending several other industrial relations Acts.
Industry, Science and Technology Amendment Act 1994	Amends various Acts relating to National Measurements, Patents and Pooled Development Funds.
International Air Services Commission Amendment Act 1994	Modifies the Commission's process of making determinations and the effect of those determinations on procedure.
Interstate Road Transport Amendment Act 1995	Amends sections relating to vehicle charging and vehicle monitoring devices.
Land Fund and Indigenous Land Corporation (ATSIC) Amendment Act 1995	Establishes a Land Fund and an Indigenous Land Corporation to help redress the disposition of Aboriginal persons and Torres Strait Islanders.
Meat and Livestock Industry Act 1995	Establishes the Meat Industry Council as a statutory authority to represent all sectors of the industry.
National Environment Protection Act 1994	As part of a Commonwealth, State, Territory and Australian Local Government Association agreement, this Act establishes a national council to determine national environmental protection measures.

Table 1.1 (continued)

Primary legislation	*Main features*
National Health Amendment Act 1995	Principally relates to the manner in which the Commonwealth price for all or any pharmaceutical benefits is to be worked out for the purpose of payments to approved pharmacists.
Patents (World Trade Organization Amendments) Act 1994	To bring Australia into line with the TRIPS Agreement, the standard patent term has been extended from 16 to 20 years.
Pipeline Legislation Amendment Act 1994	Principally concerned with easements. Amends the *Moomba-Sydney Pipeline System Sale Act* 1994 and the *Pipeline Authority Act* 1993.
Prawn Export Promotion Act 1995	Relates to the promotion of the export of sea caught prawns, parts of sea-caught prawns and sea-caught prawn products, and the collection of a boat levy and export charge.
Primary Industries Levies and Charges Collection Amendment Act 1994	Modifies the liability of sellers of prescribed goods and services.
Quarantine Amendment Act 1994	Enables the Minister to remit the whole or part of a fee payable by a person in respect of a quarantine service.
Small Superannuation Accounts Act 1995	Provides a mechanism through which the Australian Taxation Office will manage and preserve small superannuation contributions.
Superannuation Industry (Supervision) Legislation Amendment Act 1994	Clarifies the objectives of the principal act.
Superannuation Legislation Amendment Act (No 1) 1995	Technical amendments to superannuation legislation.
Telecommunications (Carrier Licence Fees) Amendment Act 1995	Amends the telecommunications carrier licence fees upper limit to ensure that the total of the annual fees do not exceed the total cost of running the industry regulator, Austel. Also allows the government to recover the cost of Australia's contribution to the International Telecommunications Union.
Tobacco Advertising Prohibition Amendment Act 1995	Allows tobacco companies to publicly advertise on issues relating to governmental or political matters.
Trade Marks Act 1994	Streamlines the registration system and its administration by the Trade Marks Office in a manner that is consistent with the TRIPS Agreement.
Weapons of Mass Destruction (Prevention of Proliferation) Act 1995	Prohibits the supply, export or provision of services that may assist the development, production, acquisition or stockpiling of weapons or missiles capable of causing mass destruction.

Source: ORR (derived from examination of original legislation)

The volume of new Commonwealth *subordinate regulation* has increased significantly over recent years. In 1992, in a study of Commonwealth rule-making, the Administrative Review Council (ARC 1992, p. ix) observed that there had been a vast growth in the volume of delegated legislative instruments. This trend has continued. Table 1.2 shows the number of statutory rules and disallowable instruments made since 1983-84. The number of new instruments has more than doubled, largely due to the growth of disallowable instruments, with the number of new statutory rules remaining relatively constant. By 1993-94, the SSCRO (1994) reported 490 statutory rules and 1323 other instruments made in that year.

Significant developments in subordinate regulation, in 1993-94, relate to civil aviation, education, and community services and health.

As stated above, data on levels and trends in *administrative decisions and instrument*s are not available.

Table 1.2

Commonwealth subordinate legislation, 1983–84 to 1993–94

Year	*Statutory rules*	*Disallowable instruments*	*Total*	*Change on previous year, %*
1983–84	553	240	793	
1984–85	581	501	1 082	36.4
1985–86	426	428	854	-21.1
1986–87	322	510	832	-2.6
1987–88	345	690	1 035	24.4
1988–89	398	954	1 352	30.6
1989–90	411	847	1 258	-7.0
1990–91	484	1 161	1 645	30.8
1991–92	531	1 031	1 562	-5.0
1992-93	408	1 244	1 652	5.8
1993-94	490	1 313	1 803	9.1

Source: Senate Standing Committee on Regulations and Ordinances (various years).

1.3 Economic impacts

The foregoing figures give a crude indication of the extent to which there have been additions to regulations, but they do not demonstrate the size of the accumulated stock, nor do they give any clues as to what might be the economic impact of regulations or whether they meet the Commonwealth's objective of 'minimum effective regulation'[2].

It is difficult to put a figure on the costs and benefits of many regulations. This is because benefits are usually subjective and for many it is difficult to calculate a market value. And many of the costs are indirect in nature and take some time to emerge.

Hence, even when a cost-benefit process is followed, some of the most important assessments of regulation must continue to rely on qualitative assessment, which forms the body of this report.

[2] Under the Commonwealth's regulation review policy, regulation will be supported only where a well defined social or economic problem exists, where other solutions such as self-regulation or market-based measures are inappropriate, and where the likely benefits of regulation exceed the likely costs. The policy does not seek 'deregulation' *per se*: rather, it seeks more selective, appropriate and better designed regulation.

2 ISSUES IN REGULATION

From an economic viewpoint, there are often cogent reasons for government intervention in particular markets. Unfettered market forces can in certain circumstances lead to inadequate or excessive provision of particular goods, services or activities. For example, firms which do not pay the full costs of their pollution will tend to emit excessive amounts of waste into the environment or undertake insufficient recycling. Likewise, investors who lack information about the performance and financial status of companies may make poor investment decisions. Regulation, such as emissions standards or information disclosure provisions, may help overcome these market failures. Provided the costs associated with regulation do not exceed the costs of the original market failure, regulation can deliver net benefits to the community.

In considering how to deal with any particular market failure, there is a variety of approaches that can be used:

- no specific action (ie: rely on the body of existing law);
- better definition of property rights where they are unspecified or vague;
- general liability laws (either strict liability, negligence or 'no fault');
- information strategies (including product labelling or media campaigns);
- market-based instruments (including taxes, subsidies, tradeable permits, performance bonds);
- standards and rules (which may be principle-based, performance-based or prescribe how the outcome will be achieved);
- schemes for testing products before they are supplied to the market (such as listing, certification and licensing);
- measures for excluding products after they have been supplied to the market (such as bans, recalls, licence revocation provisions, and 'negative' licensing); or
- other approaches: including community right to know requirements, mandatory audits, quality assurance schemes, self-regulation and co-regulation, and cost-recovery.

There are also several alternatives for designing an enforcement regime to complement regulations. Relevant options include:

- administrative versus civil or criminal sanctions;

- corporate versus director liability;
- risk-based enforcement strategies;
- enforcement pyramids (ie, warnings for initial or low-level breaches, fines for subsequent and/or high level breaches, leading to licence suspension or revocation as ultimate sanctions).

Only some of these approaches (for correcting market failure and enforcing a regulation) will be relevant for a particular type of problem, and which ones will depend on the nature and extent of the problem. While case-by-case analysis is often necessary to determine an ideal regulatory regime, it is possible at a broad level to derive some conditions under which particular types of regulations will be most appropriate.

Some of the above points have emerged in the work done by the Industry Commission (IC) and the Office of Regulation Review (ORR) in inquiries and in the ORR's regulatory review work, which includes comments on Cabinet submissions, participation in interdepartmental fora and liaison with departments. This work has driven the selection of the issues discussed below, namely where important and broadly applicable points are involved. (Other regulatory developments are described in Appendices B and C.)

The first section considers some features of regulations, such as whether they are prescriptive, outcome-oriented or principle-oriented, the options for an enforcement regime and circumstances when the costs of regulation should be paid for by those being regulated. These aspects are among those that should be considered whenever regulations are designed.

The second section analyses some particular regulatory mechanisms — price surveillance, labelling and occupational licensing — which are used widely.

The third section surveys three sectors which have experienced significant changes in recent years in the regulatory environment they face — namely the financial sector, the environment and food safety.

2.1 Regulatory design

2.1.1 Standards

A common approach for regulating particular activities is the use of rules or standards. There are three main types[1]:

- *prescriptive rules* focus on the inputs and processes of an activity, specifying the technical means used in undertaking an activity (as in the mandatory installation of speed limiters or restrictions on vehicle engine capacity).
- *performance-based rules* specify an outcome in precise terms (as in a speed limit); and
- *principle-based standards* outline the desired outcomes by specifying the spirit or broad intention of the regulation and require interpretation according to the circumstances (requiring drivers to travel at a speed 'appropriate to the conditions' or 'not in a manner dangerous').

The Commission has encountered these types of regulation in several recent inquiries, including Environmental Waste Management Equipment and Supply Systems, Occupational Health and Safety, and Tobacco Growing and Manufacturing (in the context of anti-smoking regulations). The ORR has also referred to these matters in its work on ozone protection, passive smoking, driving regulation, pro-competitive regulation and corporate regulation.

Regulators face a dilemma in determining which of these legislative approaches to adopt because:

> ...the choice between rules and standards affects costs: rules typically are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret when deciding how to act and for an adjudicator to apply to past conduct (Kaplow 1992, p. 557).

The temptation for a regulator is to lay down a prescriptive rule that must be adhered to. This encourages certainty, particularly in the short term, and will suffice when dealing with issues for which limited alternatives exist for achieving the objective of the regulation (such as outright prohibitions).

Against that though, a major problem with prescriptive rules is that they can limit flexibility in meeting regulatory objectives and can retard innovation. For

[1] Much of the regulatory literature uses a simple two-part classification: 'rules' and 'standards'. For analytical purposes, the Commission and the ORR divide the 'rules' category into two: 'performance-based standards' and 'prescriptive standards'; and uses the term 'principles-based standards' for 'standards' as defined in the literature. For this discussion, a hybrid classification system has been adopted: 'prescriptive rules', 'performance-based rules' and 'principle-based standards'.

example, when government has poor information about existing and future technologies, it may well establish a prescriptive rule that unduly restricts or over-rides market processes. In comparison to industry, governments are often at a disadvantage in deciding what sorts of technologies are presently the best available, or foreseeing what technologies are likely to arise in the future. For example, by prescribing Pay TV technologies, the Government did not allow for the development of Multipoint Distribution System technologies as a cost efficient alternative to satellite or cable transmissions.

Other problems with prescriptive rules are that they can be rendered superfluous by technological change or encourage wasteful by-passing tactics by industry. For example, the Treasury proposed to introduce into the *Trade Practices Act 1974* a pre-merger notification scheme incorporating a threshold based upon a level of 10% of a corporation's voting shares (ORR 1995c). It can be argued that such an inflexible and prescriptive threshold would be ineffective as firms may be encouraged to bypass it by mounting a takeover through the use of derivatives instead of owning shares (Cummins 1995, p. 52).

Overall, 'black letter' prescriptive rules are falling from favour because, as Rankin notes:

> ... no matter how smart the legislators, they will never be as smart as those they seek to regulate. In other words, they limit themselves as soon as they define behaviour by prescription. Once limits are set, two things happen. People either feel that having met the limits they have met their obligations, and behaviour which falls outside their limits, whether fitting the intent of the law or not, is acceptable. Or, in more extreme cases they see the limits as a challenge to be met. "The how can I get around this" mentality, which prevailed for so long in the area of taxation (Rankin 1994, p. 5).

In preference to prescriptive rules, regulators have turned, in the first instance, toward the use of performance-based rules. Several Australian agencies in the safety regulation field are moving to more performance-based regulations. For example, the National Occupational Health and Safety Commission is recommending the replacement of prescriptive rules with performance-based rules, augmented by codes of practice conferring 'deemed to comply' status in some cases.[2] Most new Australian Design Rules for motor vehicles are also performance-based. And the National Food Authority (NFA) intends to reduce the prescriptiveness of Australia's food standards (ORR 1995a, p. 84).

Performance-based rules are most suited to issues for which the desired outcome is easily quantifiable. In specifying the desired outcome, they leave it up to individuals and firms to seek out the least-cost way of achieving it. For example,

[2] Where a code of practice has 'deemed to comply' status, firms following the code are legally presumed to have met the standard to which the code applies. However, firms also have the option of seeking to meet the standard in alternative (and possibly less costly) ways.

Australian Design Rule (ADR) 69 — Full Frontal Occupant Impact Protection for Motor Vehicles — specifies a level of safety, measured by impacts to a sophisticated, instrumented dummy in crash tests, that motor vehicles must meet. However, the regulation does not specify how manufacturers should achieve this level of safety. That is, manufacturers are free to choose between installing airbags, improved crumple zones, seat-belt pre-tensioners, or combinations of these and other devices, whichever option meets the specified safety standard at the lowest cost.

However, performance-based rules also have some limitations. Firstly, while allowing firms flexibility in achieving an objective, performance rules provide no flexibility in the objective itself. For example, emission controls generally specify a maximum amount that can be emitted from a particular factory, but the effect on the receiving medium will vary according to a variety of factors, including weather conditions, time of day, and the level of emissions from other factories at the same time. Secondly, as with prescriptive standards, once an individual or firm has met the performance-based standard, there is little incentive to go beyond that standard even when it would be socially desirable. For example, firms may reduce emissions to levels prescribed in a performance standard but would have little financial incentive to reduce them further, even if further reductions could be achieved at little cost.

As well as turning to performance-based rules, some regulators are also making use of principle-based standards and 'fuzzy' law. (Fuzzy law refers to a regulatory approach that replaces rules with principle-based standards, either alone, or in conjunction with a rule).

The use of principle-based standards:

> ...assumes that detailed preventative rules cannot possibly anticipate and proscribe the inexhaustible variety of human heartlessness and negligence, and at the same time will be often be harshly over inclusive. From this perspective, the appropriate strategy is to draft broadly worded statutes and regulations, laced with words such as "reasonable" and "so far as feasible," enabling regulatory officials to "custom tailor" regulatory requirements and penalties to particular enterprises and situations... (Kagan 1994, pp. 394-395)

Critics of this approach argue that principle-based standards, because of their imprecise nature, create uncertainty. This point has substance, particularly in the short term. However, their flexibility may also avoid the ongoing uncertainty created by the identification of 'loopholes' and the subsequent need for amendments (Fels and Walker 1993, pp. 173-174).

In comments on the Corporations Law Simplification Program, the Attorney-General supported a move from prescriptive to principles-based regulation:

> There are lots of things wrong ... with many, many ... provisions in our commercial laws. They use too many concepts. They use convoluted and outdated language and they try to deal with too many things. They are too detailed. It would be better to set out the general rules and not try to deal with every conceivable situation (1994, p. 3).

In its draft report on Occupational Health and Safety, the Commission also advocated a regime based on principle-based standards — a 'duty of care' to ensure safety in the workplace — augmented by some limited rules.

While there is a move away from prescriptive rules and 'black letter' law to performance-based rules and 'fuzzy' law principles, no single approach is best in all circumstances. In some cases, the initial certainty of prescriptive rules will justify their inflexibility. In others cases, performance-based rules will allow similar certainty in terms of meeting regulatory objectives, but also allow firms the flexibility to meet those objectives at least cost. And in others, given the difficulties of specifying just one desired outcome for all circumstances and the problems of deadening the incentives for moving 'beyond compliance', principle-based standards will represent a better option.

2.1.2 Enforcement regimes

Any regulatory regime can be seen as having two components: a body of regulation and an enforcement regime.

Broadly defined, enforcement is the means by which compliance with regulations can be encouraged and, to some extent, achieved. It can provide the regulated party with the necessary incentives and facilities (including knowledge) to modify behaviour to reduce socially damaging activity.

The Commission has most recently encountered issues relating to enforcement regimes in its inquiry into Occupational Health and Safety (OHS). The ORR has also encountered these issues through its work on road transport laws and food safety.

The following discussion covers some of the key issues which arise in considering the design of enforcement regimes, specifically:

- the objectives of enforcing regulations and the implications for enforcement efforts;
- enforcement agencies' resources and the need to set priorities for enforcement efforts;
- the instruments (eg fines, education) agencies can use to encourage compliance with regulations; and
- enforcement strategies for deploying those instruments.

Objectives of enforcing regulations

In designing an enforcement regime, the first question which arises is what the objectives of the regime should be. In some cases, enforcement activities may be seen as a means of raising revenue. In other cases, the enforcement of regulations is seen as an end in its own right. However, from an economic perspective, enforcement activities should ideally be directed at achieving the social objectives that underlie a regulatory regime: that is, the enforcement of regulations should be seen as a means to an end rather than an end in itself. As the Commission stated in its draft report on OHS (p. 111):

> The immediate goal of enforcement is subordinate to the ultimate goal of reducing workplace injury and disease. Therefore, the effectiveness of enforcement is determined by the extent to which compliance with OHS legislation prevents workplace injury and disease, and the degree to which enforcement encourages compliance with OHS legislation.

Where compliance with the letter-of-the-law is subordinated to the underlying objectives of laws and regulations, there may be implications for enforcement efforts. In particular, there may be instances where enforcement should not seek full compliance with regulations.

For example, prescriptive rules and some performance-based rules lack the flexibility necessary to cope with the diversity of real-world circumstances which may influence desired regulatory outcomes. This means that flexibility and discretion may be needed in enforcing them. This view was taken by the ORR (1994c) in its submission on road safety laws:

> Inevitably, a prescriptive and performance standard can at best be a rough rule of thumb, or a reasonable average, of the optimum (or maximum) amount of time to spend at the wheel or the optimum (or maximum) speed at which to travel.
>
> However, by themselves such standards are unable to promote optimum outcomes. Again, this means that, at least in some circumstances, full compliance with such standards will promote suboptimal outcomes. In turn, this points to the desirability of some flexibility in enforcement.

On the other hand, principle-based standards incorporate sufficient flexibility because the regulatory authorities, or the courts, are required to weigh up the pros and cons of the conduct for which the standard applies, given the circumstances surrounding the activity. Properly specified, principles standards can thus promote desirable outcomes. This in turn means that rigorous enforcement of principles standards may be necessary to promote desirable outcomes. This view was taken by the Commission in its draft report on Occupational Health and Safety. In recommending that the current prescriptive OHS regimes be replaced with a regime based on a duty of care, the Commission also advocated rigorous enforcement of that duty:

> The duty of care is the central legal obligation placed on employers, employees and others involved in health and safety at work. Its effective enforcement requires the application of sanctions to all significant breaches as soon as possible following detection. (IC 1995b, p. 121)

Resource levels and priorities

A feature of many enforcement regimes — including those for road transport, occupational health and safety, food safety, environmental protection and corporate regulation — is that enforcement agencies often have insufficient resources to ensure full compliance with regulations. This is not unique to Australia. Reflecting on overseas experience, Kagan states:

> Few laws, from those against robbery and reckless driving to those against tax evasion and securities fraud, are fully enforced... Although regulatory agencies generally lack the appropriations to ensure full enforcement, hardly any government body — the highway department, the Coast Guard, the Bureau of Prisons, and so on — is allocated sufficient funds to fulfil its statutory duties perfectly. (1994, p. 384)

Does this mean enforcement agencies' resources should be increased? In a survey-based paper on food law enforcement (forthcoming), the ORR notes that the apparent lack of resources to enforce fully all food regulations is not of itself an indication that resources should be increased. Full enforcement of regulations is not always desirable and resource decisions inevitably involve trade-offs between different government programs and objectives.

Ways of dealing with breaches of regulations

The costs and effectiveness of enforcement will be influenced by the instruments chosen to achieve regulatory outcomes. Sometimes, enforcement effectiveness can be improved without adding to costs by improving the mix of instruments used.

Enforcement agencies have an array of instruments available to seek to detect breaches of regulations, including:

- market surveys
- inspections of business premises and processes;
- enforcement blitzes — by problem or geographic area;
- consumer complaints; and
- reports from competing businesses.

There are also several ways that agencies can to seek to have specific breaches of regulations rectified:

- education/advice on how to avoid repetition of the breach;

- warnings;
- fines;
- licence suspensions;
- seizures of goods, closure orders;
- criminal prosecutions; and
- adverse media publicity.

At a broader level, enforcement agencies can seek compliance with regulations through attempting to improve 'the culture of compliance'. This might involve approaches such as general education, news letters and award schemes for businesses which voluntarily meet or exceed regulatory requirements.

One issue that arises when examining the ways enforcement agencies deal with breaches is the efficiency of existing detection systems. For example, in the case of food law enforcement, priority is largely given to responding to consumer complaints. This is an essentially reactive approach. Would a more proactive approach, involving a focus on inspections of products or premises or pre-market vetting, be warranted? In the case of OHS, inspections of premises have traditionally been based on data from workers' compensation schemes. However, these data do not always align with real risks.

Another issue is the adequacy of existing penalty systems. In some jurisdictions, enforcement agencies have no intermediate penalties between warnings and prosecutions. As prosecutions can be costly and time-consuming, the lack of an intermediate step, such as an administrative fine, may limit an agency's ability to deal with persistent but small breaches of regulations.

A further issue is the adequacy of penalties. According to the theory of rational deterrence[3], penalties should be set to equal the social costs of a breach. The 'expected penalty' for a breach can be seen as the amount of the fine multiplied by the probability of an offender being detected and convicted. So if the probability of being detected committing a certain offence (and being convicted) were one-in-ten and the fine were $1000, the average expected penalty for the offence would be $100. However, where enforcement agencies' resources are limited such that the probability of any one breach being detected is small, the fine will need to be significantly larger to compensate. For example, were the probability of being detected committing an offence as low as one in a thousand,

[3] The rational deterrence model assumes firms will comply with regulations tothe extent that the value of the expected costs of non-compliance are equal to, or greater than, the value of the expected costs of compliance.

the fine would need to be $100 000 to provide a $100 expected penalty. In some jurisdictions, fines may be grossly inadequate to provide effective penalties.[4]

The question is whether to increase penalties or use alternative deterrents, such as the threat of adverse publicity or 'shaming', to bring about desired outcomes.

Enforcement strategies

Beyond objectives, priorities and means of enforcement, what 'posture' or broad strategy should agencies adopt in seeking compliance with regulation?

Should an agency adopt a combative or cooperative approach in dealing with businesses in breach of regulations? Combative strategies generally involve the threat of disciplinary action when a breach is detected. Cooperative strategies focus on changing behaviour in a more congenial manner.

A key consideration is the level of cooperation by business. When businesses are uncooperative, combative approaches may be more appropriate. For these businesses, education and gaining compliance progressively through negotiation will be relatively ineffective, given that the benefits depend in part on the willingness of participants to use the knowledge gained in the workplace. Also, negotiation can be abused by the non-cooperative businesses undertaking strategic behaviour, using it to 'buy' time and avoid compliance.

On the other hand if a business is cooperative, resources spent on legal costs will be poorly spent as cooperative firms may not need to go through the courts in order to modify their behaviour. It may also create a culture of resistance to compliance. As Gunningham (1994, p. 99) puts it:

> ...if regulators assumed all firms require threatening with a big stick in order to bring them into compliance, then they will unnecessarily alienate, (and impose unnecessary costs on) those who would willingly comply voluntarily.

One strategy to identify appropriate enforcement stances, based on the cooperativeness of businesses, is referred to as 'tit for tat' enforcement, where the agency adopts a cooperative strategy until and unless a business displays non-cooperative behaviour, where upon the agency's strategy will change substantially to a combative one. That is:

> ...the regulator refrains from a deterrent response as long as the firm is cooperating; but when the firm yields to the temptation to exploit the cooperative posture of the regulator and cheats on compliance, then the regulator shifts from a cooperative to a deterrent response. (Ayres 1992, p. 21)

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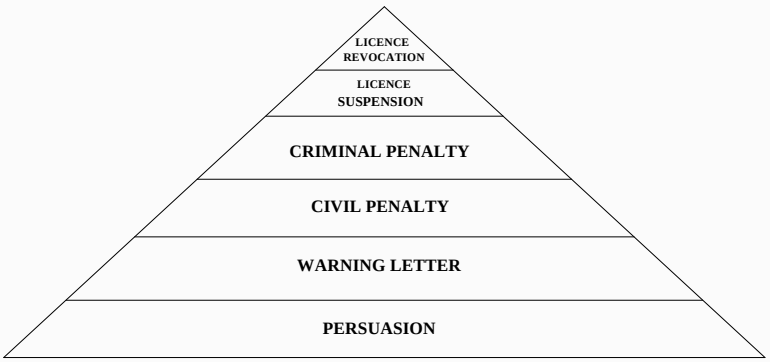
[4] In the context of OHS, the Commission, in its Draft Report, found that penalties are largely inadequate — the average fine imposed for breaches of OHS legislation in Australia being $1717 and the expected penalty is less than $20 when averaged over all jurisdictions.

Ayres and Braithwaite conclude that this 'tit for tat' strategy:

> ...resolves the contradictions of punishment versus persuasion...By cooperating with firms until they cheat, regulators avert the counter productivity of undermining the good faith of socially responsible actors. By getting tough with cheaters, actors are made to suffer when they are motivated by money alone; they are given reason to favour their socially responsible, law abiding selves over their venal selves. (Ayres 1992, pp. 26-27)

However, this strategy requires frequent interaction between the agency and the business to promptly identify and punish any betrayal of trust and therefore may be inappropriate if agencies' resources are severely limited — unless innovative ways of detecting levels of cooperation are devised. (The risk that the agency might be captured by the business it is regulating may also increase if the interaction between the two increases.)

Figure 2.1: An Example of an Enforcement Pyramid



A similar solution is the regulatory enforcement pyramid where regulators start by assuming that business is willing to comply voluntarily, but with the provision that they can move up to increasingly combative approaches for continued non-compliance.

The pyramid enforcement structure encourages compliance without actually having to move up the hierarchy. Ayres and Braithwaite (1992, p. 39) state:

> The key contention of this regulatory theory is that the existence of gradients and peaks of ...enforcement pyramids channels most of the regulatory action to the base of the pyramid — in the realms of persuasion and self-regulation. The irony ...[is that] the existence and signalling of the capacity to get tough as needed can usher in a regulatory climate that is more voluntaristic and non-litigious than is possible when the state [regulator] rules out adversariousness and punitiveness as an option.

It has been argued that cooperative strategies can be more effective when regulators display an explicit enforcement pyramid. Businesses are then made aware of the consequences if cooperative relations breakdown and non-compliance continues.

However, as the Commission noted in its draft report into Occupational Health and Safety, a potential danger in making the regulator's pyramid known to the regulated parties is that they may adopt strategic behaviour, delaying compliance until higher levels of the pyramid have been reached, where the expected costs of non-compliance become greater than the costs of compliance. By keeping the pyramid unknown to regulated parties, an element of risk is introduced to those regulated parties that want to adopt strategic behaviour. This will tend to reduce the incidence of strategic behaviour and encourage compliance at an earlier stage in the enforcement process.

2.1.3 Cost recovery for regulatory agencies[5]

Regulatory agencies are usually financed in one (or more) of three ways:

- direct payments from the budget;
- levies on industry, or other benefiting groups;
- direct charges for services.

The latter two methods are forms of cost recovery. There is increased pressure for regulatory agencies to recover their cost of operation. While this makes sense from a budgetary perspective, it may not always from a broader economic perspective.

This section looks at the question of when administration costs should be recouped by an agency. This question is influenced by the nature of the social costs and benefits of the activity being regulated.

How to pay for regulation, or to finance the functions of regulatory authorities, is an issue that frequently arises. Many regulatory agencies pursue cost recovery to some extent, although the form and level or recovery varies considerably. For instance the Therapeutic Goods Administration has a target of raising 50 per cent of its funding from charging for the costs of drug approvals, while the National Registration Authority for Agricultural and Veterinary Chemicals is to move to 100 per cent cost recovery for all its operations, except a small policy-making function, via a combination of fees for service and an industry levy. In contrast, the Government has decided not to introduce cost recovery for the NFA.

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5 The IC (1992) also looked at this issue in its Report, *Cost Recovery for Managing Fisheries.*

The following table shows the funding arrangements for selected Commonwealth regulatory agencies.

Table 2.1: Method of funding for selected Commonwealth agencies (%)

Agency	*Direct fees*	*Levies*	*Budget funding*
National Road Transport Commission	-	-	100
Therapeutic Goods Authority[1]	37	-	63
National Occupational Health and Safety Commission[2]	-	-	100
Australian Maritime Safety Authority[3]	7	67	22
AUSTEL[4]	-	100	-
Australian Broadcasting Authority		-	100
National Registration Authority for Agricultural and Veterinary Chemicals	1	77	22
Trade Practices Commission	-	-	100
Spectrum Management Agency[5]	-	-	100
National Food Authority	-	-	100

Notes and Sources: Annual Reports for each agency 1993-94, and ORR 1995.

1. Target is 50 percent
2. The National Industrial Chemicals Notification and Assessment Scheme within National Occupational Health and Safety Commission is to introduce full cost recovery approx $2.3m
3. Remainder of funds mainly from interest earned.
4. Although AUSTEL receives its funding via an appropriation from the Government, this is fully offset by a levy on the Telecommunications carriers.
5. The Spectrum Management Agency is developing cost based charging for a range of its services and licences.

The relevant question in assessing whether cost recovery should be applied to a particular regulatory function is whether it would be more efficient overall (providing higher net social benefits) to provide funding from the budget or to recover the costs from particular groups. Sometimes this overriding objective is confused with a desire simply to minimise direct outlays from the budget.

When is cost recovery appropriate?

The Department of Finance (1993) has identified conditions under which cost recovery by government agencies is most likely to be appropriate. These are where:

- there are no public interest or equity reasons why charges should not be attached to the goods or services being produced;
- the principal beneficiaries of the goods and services can be identified;
- charging for the goods and services is technically feasible; and
- users are able to influence their consumption.

This framework can be used to assess the case for charging for the regulatory activities of some agencies.

Public interest

The 'public interest' condition in part can be interpreted to refer to issues concerning the nature of 'public goods[6]' and in the case of 'mixed goods[7]' who should pay for any external benefits or external costs (also referred to as spillover effects). Some regulatory agencies are also responsible for bridging information gaps, such as occurs when one party has more information than another. Regulatory activities which (in part) are directed at correcting for asymmetric information include occupational licensing and labelling requirements.

Assuming that most regulations are directed at correcting market failures arising from externalities, then part of the assessment of who and how the costs of regulation should be paid, needs to take into account the nature of the externality being addressed by the regulator.

The terms, externalities and spillovers, refer to the situation where an activity, service or good confers benefits or imposes impacts on people, even though they have not purchased the service or good (or, if they have, the amount paid does not take into account the spillover effect). An example of a negative externality is the downstream effect of an industry which disposes its wastes into a river. An example of a positive externality is an immunisation program which reduces the risk of catching the diseases for those who have not been immunised.[8]

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6 Public goods exist where it is costless to allow additional consumers to enjoy the benefits of the good and where it is not possible anyway to exclude them from doing so.

7 Mixed goods have a private good component and also have external or spillover effects.

8 Another way of viewing 'externalities' and the problems they pose to society is as poorly defined property rights. In other words, it is difficult for law to give ownership over say the rules of the road or over the benefit provided by those being immunised to

Another example is rules of the road, whereby regulations create positive benefits for most of the population. By establishing, proclaiming and enforcing rules for drivers and pedestrians, use of the road is made much safer. Regulations range from the agreement to drive on the left-hand side of the road to rules about speeding and drink driving. In general, rules of the road and their enforcement provide a positive externality for which it is difficult to charge, although fines on offenders can be seen as a 'polluter pays' component.

Where groups provide benefits to other people for which they are not fully recompensed, this may result in some desirable goods and services being provided at less than desirable levels. And where groups impose costs on others for which they do not have to pay fully, this results in the associated goods and services being provided at greater than desirable levels and/or no incentive is given for providers to find ways to limit the negative externality.

Where it is not possible to allocate property rights and some other form of government action is being used to correct for spillovers, the question of who should pay will depend on the nature and size of the spillover and who is able to affect the size of the spillover at least cost. The prime objective is to achieve an efficient allocation of resources. For example, it may be efficient to charge polluters according to the negative impact they have on others in order to reduce the size of their activities and to give them incentives to 'clean up their act'. On the other hand, with respect to immunisation programs, it would be efficient if charges to recipients captured only part of the cost, according to the direct benefit to the recipients[9], with the rest of the cost being paid for out of the public purse or from those who are not immunised if they could be identified and charged.

With respect to cost recovery, in general where those being regulated are the source of a negative externality, it may be efficient to charge them also for the cost of administering the regulation or at least to take the costs of regulation out of the charges imposed on them, as this is part of the cost of their activities imposed on society. In the case of positive externalities, in general it is efficient

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those who are not. If it were possible for the providers of these benefits to charge for them as in a normal market, then there would be no further need for government intervention. The problem arises because people cannot be excluded from benefitting even if they do not pay.

Similarly, in the case of negative externalities (such as air or water pollution) the problem arises because it is not possible effectively to define ownership of clean air and water, in such a way that owners can sell and reap the benefits of non-pollution nor charge polluters for the cost of any degradation they cause to the resource.

9 It can also be argued that it is in the public interest to subsidise fully immunisation services because they reduce the number of people requiring treatment from the publicly funded heath system.

to fund the administrative costs from the public purse or only partially to recover the costs from the direct users or recipients.

In summary, it is only advisable to charge for the costs of administering a regulation if doing so helps to correct for the externality (or other market failure) and it is important not to do so if this 'taxes' a positive externality. While it is not always clear cut, there is a strong presumption in favour of charging those providing information with the costs of regulating such. This is because the costs can to some extent be passed on to the beneficiaries, namely the direct consumers of such products, such as occurs with those making use of the information contained in labelling or the services of licensed occupations.

Where regulations themselves and their enforcement benefit or disadvantage particular groups, care must be taken in how the administrative costs are covered. This issue is discussed below, with continuing reference to the guidelines from the Department of Finance.

Who are the beneficiaries and who should pay?

Identifying the beneficiaries of regulation for cost recovery can be difficult. For many regulations, the ultimate beneficiary is the community as a whole or at least a diffuse group of people.

That said, cost recovery from a diffuse group of beneficiaries may still be possible. For example, charging the suppliers to such a group is often an efficient way to charge those who ultimately benefit. Depending on the extent to which business can pass on the costs, any increase in business costs from regulation will be borne by the industry in the form of lower profits and by consumers in the form of higher prices. Such an approach is likely to be appropriate where the benefits of regulation accrue mainly to those using the service and there are no spillover effects to non-purchasers. For instance, regulations ensuring that food is fit for consumption mainly directly benefit the actual consumers. Charging firms marketing these products ensures that those who ultimately benefit, ultimately pay for the regulation.

It is important to assess the incentive effects of the method of charging used, even in cases where the consumers are the direct beneficiaries. For example, the Government decided not to introduce partial cost recovery for variations to the Food Standards Code (FSC) by the NFA. One supplier may request a change to the standard, yet this variation may benefit other food producers in the same industry and even across industries. In this situation, charging all of the costs for variations to the FSC to the one supplier could discourage a firm from seeking variations that would benefit it and society in general. In some circumstances, the regulator could explore other options, such as a broad based levy to be paid by all beneficiaries, or establishing proprietary rights to approved products.

Either of these options could set up the mechanism to ensure that all producers who gain from a change contribute to the regulatory costs. Unfortunately, in this particular case, these options were explored but are not workable due to high administrative costs in applying a levy and because the FSC is not set up on a proprietary basis — that is, there can be no ownership of standards. This is why the government decided to fund the cost of variations to the FSC from the budget.

An example, where it is not just the direct users who ultimately benefit, is the National Industrial Chemicals Notification and Assessment Scheme (NICNAS). In this case, a large public benefit is being sought in the form of protection of people and the environment from the harmful effects of industrial chemicals. If society is risk-averse and wants all new chemicals to be tested before their release, it may be appropriate to charge for 100 per cent cost recovery, with the cost being passed on to consumers. One implication is that potential suppliers may decide not to seek approval for chemicals which may have significant benefits to some. This may still be socially desirable, if the government has correctly evaluated society's preferred trade-off between reducing the risk of being exposed to potentially dangerous chemicals and gaining access to new chemicals and their associated benefits.

Technical feasibility of cost recovery

Feasibility is rarely a barrier to implementing cost recovery where fee-for-service charges are possible. Fee-for-service arrangements, such as safety certification, usually involve few additional agency resources and rely on financial management systems that agencies should develop anyway for sound financial management and accountability. Fees-for-service are efficient as long as beneficiaries can be charged.

Technical feasibility becomes more of an issue where levies are concerned, or where there is no direct contact with the beneficiaries of the regulations. When the industries or consumers that benefit are easy to identify and contact, the administration costs or levies can be low. This is obviously the case where the industry players are few in number, such as is the case with telecommunications. However, if it is difficult to identify who should pay, and if the costs of collecting a levy are high, then budget funding is often more appropriate. A relevant (though not conclusive) test is whether it is more expensive to collect a levy than it is to raise general taxation.

Influencing consumption

Charging those who have direct contact with a regulatory agency can make agencies more accountable for their operations. Those paying for regulation in a sense become clients of the agency and expect an efficiently delivered service.

Cost recovery calls for the identification of the full costs of different activities. This in itself provides a good basis for determining whether the correct amount of resources is allocated to particular activities.

However, there are two important qualifications to this viewpoint.

One is that users of regulation are rarely able to influence the amount of regulation they are subject to or consume. Unlike charging for many government activities, cost recovery for regulation is rarely able to capture one of the main benefits of a 'user-pays' approach — using the price mechanism to determine how much of a good should be produced, or in this case how much regulation there should be.

The other qualification relates to the risk of compromising the independence of the regulator. Those paying for the costs of regulation may want to have some say in how the regulation is interpreted and applied to them, and this may reduce the independence of the regulator in striving to give priority to broad public welfare.

Conclusion

Partial or full cost recovery for regulatory agencies is undertaken in a wide variety of circumstances. Where cost recovery is appropriate, there is no reason to expect that all agencies should recover costs in the same way or by the same amount. A carefully designed cost recovery regime, which does not compromise the independence of the regulator, can complement the regulatory goals of an agency by instilling cost consciousness in the agency itself and in the users of its services.

The form and extent of cost recovery is an issue which should be considered on a program by program basis. If it is not possible to charge all the beneficiaries then charging any one group may not be efficient or equitable. In some cases, it may be more administratively costly to fund an agency via cost recovery than via budget funding.

2.2 Some regulatory mechanisms

2.2.1 Prices surveillance

Concerns within the community that certain industries or firms may be charging excessive prices and reaping excessive profits have been dealt with by governments through price surveillance or monitoring arrangements[10].

Commonwealth prices oversight

One of the recommendations of the report *National Competition Policy* (Hilmer 1993), was that all existing price surveillance be reviewed.

To this effect, on 2 December 1993 the Assistant Treasurer asked the Prices Surveillance Authority (PSA) to undertake a two year public review of all (17) goods and services subject to prices surveillance, with the exception of those supplied by Australia Post. The public inquiries were divided into four groups with reports due by 2 October 1994, 2 January 1995, 2 July 1995, and 2 December 1995 respectively.

A general review of prices surveillance was timely. The economic environment has changed significantly since 1984, when the PSA was established. A substantial program of microeconomic reform has opened the economy internationally and addressed regulatory impediments to competition in many previously sheltered markets.

A consensus appears to be emerging that prices oversight should be used sparingly, and only when pro-competitive reforms are inappropriate. In announcing the review, the Assistant Treasurer said that, where competition is effective, regulatory intrusion into pricing simply adds to costs and prices. However, he noted that where competition is ineffective, the Government is committed to ensuring that consumers are not exploited.

In *What Future for Price Surveillance?* (IC 1994a), a case was made for winding back surveillance and monitoring unless competition is clearly ineffective. Where competition is effective, prices surveillance adds to costs and reduces incentives to innovate and invest, without bringing a compensating price advantage to consumers.

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10 The *National Competition Policy* Report refers to two forms of prices oversight. *Prices monitoring* requires firms to provide, at prescribed intervals, specified cost and price data regarding declared products to the Australian Competition and Consumer Commission. *Prices surveillance* requires firms to provide specified cost and price data and seek a non-binding recommendation as to whether the price is consistent with the relevant pricing principles. (IC 1994a, p 75)

While the Commission has supported prices surveillance in a number of inquiries involving public utilities and natural monopolies, it considers that in view of the informational constraints facing the regulator and the costs that, surveillance can impose on industry, prices surveillance should be limited to those firms which are clearly in a dominant market position, namely that they:

1. have a greater than two-thirds market share; *and*
2. have no major rival; *and*
3. face sporadic or trivial imports (defined as import penetration persistently below 10 per cent of the market); *and*
4. are sheltered by substantial barriers to entry (such as limited capacity for expansion by rivals).

Prices surveillance has little prospect of bringing net benefits to the community in markets with more than one major firm, because market power then tends to be limited and the difficulties of surveillance are magnified. The rivalry within the deregulated interstate airline duopoly in Australia illustrates the resilience of competition in concentrated markets.

Nevertheless, in some cases limiting prices surveillance to dominant firms may not be enough to allay public suspicions about market power. In sensitive industries, and in border-line cases of market dominance, there may be a role for monitoring prices. In industries previously subject to prices surveillance, a transitional period of prices monitoring may also be a useful device for re-assuring consumers.

Outcomes from the PSA review of prices surveillance

In response to the first of the set of reports by the PSA, the Assistant Treasurer announced new pricing policy arrangements on 8 November 1994. The Government decided that prices surveillance should be used more sparingly and that more reliance should be placed on prices monitoring to identify markets where excessive price increases may be occurring.

The Assistant Treasurer decided to maintain prices surveillance for the three cigarette companies and the two major beer companies. Coffee and biscuits are to be subject to price monitoring for three years, while tea and tampons will no longer be subject to any prices oversight.

The second of the set of reports was released on 2 January 1995 on breakfast cereals, float glass, Western Australian LPG and Portland cement. The Assistant Treasurer replaced surveillance with prices monitoring in each of these industries.

The third set of reports was released on 2 July and recommended that: 'two more companies should join the 20 that have already been released from the price vetting regime.' (PSA 1995b, p. 16) The PSA also made the general comment:

> As competition in the Australian economy intensifies, there is less need for government vetting of the prices charged by companies. There are more areas where market pressures can do the job of restraining price rises.

Retail banking fees and charges

The concern expressed by many groups over increased bank fees and charges led the Assistant Treasurer to instigate (early in 1995) a public inquiry by the PSA into fees and charges imposed on retail transaction accounts by banks and other financial institutions. The ORR made a submission to this review, titled *Competition and Retail Banking* (ORR 1995b).

From a number of perspectives, there is now significant competition in the retail banking industry in Australia. No bank has significant market power on its own. Also, given the number of sellers of banking services, the diversity of banking products sold, and the demonstrated capacity for entry to and exit from the banking industry, the pre-conditions for collusion among banks are not present. An indication of the competitiveness of the retail banking industry in Australia is that consumers in most parts of Australia can choose between many different banks and the competitive fringe of operators providing banking services. Although some areas (eg country towns) may have a more limited choice, the advent of technology based services (eg telephone banking) enhances consumer options even in poorly serviced areas.

Prior to deregulation, the Australian retail banking system was characterised by a high number of cross-subsidies amongst different categories of consumers. Bank income was derived largely from interest rate margins (and prior to the early 1970's from a fixed margin charged on foreign exchange dealing). There were few specific fees. This was inefficient and penalised some consumers. Since deregulation, fees and charges have increasingly been applied on transaction accounts, and the proportion of income from interest rate margins has declined.

While enhancing economic efficiency, the introduction of bank fees and charges can potentially impose a disproportionate burden on those with low incomes, such as social security beneficiaries and students. However, the banks currently exempt from fees and charges most potentially disadvantaged groups within the community. In addition, there are several avenues open to consumers to minimise or eliminate the impact of the current structure of fees and charges.

The structure of bank fees and charges could change in the future. Should this result in a stronger case for government intervention on equity grounds, the ORR concluded that an efficient approach would involve a 'community service

obligation' on banks to provide specific groups of customers with free basic banking services, as long as the Commonwealth Government reimbursed the banks for the costs of doing so.

The PSA recently reported to the Assistant Treasurer that the current fee structure is inefficient and sends the wrong signals to the public and recommended that financial institutions should change the fees they levy on retail transaction accounts so that fees are no longer skewed towards the account-keeping part of the fee. The report contained 27 recommendations, including:

- that financial institutions review and adjust their fee structures to achieve better relativity between the fees and the costs of the individual components of account products;
- that institutions give priority to restructuring fees rather than increasing them;
- that governments directly address a comprehensive policy approach, including the issue of community service obligations, to the problem of essential services provision to remote communities, given trends to rationalisation of privately provided services (including banking), and commercialisation and privatisation of many government services;
- that the Australian Bureau of Statistics consider the inclusion of the retail transaction account fees, charges and transaction taxes combined in the consumer price index;
- that State and Territory Governments enact legislative changes to remove barriers to credit unions and building societies accessing a range of deposit and investment funds;
- that financial institutions show on account statements, and at ATM and branch locations, the basis on which fees are calculated and provide information as to how fees can be avoided; and
- that the Minister formally direct the PSA to monitor and regularly report on the financial services industry in relation to retail transaction accounts for a period of three years. (PSA 1995b)

2.2.2 Labelling issues

Labelling schemes are one instrument commonly used to overcome perceived problems in the consumer protection or safety areas. They potentially have the advantage of avoiding controls on manufacture or other more prescriptive measures. For consumers, labelling allows informed choice without necessarily constraining diversity. For instance, while irradiated food is presently banned

from sale in Australia, the NFA is examining options such as allowing irradiated food to be sold provided that it is appropriately labelled.

However, labelling schemes are not costless. They usually involve expense for business and enforcement costs for government, and they may not be appropriate in all circumstances.

The benefits of labelling need to be balanced against the costs. In assessing the costs and benefits of any compulsory labelling scheme two prime questions are:

- do consumers want certain information to be a mandatory requirement on labels; and
- if so, can this information be conveyed accurately in a simple message?

Two recent labelling cases illustrate the issues that arise when considering this type of regulation.

Country-of-Origin Labelling

In June 1994, the NFA released a Discussion Paper proposing that the Food Standards Code be varied so that:

- all packaged and most unpackaged foods would be required to carry a statement indicating the country or countries of origin;
- the terms 'produce' and 'product of' a country would mean that all major ingredients are from, and the processing of the food has taken place in, that country; and
- the term 'made in' a country could only be used if the food obtained its 'essential qualities' in that country.

Over 90 per cent of products contain information on a product's country-of-origin and recent research indicates that country-of-origin information is regularly used by consumers, but that there is confusion as to what different terms mean and a level of mistrust about origin claims. Many consumers believe at present that Product of Australia, and Made in Australia are synonymous (Yann 1995).

Much of this confusion arises because country-of-origin is a concept that is difficult to reduce to a few simple phrases with strictly assigned meanings. This is so because there are differing concepts of origin and differing uses to which the information is put. For instance, consumers may want to know where a product gained its 'essential character', or they may want to know the level of Australian value added, or where the ingredients came from. Some consumers are also concerned with the ownership of the company that produced the good. All these considerations make it very difficult legislatively to assign meanings to country-of-origin terms.

This legislative difficulty is illustrated by the lengthy period in which the Government has been trying to come up with workable definitions of common origin terms. The National Food Authority received three applications to vary country-of-origin labelling of food products in September 1992. In October 1992 the Government established two working parties to examine country-of-origin legislation generally which led to the Introduction of the *Trade Practices (Origin Labelling) Bill* into the Parliament in March 1994. However, Parliament has not passed the Bill and it will not proceed at this time.

The Government has asked the NFA to recommence its consideration of the origin issue in relation to food. In August 1995, the NFA held a two-day workshop attended by industry, consumer and government representatives in an attempt to reach consensus on the issue. The NFA is expected to release a further draft proposal in September. It remains to be seen whether it is possible to improve on the current origin labelling requirements.

Standard Drink Labelling

In 1991, the Ministerial Council on drug strategy made an application to the NFA requesting that standard drinks be considered as an additional form of alcohol content labelling on beverages. The NFA endorsed the proposed scheme.

Labelling alcoholic drinks with the number of standard drinks does not encounter some of the difficulties faced by county-of-origin labelling. The available research shows that the alcohol content of drinks is information routinely sought by consumers, particularly so where people need to know whether it is safe for them to drive a car. Standard drinks is a simple way of expressing alcohol content. Unlike country-of-origin concepts, a standard drink can be objectively defined (as 8 to 10 grams of alcohol). In conjunction with simple education campaigns, standard drink content is information which can easily be understood and processed by consumers.

The wider implications of labelling regulation are to be considered in the Industry Commission's current inquiry into Packaging and Labelling.

2.2.3 Occupational licensing

Occupational licensing is a form of regulation that restricts entry to an occupation or profession to those who meet requirements stipulated by a licensing authority. Requirements can include educational qualifications or membership of professional associations, absence of a criminal record, possession of appropriate professional resources and materials, and subjective personal tests, such as whether an applicant is a 'fit and proper' person.

Occupational licensing requirements apply in several occupations and professions, including the legal and medical professions, accountancy, taxation agents, media ownership, aviation pilots and heavy vehicle operation.

The benefits of occupational licensing are premised on judgements that market forces may not work efficiently in certain areas, and that it is better to exclude incompetent or dishonest practitioners from the outset rather than deal with the consequences of their actions later.

Occupational licensing provides some guarantee that services provided will be of a reasonably high quality. While consumers have a natural incentive to seek out goods and services with the price-quality combination they want, this is particularly difficult for consumers where the supplier has much more knowledge about the likely quality of a service before it is rendered. In those areas where such asymmetrical information is an important factor, occupational licensing will provide consumers with additional confidence in the service being purchased. A particular form of asymmetric information arises for the one-off purchaser who therefore cannot build up experience of a particular product or service.

Occupational licensing also reduces the likelihood of fraud by unscrupulous practitioners, and can provide greater assurance to non-contracting parties who may be incidentally affected by decisions taken on professional advice.

Most of the costs associated with occupational licensing come from:

- restrictions on entry which reduce the number of potential providers and weaken competition to the detriment of consumers;
- restrictions on the degree and nature of the services provided by the licensed occupations, eg advertising restrictions and partnership controls, which may operate against the interests of the more efficient providers and consequently also be to the detriment of consumers;
- requirements for licensed providers to satisfy a minimum level of expertise (eg. in some jurisdictions conveyancing can only be provided by lawyers), which restricts the supply of services and raises their prices; and
- administrative costs to government involved in establishing and running a licensing scheme or, if they are recouped by government as licensing fees, they are likely to result in higher prices to consumers.

A key issue is the extent to which the requirements set to obtain a licence accurately match the needs of consumers. However, higher standards generally result in higher quality *and* higher costs, and if standards to obtain entry into a profession are not necessary to carry out the functions at the level of quality desired by consumers, inefficiencies may result.

Also, less costly mechanisms may achieve similar results including:

- *use of existing laws*, including the consumer protection aspects of the *Trade Practice Act 1974* and relevant State Government legislation, to regulate the conduct of market participants;
- *enhanced information strategies* for consumers, including warnings on official forms, advertising campaigns and publication of pamphlets about specific professional/occupational services (possibly including indicative pricing schedules);
- *listing or certification schemes* which require practitioners to inform a central authority about matters such as name, address, business organisation, educational qualifications and previous experience in the industry, without specifying 'minimum standards'; and
- *negative licensing* where agents are not screened before starting to practise, but only prohibited from practising if shortcomings in their operations are identified such as violation of general consumer protection legislation.

These issues have arisen in two recent reviews of licensing arrangements to which the ORR has contributed — one applying to migration agents and the other applying to customs agents.

The migration agents registration scheme

The Parliamentary Joint Standing Committee on Migration conducted a review of the scheme, commenced in 1992, which requires those providing migration advice to register as migration agents. The ORR's submission (ORR 1994a) described the economic effects of the scheme's registration fees and its quality assurance objectives, and the potential for it to be a barrier to potential new agents. Some alternative approaches to a registration scheme, such as consumer warnings and negative licensing, were presented.

The advantages of negative licensing are that it may avoid the administrative costs associated with the current licensing system; reduce the costs to practitioners of becoming registered as agents, and prevent the possibility that the current licensing scheme could be used as an undue barrier to entry to the particular profession.

The licensing of customs agents

The Australian Customs Service requested advice regarding the desirability of continuing the registration of customs agents. The key issues in relation to this scheme include whether the present regulation of customs agents provides a sufficient consumer protection and quality control mechanism or whether the costs and restrictions imposed by the scheme exceed those benefits.

There is some evidence that the present scheme does not provide such benefits sufficiently to justify the costs and restrictions imposed on those who may desire to practise this occupation, and that alternatives to the current scheme could be considered. These include issuing consumer warnings and better information, through to a negative licensing arrangement.

The licensing of financial/securities advisers

The Australian Securities Commission is currently reviewing its licensing arrangements for securities advisers and has sought public comment on the most appropriate arrangements. This is discussed more fully in section 2.3.1.

Government reforms with implications for occupational licensing

The Commonwealth and State Governments have made some reforms to occupational licensing and the regulation of the professions. These include mutual recognition and a review of partially registered occupations, as well as the new competition policy legislation.

Mutual recognition and a review of partially registered occupations

In May 1992, the Heads of Government agreed to arrangements designed to promote freedom of movement of goods and service providers within Australia. These arrangements involved the Commonwealth enacting the *Mutual Recognition Act 1992*, which came into force on March 1993. The States and Territories were to refer power to the Commonwealth to ensure that a person registered in one or more jurisdiction would be accepted as qualified in all other jurisdictions. However, it was recognised that for some occupations, registration was required in some States and not in others and that such inconsistencies were a barrier to freedom of movement of practitioners across jurisdictional boundaries.

With a view to eliminating such inconsistencies, the Vocational Education, Employment and Training Advisory Committee (VEETAC) Working Party on Mutual recognition has conducted a review of 'partially registered occupations'. While the primary purpose of the review was to reduce administrative barriers to mobility between States, there was a presumption in favour of deregistration in all States unless an overwhelming case for continued registration could be found. The key criteria for continued registration are public health and safety, and consumer protection. The results of the review should become public later this year.

National Competition Policy

As part of the implementation of the report on *National Competition Policy* (Hilmer 1993) each jurisdiction has agreed to review its existing anti-competitive legislation and related regulatory arrangements. It is expected that anti-competitive occupational licensing arrangements will be subject to scrutiny under these agreements and will be subject to the provisions of the competition law (IC 1995, pp 103-115).

In the past, some occupations and professions have been found by the Trade Practices Commission (TPC) to have engaged in anti-competitive practices, some of which may have been sanctioned by government regulation, while others have been imposed by professional associations or by 'custom and practice'. In particular, the legal profession had been identified by the TPC as having significant potential for reform (See TPC 1992).

2.3 Some sectoral issues

2.3.1 Regulation of Australia's financial system

The Australian financial sector — with assets exceeding $850 billion in 1993-94 — has experienced continued rapid growth, product innovation, technological change, internationalisation and significant deregulation, enhancing consumer choice.

There has also been an expansion of new or amended regulations. While there is some variation, in broad terms the goals of the regulators are to ensure that the financial system is efficient, flexible, competitive, is characterised by predictable and stable growth and meets prudential standards.

In contrast to some Scandinavian countries and Canada where one agency is responsible for regulating the entire financial system (CFS 1994), the Australian financial system is regulated by several agencies. Table 2.2 shows the functions and activities of six key regulators.

Table 2.2: Key regulators of the Australian financial sector [11]

Regulator	*Functions and activities regulated*
Reserve Bank of Australia (RBA)	Promote stability in the Australian financial system and regulate the conduct of banks.
Australian Securities Commission (ASC)	Administer the Corporations Law.
Insurance and Superannuation Commission (ISC)	Supervise insurance and superannuation entities.
Council of Financial Supervisors (CFS)	Facilitate coordination and cooperation between financial regulators.
Australian Financial Institutions Commission (AFIC)	Ensures compliance of building societies and credit unions with prudential standards and practices determined by AFIC.
Australian Transactions Reports and Analysis Centre (AUSTRAC)	Identify financial activity related to tax evasion and major crime by monitoring financial transactions.

As well as these organisations, there is a number of self-regulating institutions, including the Australian Stock Exchange and the Sydney Futures Exchange. Some industry associations also provide dispute resolution mechanisms. Examples include the Bank Ombudsman and complaints resolution schemes operated by the Financial Planning Association of Australia Ltd and the Life Insurance Federation of Australia. Self-regulation is also undertaken by professional associations such as the Institute of Chartered Accountants, the Insurance Council of Australia Limited and the Australian Society of Certified Practising Accountants.

Recent regulatory developments in the Australian financial system

In the 1980s, Australia's financial system underwent major change, largely driven by the reform of anti-competitive regulation. Following the corporate failures in the late 1980s, new regulatory regimes have been implemented aimed

[11] Some areas of the financial market, such as trustee companies, friendly societies, credit unions and building societies, are regulated primarily by State agencies (CFS 1994, pp. 35-36).

at enhancing corporate accountability and disclosure. A number of these involve self-regulation, based on codes of conduct.

Changes in regulations of the financial sector have included enactment of the *Corporate Law Reform Act 1992,* which addresses the issue of 'passive directors' by introducing an objective test for the director's duty of care. It also introduces provisions to regulate the relationship between a company and its directors and related corporations, prohibits loans by a company to its directors, provides for enhanced disclosure relating to potential and real conflicts of interest by directors and contains sweeping reforms to the insolvency provisions (Lavarch 1995, pp. 3-4).

Subsequently, the *Corporate Law Reform Act 1994* enacted a new and enhanced disclosure regime, and changed fund raising provisions. The Corporations Law will also be progressively extended to include building societies and credit unions. In addition, the Attorney-General's Department is coordinating the Corporations Law Simplification Program which seeks to simplify and improve the Corporations Law. (See Appendix C for more information.) The Attorney-General referred to the 'unnecessary complexities that currently make the Corporations Law almost unintelligible to the ordinary user' (Lavarch 1993).

The thrust of the new regulation of the financial sector has been to ensure that supervision remains effective, that institutions have an adequate capital base and that decision making is improved through high quality and timely information being made available to consumers, shareholders, managers and regulators. Much regulatory activity has focused on the new, high growth financial markets and activities, such as derivatives and regulation of superannuation.

One key concern of industry participants is that self-regulation and Codes of Conduct — while being useful alternatives to direct legal or rules based regulation — transfer the direct administrative costs of regulation from public sector regulators to industry participants. Thus, many industry associations now have to incur the cost of administering Codes of Conduct etc, whilst their members continue to incur costs complying with regulations and such Codes. It is also important to ensure that the administration of such Codes is transparent. It is possible that Codes of Conduct provide private sector organisations with a monopoly over regulation making and administration, with the risk that these act as barriers to entry.

Recent developments in financial sector regulation include the proposals to allow non-bank financial institutions to issues cheques directly to consumers and separate reviews of the regulation of financial advisers and derivatives. In addition, the PSA released its report on retail banking charges and fees in July 1995 (see section 2.2.1 for more information). A recurring theme in these areas is the complexity, and at times conflicts, created by having many regulations and

regulators in this field. There is a risk of inconsistent regulation and over-regulation.

Cheque issuing rights for non-bank financial institutions

The *Cheques and Payments Orders Act 1986* prohibits building societies and credit unions from issuing cheques directly to consumers. Rather, these institutions can only issue cheques via banks, thus incurring additional administration costs and having to advertise on their cheques the names of a competitor (ie the bank issuing the cheque).

This regulation restricts competition between financial institutions and reduces consumer choice. Indeed, the Report of the House of Representatives Standing Committee on Finance and Public Administration, *A Pocket Full of Change* (1991), criticised this prohibition as a significant barrier to competition.

On 7 July 1995 the Attorney-General announced that amendments to the *Cheques and Payments Orders Act 1986* would be introduced in the Spring 1995 session of Parliament, to allow credit unions and building societies to issue cheques under their own names or through special service providers (SSPs).[12]

The proposed changes are supported by the RBA and the TPC. The ORR also supports this proposal, since regulatory arrangements under the AFIC are now similar to those pertaining to banks and there is no justification to continuation of this prohibition. In addition, the proposed reform will enhance competitive neutrality — consistent with the thrust of the proposals of the report on *National Competition Policy* (Hilmer 1993) — and provide benefits to consumers through enhanced competition and choice.

Regulation of financial/securities advisers

There has been rapid growth in the financial advice sector of the economy over the last decade. Since deregulation consumers have been able to choose between a greater variety of financial products. This has been matched by the growth in the number of organisations providing financial advice. Financial advice is provided by a wide range of organisations and individuals, both in Australia and overseas. It can be sourced from computer software, media reports, banks, solicitors, insurance companies, real estate agents, stock brokers and other financial advisers. Some advisers provide advice about a narrow range of products, such as real estate agents or share brokers, whilst others provide wide ranging advice.

[12] SSPs are industry bodies that can be established by credit unions or building societies to provide centralised treasury, payments and other financial services to members.

There has been some community pressure for further regulation of financial advisers to protect investors and enhance public confidence. Prudential supervision of financial advisers is provided primarily by the ASC and the ISC. In addition to these two key regulators, prudential supervision by the RBA and AFIC can also impact on the conduct of financial advisers.

The ASC regulates financial advisers, who are required to have a licence. Such licences are allocated according to established criteria, including level of education, integrity and experience, and require minimum standards. In February 1995 the ASC Licensing Review Task Force released an Issues Paper on the regulation of financial advisers. This paper assessed possible changes to the licensing regime and also considered self-regulation.

In its submission to this review, the ORR supported the objectives of the review to promote high quality advice, reduction of risks and increased public confidence. The ORR highlighted alternatives to licensing (such as reliance on the *Trade Practices Act 1974;* strategies for improving the flow of information between regulators, consumers and service providers; restrictions on advertising; and other mechanisms such as listing of advisers in centralised data bases and co-regulation) and suggested the costs and benefits of the proposed regulations and alternatives be considered by the ASC[13]. The ASC review of regulation of financial advisers released a draft report in August 1995 which proposed providing information and education programs for consumers; strengthened dispute resolution mechanisms and new minimum standards; and

[13] The ORR also discussed specific issues pertaining to licensing including: measuring the quality of advice; regulation of professions at the margin that can sometimes provide advice (such as the persons working in the media or solicitors); the adequacy of resources of advisers and the advantages of professional indemnity insurance over the existing $20,000 security bond requirement.

mechanisms that could — over time — lead to increased self regulation and a reduced role for the ASC. A final report is due in November 1995.

The ISC regulates advice relating to superannuation, life insurance and general insurance and it is also reviewing a Code of Practice for *Sales Practices and Customer Complaint Handling in the Life Insurance Industry.* An Industry Working Group was asked by the Parliamentary Secretary in early 1995 to review the Code and this Group reported back in June 1995. The ISC released a final Code on 3 August 1995 (ISC 1995c).

Other public bodies are involved in aspects of financial advice through their consumer protection role. For example, sections of the *Trade Practices Act 1974* deal with misleading and deceptive conduct. In addition, complaints can be assessed by the Superannuation Complaints Tribunal and State based consumer complaints tribunals. Disputes can also be handled by various self-regulation regimes, such as the Bank Ombudsman, Life Insurance Federation of Australia dispute resolution and complaints scheme, and the Financial Planning Association of Australia Limited complaints scheme. Other product specific dispute handling processes include those covering real estate agents and solicitors.

While there is general agreement amongst financial advisers that standards of advice should be improved and that consumers should always be able to obtain independent, honest and competent advice, there is less agreement about the best regulatory approach to attain such goals.

Some industry groups, including the Financial Planning Association of Australia Limited, expressed concern that there is scope for overlap and inconsistency between regulators and regulations. With a number of product specific regulators and complaint resolution processes, financial advisers face products with different regulatory obligations. There are also alternative dispute resolution processes available to consumers.

Regulation of derivatives

A derivative is a financial instrument that derives its value from the value of one or more underlying assets, reference rates or indexes. Derivatives have been used for decades for products, such as wool, to reduce financial losses from unexpected changes in prices. The potential for derivatives to increase financial risks was highlighted, most recently, by the collapse of UK based Barings Bank Plc. In recent years there has been greater focus on the regulation of derivatives.

The main regulators of the financial market are the RBA, the ISC, the ASC and the CFS. Each regulator has considered the problems which may arise from the misuse of derivatives.

The RBA regulates use of derivatives by banks through a disclosure based regime. Since 1988 capital requirements — which ensure that banks have access to capital commensurate with their risks — have included a minimum amount against counterparty failure through use of derivatives. The Basel Committee on Banking Supervision has worked to expand capital adequacy arrangements arising from price movements, including movements related to derivatives trading. In 1994 the RBA implemented a visits program to banks to review use of derivatives, to learn about the approach of each bank and ensure that banks have in place systems and controls to address market risks created by derivatives. In addition, the RBA has required improved disclosure in published accounts, consistent with the approach recommended by the Bank of International Settlements, the central bankers' bank (RBA 1995).

The ASC is responsible for promoting efficient and fair markets in financial products, including derivatives. The ASC regulation of derivatives is based on disclosure standards and 'best practice' internal risk management. In May 1994 the ASC released a report on *Over-the-Counter Derivatives Markets*.

In 1995, the ASC endorsed a statement prepared by the Australian Society of Corporate Treasurers which established new minimum disclosure standards for accounts ending 30 June 1995. The ASC also encouraged entities to adopt industry best practice guidelines. In addition, on 20 June 1995 the ASC endorsed an Australian Accounting Standards Board and Public Sector Accounting Standards Board Exposure Draft, on the presentation and disclosure of financial instruments for derivatives and other products. The approach of the ASC to the regulation of derivatives was outlined by its Chairman, Mr Alan Cameron in a speech to the Institute of Chartered Accountants:

> In my view, a knee-jerk regulatory response to these issues would do little to mitigate the perceived risks and only serve to restrict the development of the financial markets. The philosophy underlying our approach to this issue is that mechanisms such as disclosure to the market, self-regulation, education and cooperation with industry bodies are more effective regulatory tools than increased prescription and prohibition. (1995, p. 6)

The ISC regulates the use of derivatives in the superannuation, life insurance and general insurance sectors. In March 1995, the ISC released three Discussion Papers dealing with the regulation of derivatives for these sectors. These papers put forward a number of options for changes in the regulation of derivatives, along with ISC proposals. The ORR — in its submission to the ISC — agreed with the overall proposals in the three Discussion Papers (ISC 1995a, p. 6; 1995b, p. 8; 1995c, p. 8) which are aimed at ensuring that superannuation entities, insurance companies and life insurance companies have in place adequate controls on the use of derivatives and adequate checks on compliance with those controls. However, the ORR pointed out that a little more information

about the costs and benefits of each option and that a systematic comparison of ISC proposals with the approaches adopted by other regulators would be useful. In addition, the ORR argued — in relation to superannuation funds — that:

> ... a prohibition on the use of speculative derivatives could be too wide, covering both use of highly leveraged derivatives — which arguably should be restricted — and high risk/return derivatives with no leverage, where there seems a lesser case for prohibition.

This ISC review of derivatives, along with consultation with interested organisations, is ongoing.

The CFS — which brings together the main regulators — has reviewed the adequacy of existing procedures to ensure that regulations governing use of derivatives are efficient and fair. The CFS has also participated in a current review of law on derivatives by the Companies and Securities Advisory Committee (CSAC), for the Attorney-General (RBA 1995). On 30 January 1995 the CSAC released a research paper titled *Law of Derivatives: An International Comparison.* In addition, some State governments — including the Victorian State Government — have imposed new rules on the use of derivatives by government business enterprises.

In response to the increased focus on derivatives by regulators, some industry participants — including the Australian Financial Markets Association and the Institute of Company Directors — are developing Codes of Conduct governing the use of derivatives.

Overall, regulators have continued to allow the prudent use of derivatives, whilst ensuring that disclosure regimes and risk management systems are enhanced. These changes will enable better evaluation by markets of risks of using derivatives. They will also reduce the risk of derivatives leading to failure of organisations or systemic failure of the financial system. However, the risk of financial losses from derivatives needs to be balanced against returns that can be derived from the prudent use of derivatives to reduce risks.

AUSTRAC

The Australian Transaction and Reports Analysis Centre (AUSTRAC) began operation in 1989. Its objective is to assist in the detection of tax evasion and criminal activity such as money laundering through the financial system. It receives reports on particular cash and other financial transactions, from cash dealers such as banks, credit unions, building societies, securities dealers and bookmakers. AUSTRAC analyses and disseminates this information to law enforcement agencies and the ATO.

In 1993, the Senate Standing Committee on Legal and Constitutional Affairs released a report into the operation and effectiveness of the Act underpinning AUSTRAC, *the Financial Transaction Reports Act 1988.* It found the Act to be cost effective. While it recognised that the legislation imposed considerable costs on cash dealers — the Australian Bankers Association presented evidence it cost its members $25 million in 1993 — the Committee felt such costs were offset by benefits such as increased tax revenue and information for law enforcement investigations.

On 12 July 1995, the Federal Justice Minister announced that the Government accepted most of the Inquiry's recommendations. Key decisions included a requirement that solicitors will report to AUSTRAC cash transactions over $10 000, whilst bullion dealers will also be required to identify customers to AUSTRAC. Furthermore, cash dealers will no longer have to adhere to mandatory minimum account opening procedures. Rather, they will have the discretion to depart from standard procedures where the circumstances so warrant.

2.3.2 Environmental regulation

The environment has been one of the key areas for expansion in regulation.

Environmental regulation has traditionally been the responsibility of a variety of agencies operating at the Local, State and Commonwealth level, as well as certain intergovernmental agencies. These include State and Commonwealth departments of the environment, specialised State pollution control bodies or environmental protection agencies, and intergovernmental Ministerial Councils such as the Australian and New Zealand Environment and Conservation Council (ANZECC). Certain environmental matters relating primarily to vehicle emissions are also determined by the National Road Transport Commission in consultation with environmental bodies.

Over the last year, arrangements for a National Environment Protection Council have been finalised. (See Appendix B.)

At the Commonwealth level, the EPA and/or the Department of the Environment have been involved in developing proposals or implementing changes in relation to the following areas:

- environmental impact assessment (EIA) policies and procedures;
- 'State of the Environment' reporting requirements;
- 'community right to know' legislation;
- national pollutant inventory;

- international trade in hazardous wastes; and
- hydrofluorocarbon reduction strategy.

Details of some of these areas are presented in Appendix B. In this section, two of these areas are described and commented upon.

Environmental impact assessment

In October 1993, the then Environment Minister announced a comprehensive public review of all aspects of the Commonwealth's EIA process. Following extensive consultation and several consultancy reports, the EPA released a discussion paper in November 1994 called *Public Review of Commonwealth Environment Impact Assessment Process*. While judging that the current EIA process has generally worked well to date, the paper states that "The review is being undertaken in recognition of the need for the environmental impact assessment process to evolve to reflect changing environmental imperatives and community and industry expectations." The paper presents a range of options and proposals for modifying the EIA process.

One of the paper's proposals was that the objective of EIA should be to protect the environment rather than, as it is at present, to ensure that Commonwealth decision makers have adequate information to enable them to take proper account of environmental factors. In advice to the EPA, the ORR argued that, similar to the role regulation impact statements (RISs) play in helping Government choose between regulatory options, EIAs should be an analytical tool or aid to good decision-making rather than locking in any specific outcomes. A second concern relates to a proposal in the paper to expand the jurisdiction of the Commonwealth EIA process. Aspects of the proposal relating to discretionary powers to require certain projects to be subject to a Commonwealth EIA could add unduly to business uncertainty. The ORR (1995d) commented:

> if the Commonwealth's jurisdiction were to expand, the EPA's favoured option would imply a high level of discretionary power which could create uncertainty as to when a Commonwealth EIA would be required. As the discussion paper points out, one of the greatest concerns of industry with EIA is the uncertainty generated by the assessment process. The ORR notes that the option of a designated list of developments reflects EPA's desire to provide more certainty as to when the Commonwealth EIA would be triggered. However, any increased certainty flowing from use of the designated list could be undermined if the discretionary power was employed too frequently.

If the Commonwealth Government judges that a discretionary power is required then, it would be likely to apply 'on rare occasions only'. As these are likely to involve sensitive issues, uncertainty may be reduced if the power to require an EIA were to reside with the Government as a whole rather than with the

Environment Minister. This could be done by requiring that a decision of Cabinet is needed if the Government wants an EIA to be carried out on a project not on the designated list.

Hazardous wastes

In 1993, Australia exported hazardous waste worth approximately $121 million for recycling or recovery operations to both OECD and non-OECD countries. More than 80% of this trade went to OECD countries.[14] In recent years, Australia has not exported any hazardous wastes for final disposal.

Since 1989 Australia has regulated the import and export of hazardous wastes under the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*. The implementing authority is the EPA.

Australia also has obligations regarding international trade in hazardous wastes under two international agreements. These are the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* and the OECD Council Decision C(92)39/FINAL.

The *Basel Convention* aims to minimise the generation and international trade of hazardous wastes. In particular, it aims to protect 'vulnerable' countries from unwanted hazardous wastes.

In March 1994, the Parties to the *Basel Convention* agreed to:

- prohibit immediately all exports of hazardous wastes from OECD countries which are destined for final disposal in non-OECD countries; and
- also phase out and prohibit, from 31 December 1997, all exports of hazardous wastes from OECD countries that are bound for recycling or recovery in non-OECD countries.

The OECD Council Decision deals with trade in hazardous wastes between OECD countries only.

Currently, the *Hazardous Waste Act* in Australia effectively only regulates trade in hazardous wastes that are regarded as worthless and therefore intended for disposal. However, the Basel Convention and OECD Council Decision affect trade in valuable hazardous wastes which can be recycled or recovered for other uses. To correct this inconsistency and to provide the industry with greater certainty, the Commonwealth Government agreed to amend the Act.

[14] The remainder of this trade went to some non-OECD countries. These countries were Indonesia, China, Korea, India, Malaysia and the Philippines. The exports comprised metalliferous materials, particularly lead acid batteries and by-products from the base metals industry.

A Draft Amendment Bill has been introduced into the 1995 winter session of Parliament. This Bill includes changes which:

- expand the scope of the Act to encompass Australia's obligations under the *Basel Convention* and the OECD Council Decision. These amendments will enable regulation of trade in hazardous wastes destined for recycling or recovery;
- make explicit in the Act Australia's policy of exporting hazardous wastes for final disposal only under exceptional circumstances;
- ensure company directors could be held accountable for their stewardship of hazardous wastes; and
- clarify the rights of environmental groups and others to challenge decisions made under the Act.

The amended Act will also establish an administrative process to give greater certainty to definitional issues such as what materials will be classified as hazardous wastes and what the *Convention's* 'environmentally sound management' of wastes means in practice. Consultation with industry and non-governmental organisations will continue as these arrangements are developed.

The proposed amendments do not implement a ban on exports of hazardous wastes for recycling or recovery from OECD to non-OECD countries. Proposals to incorporate the ban into the convention will be considered at a meeting of the Conference of the Parties on 18 to 22 September 1995. The Australian Government supports the general objective of amending the convention to provide better protection to countries vulnerable to 'unwanted' hazardous wastes. At the same time, the Government has concerns about the lack of certainty in the Basel Convention definitions, and could not ratify any amendment to the convention until it is clear which materials are covered by any ban.

2.3.3 Food safety regulation

Food standards

Responsibility for developing food regulation is split between government authorities at the Local, State/Territory and Commonwealth levels. The NFA, established in 1991 by agreement between the Commonwealth, State and Territory Governments, is responsible for developing food composition and labelling standards. The NFA has statutory independence and is obliged, in developing or varying regulations, to follow guidelines set out in Commonwealth legislation. State and Territory Governments retain responsibility for hygiene matters, packaging and other environmental legislation. In some cases State

regulations are augmented by specific Local Government by-laws relating to food premises.

With respect to the NFA, during its first three years of existence it has concentrated on processing a backlog of applications to vary food standards and completing a review of food policy as required by Cabinet.

More recent developments include:

- the commencement of a 'standard-by-standard' review of the entire Food Standards Code;
- the development of regulatory impact assessment procedures for NFA food standards;
- a review of the NFA's risk assessment and management procedures; and
- the commencement of negotiations with the States and Territories on the need for national coordination of food surveillance activities.

In commenting on these matters, the NFA stated:

> Over the past year, the NFA has developed and clarified its major priorities, improved its consultative arrangements with industry stakeholders and increased its role in developing alternative forms of regulation such as voluntary industry codes of practice.
>
> The review of the Food Standards Code has been identified as a key priority for the next two years. The review will be a major vehicle for the NFA to implement its revised regulatory arrangements. These revised arrangements start with a commitment to the use of voluntary industry codes of practice instead of prescriptive legislation wherever this is feasible. ...Already the NFA has developed two codes of practice: one for self-serve take-away salad bars and another for the use of nutrient claims on labels. It has worked closely with the smallgoods industry to develop a code of hygienic production for smallgoods, which although currently mandated by law, will become a voluntary code of practice as soon as the industry demonstrates an ability to voluntarily regulate these matters themselves.
>
> The NFA has also been working closely with the ORR to implement a formal system of regulatory impact assessment. These procedures involve identification of all stakeholder groups effected by regulation and some quantification (where possible) of the impacts on each of these groups. ...While the NFA is required by its legislation to consider the effects of its activities on industry and trade, a more formal process of evaluating impacts will improve its responsiveness to industry needs.

As well as these broad policy developments, there have also been five specific developments of note.

First, the NFA has released a proposal for national food hygiene regulations. According to the NFA (1994), its proposal '...would provide a systematic nationally uniform approach to ensuring that food is handled safely, place greater

responsibility on the food business and promote greater awareness of food hygiene issues.' The proposal centres around Food Safety Plans — plans developed by individual food businesses which relate specifically to the food safety risk areas in those businesses. national food hygiene regulations

This NFA proposal also marks an attempt to expand the extent of national uniformity of food regulation beyond food composition and labelling matters — the two areas initially agreed to as appropriate for nationally uniform regulation in the 1991 agreement that led to the establishment of the NFA. The National Food Standards Council (NFSC) — which is the Commonwealth, State and Territory Ministerial Council which deliberates on NFA proposals — recently gave in principle endorsement to nationally uniform hygiene regulations.

Second, following the Garibaldi salami incident in South Australia in which one child died and several others were struck seriously ill, the NFA in cooperation with State and Territory authorities and the smallgoods industry developed a *Code of Hygienic Production: Uncooked fermented comminuted meat products.* This Code is a development of the principles set out in the NFA's proposal for national food hygiene regulations (see above), applied specifically to these products. The Code was developed under the emergency provisions in the NFA Act.

Third, the NFA has developed a new proposal on the vitamin and mineral fortification of foods. Its initial proposal, which would have required the reformulation of several foods including some common breakfast cereals, attracted criticism from a number of sources (including the ORR). The proposal was not adopted by the NFSC. The NFA has developed a new and less contentious proposal which has been accepted by the NFSC.

Fourth, the NFA is re-examining the issue of food irradiation. Irradiation is a food processing treatment which can extend the shelf-life of food and destroy certain bacteriological contamination in food. However, some community interest groups have questioned its safety and argued that there is no consumer demand for irradiation. Consequently, there has been a moratorium on the use of irradiation since 1990. In its submission to the ORR's survey on safety regulation (ORR 1995a), the NFA stated:

> The case of irradiation is an example of a situation where a lack of community confidence led to a political solution being imposed— the moratorium on irradiation. This was despite the fact that National Health and Medical Research Council [the NFA's predecessor] had prepared a standard for irradiated food. There would appear to be general consensus amongst the scientific community that, by criteria applied to establish food additive safety, food irradiation is safe. Providing that irradiated food is so labelled, consumers can clearly make food choices about it and the market will respond. Nonetheless, there is likely to be considerable debate about technological justification, re-irradiation of spoilt food and other subjective quality issues before

NFA is able to propose to governments a draft standard which is politically acceptable.

The fifth development affecting the NFA has been the recent consideration of cost-recovery arrangements for certain NFA regulatory activities. In December 1994, the Government determined that the NFA should charge applicants ten per cent of the cost of processing applications to vary the Food Standards Code. More recently, however, the Government has announced that it will not require cost-recovery by the NFA. (See section 2.1.3.)

Enforcement of food safety regulations

While there has been significant scrutiny and reform at the national level of regulation-making arrangements for food safety, there has been less action regarding the 'enforcement' of food regulations. The Commonwealth Government has expanded the imported food inspection program and there has been some centralisation of enforcement tasks to AQIS. However, there has been no reform to mirror the changes in regulation-making arrangements which are the responsibility of the NFA.

There has been more scrutiny and/or change at the State and Territory level. For example, in NSW there has been a move away from centralised enforcement to a regional health unit structure, local government amalgamations in Victoria are causing changes there, the Queensland Department of Health has recently reviewed its food act, part of which deals with enforcement provisions, and aspects of the South Australian approach are being rethought. Not all of these changes have received universal approval from those involved in enforcing food laws and, in some cases, the changes have yet fully to work their way through the system.

Meanwhile, food inspectors at the local government level have been faced with fundamental pressures to modify their approaches to enforcement. Changes in institutional boundaries in some States, the reduction or abolition of prescriptive regulations in others, greater emphasis on self-regulation, industry competitiveness and quality management systems, changes in technology, and cut-backs in resources for enforcement in many areas, have necessitated greater sophistication in dealing with food safety issues or, at least, a refinement of traditional approaches.

As discussed above, the ORR is currently examining the enforcement of food regulation in Australia. While still at a preliminary stage, this work has revealed several problems/issues associated with current enforcement approaches.

First, there appear to be problems related to current institutional arrangements for enforcing food laws. The current arrangements are complex, vary from State to State, and in total involve over 600 agencies operating at all three levels of government. Combined with often inadequate coordination mechanisms,

particularly at the national level, the present arrangements cause inefficiency, duplication and uneven enforcement of provisions across jurisdictions. On this latter point, there have been cases where the decision to enforce a national regulations by one State, but not another, have resulted in a commercial disadvantage to firms in the first State.

Second, many enforcement agencies appear significantly under-resourced for the enforcement tasks they are assigned. As noted earlier, this problem is not unique to agencies dealing with food issues, and it is not clear that the enforcement of food laws should necessarily have first call on any additional governmental resources. Nevertheless, a lack of resources obviously limits the effectiveness of the agencies and has implications for the approaches they take.

Third, setting priorities by enforcement activities varies from agency to agency. The extent to which this is a problem is unclear. The variations are not always significant and, in the main, the agencies seek to set priorities for their efforts first and foremost on the basis of risk to public health. Nevertheless, the question arises as to whether the States and the NFA should seek to develop national priorities for some matters. There have been some moves in this direction and agreement has been reached between the NFA and the States and Territories to pursue this matter, but progress to date has been limited.

Fourth, there are gaps in the armouries of some agencies. For example, in some States there is no provision to levy on-the-spot fines. The penalties available for breaches of food regulations may warrant review. In some cases they appear to be unrelated to risk and may be too low to be an appropriate deterrent for some types of breaches.

Fifth, the question arises as to whether the strategies followed by the enforcement agencies are appropriate. For example, many food enforcement agencies see their 'core business' as responding to public complaints and dealing with specific breaches of regulations, with broader educative approaches aimed at influencing the overall 'culture of compliance' amongst business being relegated to optional extra status. The issue arises as to whether some rebalancing of enforcement practices would prove more effective in achieving the public health and safety objectives underlying food regulations.

Sixth, as alluded to above, there are problems with coordination between agencies. Amongst other things, this can result in duplication of enforcement activity. For example, in response to a recent ORR survey (ORR 1995e), the South Australian Health Commission stated:

> Apart from procedures for food recall, advice between States is informal. Because there is no official recording and access to information on an Australia wide basis (a National Database), it may take time to identify that a company is regularly in breach of standards. This is particularly important for breaches involving the sale of unfit food. This lack of interchange means that *duplication* of activity must take place if a State Authority is to be in a position to monitor standards within its own jurisdiction.

> If a State food authority could, for the purpose of reporting to its own administration, access a common database to show adequate monitoring and enforcement of food standards in the State where foods were produced, then there is scope to minimise duplication of work.

The NFA has responsibility under its Act for the national coordination of surveillance efforts. While it has yet to achieve tangible improvement in this area, the NFA has advised the ORR that it is in the process of developing explanatory memoranda and interpretation notes, is planning to bring together representatives from all levels of government responsible for enforcement to explore issues of communication, and is progressing towards the establishment of an Australian Food Standards Information Network database.

3 DEVELOPMENTS IN REGULATION REVIEW POLICIES AND PRACTICES

This chapter sketches some of the more important developments in policies and practices in regulation review. It covers national developments, those in the States and Territories, and touches on some issues recognised internationally as relevant to many different countries.

3.1 National/Commonwealth developments

National Competition Policy and regulation review

The report on *National Competition Policy* (Hilmer 1993) gave particular attention to the potential economic costs of regulation. It describes regulation by all levels of government as the greatest impediment to enhanced competition in many key sectors of the economy (Hilmer 1993, p. xxix), but recognises there may be a need for some government regulation when market failures occur.

Accordingly, the report recommended that:

- a central plank of national competition policy be the reform of regulation that unjustifiably restricts competition;
- any restriction on competition must be clearly demonstrated to be in the public interest.

All Australian governments have accepted these principles and at the April 1995 COAG (Council of Australian Governments) meeting they signed a Competition Principles Agreement, of which one element commits them to programs of legislation review. Specifically, each government is to develop (by June 1996) a program of review and is to reform (by the year 2000) all existing legislation which restricts competition. Reviews are to:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction; and

- consider alternative means for achieving the same result, including non-legislative approaches. (*Competition Policy Reform Act 1995,* Competitive Principles Agreement, clause 5 (9))

National standard setting principles

The past five years have seen the growth of national standard setting bodies. These bodies include the National Food Authority, National Registration Authority, and the national Environmental Protection Agency. Typically among other functions, these agencies develop proposals for standards to be considered by the relevant Ministerial Council. According to Gardner (1994), there are 43 Ministerial Councils with powers to make standards for products or services.

In its report to COAG in February 1994, the Committee on Regulatory Reform reported on key issues related to setting national standards, and agreed there was a need to develop a set of principles to be applied in setting standards to overcome problems such as inconsistency, excessive complexity and excessive costs for business.

At its April 1995 meeting, COAG agreed that all national standards which require agreement by Ministerial Councils or standard-setting bodies should be subject to a nationally consistent assessment process. The major element of this process is the completion of a regulatory impact assessment. The agreement documents the elements of what would constitute an adequate completion of the RIS process. The endorsed set of principles and guidelines to be used by national agencies when developing standards are at Appendix D. The principles are consistent with the Commonwealth's guidelines for preparing Regulation Impact Statements (RISs).

In addition to a description of the elements of an adequate RIS, the guidelines provide a set of broad principles which should be applied when standards and regulations are being developed. These include:

- minimising the side-effects of regulation;
- minimising any adverse impact on competition;
- ensuring that, wherever possible, standards are compatible with relevant international standards;
- not restricting international trade;
- regular review of regulation;
- flexibility of standards and regulations; and

- achieving an appropriate balance between limiting the exercise of administrative discretion and having a degree of flexibility.

The COAG endorsed document also directs Ministerial Councils and other regulatory bodies to take into account a number of objectives, including:

- to devise regulations which minimise the burden on the public while still meeting the objective;
- to devise compliance strategies which ensure the greatest degree of compliance at the lowest cost to all parties;
- to consider secondary effects;
- to ensure regulations focus on outcomes rather than inputs;
- to allow for the transition to compliance with new regulations;
- to advertise new regulatory measures; and
- to consult with the public while a draft RIS is being produced.

The ORR has a specific role in the national standards setting process and this is discussed further in Chapter 4.

Committee of Inquiry into Australia's Standards and Conformance Infrastructure

In June 1994, a three member Committee of Inquiry into Australia's Standards and Conformance Infrastructure commenced. Two elements prompted the Inquiry — concern about the impact of standards on industry competitiveness, and the dissatisfaction of many users with the standards and conformance infrastructure.

The Committee was supported by a secretariat provided by the Department of Industry, Science and Technology, and reported to the Minister for Small Business, Customs and Construction. It released a report entitled *Linking Industry Globally* on 16 March 1995.

The standards and conformance infrastructure comprises three components, measurement, standards and conformance. Measurement provides the foundation of a high quality standards and conformance infrastructure. Measurement has two key functions which are to establish and maintain physical standards of measurement and to provide for the uniform use of units of measurement where measurement is made for a legal purpose (defined as trade, taxation or regulation). Standards include regulations, specifications and procedural requirements. Conformance includes activities such as inspection, laboratory

testing, product and quality systems certification, and the process of accrediting bodies which carry out those testing and certification Activities.

The Inquiry dealt with a wide range of issues. Some of the principal areas of concern in the regulatory area were:

- confusion over the nature and purpose of voluntary and regulatory standards by the writers of standards and by users;
- the costs to small business of quality management systems (QMS) certification; and
- the need to secure greater acceptance by regulators of competitive, third party, certification arrangements.

The Committee made 60 recommendations aimed at refocussing and enhancing the performance of the infrastructure. Some of the recommendations relating to regulatory issues are outlined below.

The Committee considered that the role of government should be to ensure that the system is functional, efficient and has strategic direction. In a complex framework of Commonwealth, State and Territory governments, the mechanisms to coordinate the needs of business, consumers, regulators and science are diverse and difficult. The Committee saw that there was a demonstrated requirement for coherence and strategic direction at all levels.

Standards

Commonwealth, State and Territory governments have recognised the importance of reviewing the burden of regulation, including regulatory standards, on industry. These developments may not, however, resolve some of the problems specific to regulatory standards. Hence a proposal to establish guidelines for national standard setting has been prepared for consideration at the next COAG meeting. The Committee commended the COAG endorsed principles and guidelines for national standards (see above), and supported their acceptance by Commonwealth, State and Territory governments for application to new standards.

The Committee was opposed to the practice of regulators adopting voluntary standards. While acknowledging that the practice was faster and less costly than developing new standards, the Committee was concerned that voluntary standards are often very prescriptive, and tend to cover aspects which it is not appropriate to regulate. Such standards can also act as a barrier to new entrants to the industry.

The Committee believed that regulatory standards need to be written for the purpose at hand. Regulators should either develop their own standards or use bodies such as Standards Australia to do so for them.

Conformance

Regulators normally require conformance to be demonstrated prior to products being placed on the market. Conformity assessment contributes directly to the cost of compliance with regulatory standards — these costs of compliance are multiplied when variations exist between States and Territories.

The Committee noted several initiatives which would improve the efficiency of regulatory conformance arrangements by increasing transparency and scrutiny. Additional benefits could accrue from developing principles against which regulatory conformance systems can be assessed. The Committee suggested:

- the level of compliance required should be commensurate with the risk associated with non-compliance;
- options should be available for demonstrating compliance;
- competitive third party testing and certification should be used wherever possible; and
- conformity assessment arrangements must not erect barriers to trade.

Legislative Instruments Bill

The Legislative Instruments Bill 1994 (the Bill), creates a new regime governing standards and procedures for the making, publication and scrutiny of delegated legislation. (Chapter One detailed the substantial rise in the use of delegated legislation.) The Bill is expected to commence on 1 January 1996 but has not yet passed through Parliament and so may be subject to amendment.

The Bill is the Government's response to the Administrative Review Council's 1992 report *Review Making by Commonwealth Agencies*. It responds to concerns raised by a variety of business and other groups, including the Industry Commission, over perceived weaknesses in the formulation of Commonwealth delegated legislation. It introduces procedures for the development, drafting and recording of subordinate instruments similar to those in the *Subordinate Legislation Acts* of Victoria, New South Wales, and Tasmania.

Section 4 of the Bill defines a legislative instrument as an instrument in writing:

> (a) that is or was made in the exercise of a power delegated by the Parliament; and

(b) that determines the law or alters the content of the law, rather than stating how the law applies in a particular case; and

(c) that has the direct or indirect effect of imposing an obligation, creating a right, or varying or removing an obligation or right; and

(d) that is binding in its application.

A register of legislative instruments

The Bill provides for the establishment of a publicly accessible electronic Register of legislative instruments (the Federal Register of Legislative Instruments) to be maintained by a nominated official of the Attorney-General's Department (the Principal Legislative Counsel). A legislative instrument made after the commencement of the Act must be registered to be enforceable. The Bill also establishes a timetable for existing instruments to be registered, and if an instrument is not registered by the due date, it will become unenforceable. According to this timetable, all instruments in force will be on the Register by 1 March 1998.

The Principal Legislative Counsel has responsibility to ensure that delegated legislation is appropriate and of high quality. In doing so it is expected that there would be consultation with other government bodies, including the ORR, as required.

Consultation on new or amended legislative instruments

An important aspect of the legislation in relation to improving the quality of legislative instruments is a new process of consultation for instruments affecting business. The Government first announced an intention to improve the processes of regulation making and its effect on business in *Working Nation* in May 1994.

Government agencies proposing such regulations must give notice of the proposal to representative groups or if none exist, issue a public notice. The rulemaker must prepare and make available a 'Legislative Instruments Proposal' which sets out the reasons for the instrument, its costs and benefits, and an assessment of any alternative ways of achieving the objectives of the instrument.

The new consultation process will ensure that groups affected by legislation are given the opportunity to propose alternative or more efficient ways in which the objectives of the regulation can be achieved.

The Bill provides that an explanatory statement setting down a number of matters, including the purpose and operation of the instrument, must be provided by the rule maker at the time of lodging the instrument for registration (Section 32).

The ORR has a significant role under the Bill which is discussed in Chapter Four.

Parliamentary Scrutiny of Legislative Instruments

The Bill introduces a new regime for the Parliamentary scrutiny and disallowance of legislative instruments. The Bill will re-enact the provisions of *Acts Interpretation Act 1901* which deal with disallowance and will amend the *Acts Interpretation Act* to provide for disallowance of non-legislative instruments. The Bill provides that after a legislative instrument has been registered, a copy must be tabled in each House of the Parliament within six sitting days, together with an explanatory statement (if required) and any other material required by section 32. The Bill also introduces a new mechanism for deferred disallowance of a legislative instrument.

Trans-Tasman mutual recognition (TTMR)

An Australian national scheme for mutual recognition of goods and occupations commenced in March 1993 (IC 1994b, p. 223). It ensures that most goods initially produced or imported into one State or Territory under the laws of that jurisdiction can be sold freely throughout the country. In addition, members of regulated occupations can now enter an equivalent occupation in other States or Territories. It is bringing substantial benefits in terms of freer movement of goods across interstate borders and increased ease of interstate trade. Movement of labour between jurisdictions has also been made easier.

COAG and the Government of New Zealand have released a discussion paper proposing that New Zealand be incorporated into the existing mutual recognition agreement. A TTMR agreement would increase the coverage of the existing agreement by about 20 per cent in terms of population.

Under the suggested timetable for TTMR, the agreement would take effect on 1 July 1996. A one year delay can be sought to allow preparation for mutual recognition, such as harmonisation of standards that require consistency before mutual recognition takes effect. The proposal explicitly allows for harmonisation of standards in respect of certain goods with potentially significant implications for health and safety. These include food, agriculture and veterinary chemicals, and for plant and equipment such as pressure vessels.

The experience with mutual recognition in Australia is that it has provided a spur to harmonisation of standards where this has been necessary. It is likely that such will also occur in the case of TTMR. However, the discussion paper foreshadows that some harmonisation proposals will take significantly longer than the TTMR timetable and will require further exemption. While this may be justified for some products with significant health implications, it has the potential to delay the benefits of TTMR in some areas for years.

This is primarily a concern in the food area, which is a major component of trans-Tasman trade and an area where differing standards are known to be causing problems. However, as the majority of food standards are not directed at health and safety, it would seem appropriate to subject most standards to mutual recognition, with harmonisation only occurring where a uniform standard is necessary for health and safety reasons.

3.2 State and Territory developments

The Commonwealth and most States and Territories have in place regulation review policies. While the commencement dates of such activities differ, as do the levels of activity and success, some regulatory review elements are common to most States and Territories. These include:

- the existence of a regulatory review unit; and
- a subordinate legislation act which often prescribes a requirement for regulatory proposals to be accompanied by a RIS and/or for the staged repeal or review of regulations.

Table 3.1 summarises the regulation review mechanisms in place in each State and Territory. Appendix E provides more detail on these mechanisms as well as a brief summary of recent activities and prospective activities for each State and Territory.

All States and Territories have established some form of regulatory review unit (see Table 3.1). Some of these units, such as those in New South Wales and South Australia are established within the central Department of Premier and Cabinet, others are established within the Department of Treasury or industry departments. These units co-ordinate regulation review activities within each jurisdiction and advise, educate and train officials from departments and agencies on regulatory matters and techniques. This often involves producing guidelines and manuals to assist in preparing a RIS for new regulations or when reviewing existing regulations. The regulation review units also act as principal points of contact for business and the general public on regulatory matters.

Table 3.1: State and Territory regulation review mechanisms

State/Territory	*Regulation review unit*	*Subordinate Legislation Act*	*RIS or cost benefit analysis*	*Staged repeal*
NSW	✓	✓	✓	✓
VIC	✓	✓	✓	✓
QLD	✓	✓	✓	✓
WA	☑		✓	✓
SA	✓	✓	✓	✓
TAS	✓	✓	✓	✓
NT	☑			
AC	✓		✓	

☑ Western Australia and the Northern Territory do not have formal regulation review units as exist in the other States and Territories. However, regulatory review functions are largely undertaken by the Ministry of Premier and Cabinet and the Small Business Development Corporation in WA, and the Department of Asian Relations, Trade and Industry in NT.

Most States and Territories have in place a subordinate legislation act that requires a RIS to be prepared for regulatory proposals.

A RIS generally has several components. First, it must include a clear statement of the objectives of the regulation. Second, alternative approaches for dealing with the perceived problem must be identified and assessed. Third, the expected benefits and costs to the community of regulating must be assessed. This 'cost benefit analysis' (CBA) must be comprehensive and consider the impact of the regulatory proposal on business, consumers, government and the community as a whole. Typically the RIS process requires that the regulatory option selected is one that maximises the community's net benefit on the basis of the cost-benefit analysis undertaken.

A RIS is generally checked by the regulation review unit or, as in Victoria, may be checked by another independent entity to certify that it has been adequately prepared. The RIS process also requires that the Department/agency proposing a regulation consult with interested groups on the proposal and its alternatives.

Another key feature of most State/Territory review mechanisms is 'staged repeal'. Staged repeal establishes a timetable for the repeal of the existing stock of regulations and also requires new regulations to be automatically reviewed and repealed once a given amount of time, typically, ten years, has passed. The objective of staged repeal is to have regulations reviewed to judge their efficacy and need once they have been in place for some time. This allows regulations to

be assessed and re-made if necessary or allowed to expire if they are no longer needed.

As well as performing functions related to the operation of subordinate legislation acts, most State/Territory regulation review units are involved in co-ordinating or conducting reviews of particular sets of regulations. In some cases these reviews have been done on a sectoral basis, such as the review of regulations affecting butcher shops (QLD), the motor trades industry (SA), the legal profession (VIC) and regulation of real estate, travel and other agents (ACT). In other cases, reviews have been broader in scope. Examples include business licence reviews and simplification programs in Victoria and Tasmania, or the comprehensive review of legislation and regulation affecting business undertaken in Queensland.

In addition to the activities described above, most State and Territory units are involved in activities to harmonise regulations across Commonwealth and State/Territory jurisdictions. This involves being a member of, or contributing to, national fora concerned with regulatory issues such as the Commonwealth/State Committee on Regulatory Reform which reports to COAG. This Committee has worked on harmonisation issues such as; extending mutual recognition arrangements to New Zealand; the review of partially registered occupations; and guidelines for national standards setting by Ministerial Councils.

In the near future State/Territory review units will also be involved, to differing degrees, in implementing the legislation review principles of the Competition Principles Agreement (see Section 3.1) made earlier this year. This will require the review of all existing regulation for anti-competitive effects and its reform (where necessary).

3.3 International developments

It is useful to compare the national and State developments described in Sections 3.1 and 3.2 with what is happening on the regulatory front in other countries.

Most developed nations have begun to seek increased quality in regulations and to harmonise them with other policies and other countries (OECD 1992). Complex regulatory regimes are used to serve and balance the social and economic goals of societies, but many countries are dissatisfied with their quality, effectiveness and cost. Faced with a more integrated world economy, environmental concerns, consumer interests (particularly in the area of health and safety), more accessible processes for regulation decision-making, and with the

growing recognition of the costs of regulation, governments have been questioning longstanding regulatory traditions.

The 1980s saw OECD member country initiatives aimed at improving the regulatory environment. Although each country responded in its own way, two broad approaches emerged. One focussed on outcomes and efficiency, looking at the economy-wide implications of regulations, and involved deregulation and rationalisation. The other took a process and legal approach, paying specific attention to technical detail, simplification and accountability.[1] Australia, along with the US, UK and Canada, took the former approach, while a number of countries, including France, Germany and the Netherlands, took the latter.

One important common outcome, for most countries, was the establishment or increased role of centralised regulation review bodies. These bodies can have a number of purposes including improving consistency with other policies, improving information flows to executive government, giving policy advice to regulators, and carrying out governments' regulatory reforms (OECD 1992).

General developments

Regulatory developments, which are closely related to institutional and political structures, can differ markedly between countries. (Appendix A provides outlines for a few selected countries — the US, UK, Canada and Japan.) Yet it is possible to discern some broad themes.

International developments include the establishment of oversight mechanisms to provide day-to-day review of individual regulations (preferably at the early stages of regulation development) and general monitoring of regulatory activity. Some countries have also developed independent advisory commissions to review proposals, collect information and hold public hearings. As well, some have implemented systems for registering existing regulations and planning new ones, useful for identifying and co-ordinating regulations as well as for increasing transparency (SIGMA 1994, p. 20).

Several countries conduct systematic reviews of existing regulation on a rolling basis, conducted by the ministries responsible and forwarded to a central authority; some allow for public input to ensure that the public's experience with regulations is taken into account.

Another development has been the more widespread use of cost benefit or similar analysis in the regulation making process. Some countries, including the US and

[1] There is, however, often overlap in the objectives of both approaches. For example, increased transparency is an objective of both approaches because it improves both accountability and efficiency.

Canada, have made it a matter of law or policy that regulatory proposals can only be accepted if the benefits exceed the costs. Other countries, including Australia, use cost benefit techniques as a decision making tool, whilst others, including the UK, focus on costs.

Common developments that are more specific in nature include:

- setting clear limits of authority on subordinate regulators in some countries;
- developing regulatory budgets;[2]
- providing more information about regulations to elected officials;
- improving techniques for reviewing regulations;
- focusing more on outputs and not inputs in the regulatory process;
- introducing sunset clauses in new regulations;
- regulatory flexibility legislation, which allows those being regulated to meet regulatory objectives in alternative ways by developing their own compliance plan;[3]
- some countries, particularly UK and Germany, are examining both the regulatory approaches that correct market failures, and the advantages of correcting or supporting markets rather than replacing them with regulations; and
- information solutions (that use economic forces to change behaviour, such as labelling) and voluntary regulatory measures (in areas such as consumer safety) are being considered.

OECD developments

The OECD, through its Public Management Service (PUMA), is currently engaged in a program on regulatory management and reform.[4] The OECD aims to increase awareness of regulatory developments in member countries and encourage information transfer.

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2 Where each regulator is allocated a given 'regulatory cost' which they must not exceed.

3 See Canada p. 82.

4 SIGMA (Support for Improvement in Governance and Management in Central and Eastern Europe) is also working on how the regulatory process can be improved, through procedural and institutional change, as part of its mission to support the development of efficient and effective public institutions in participant countries including Bulgaria, Czech Republic, Hungry, Poland, Romania, the Slovak Republic, Albania, Estonia, Latvia, Lithuania and Slovenia.

A recent achievement stemming from that work is that on the 9 March 1995 the Council of the OECD adopted a *Recommendation on Improving the Quality of Government Regulation*, the first international standard on regulatory quality. The recommendation encourages member countries to review their political and administrative processes for developing, implementing and revising regulations. A crucial part of the Recommendation is the OECD Reference checklist for regulatory decision making which contains ten questions, reflecting principles of good decision making, that should be asked when developing regulations (see Box 3.1).

This checklist is an important and positive development. However, the OECD has noted that checklists alone are insufficient and that some member states have experienced resistance from regulators. This indicates that, if checklists are to work, governments must 'develop systematically-organised procedures, *with sustained political support at the highest level*' (italics in original) (OECD 1995, p. 7), such as establishing central oversight bodies or independent regulatory review processes, and disclosing responses to affected parties.

Box 3.1: OECD Reference checklist for regulatory decision-making

Question No. 1: ***Is the problem correctly defined?***
— nature, magnitude and why it has arisen.

Question No. 2: ***Is government action justified?***
— benefits and costs of action (based on realistic assessment of government effectiveness), alternative mechanisms, whether due to previous regulation, and establishment of periodic review.

Question No. 3: ***Is regulation the best form of government action?***
— can and should choose from variety of regulatory (including performance regulation), and non-regulatory instruments (such as economic instruments[5], voluntary agreements, information disclosure, and persuasion).

Question No. 4: ***Is there a legal basis for regulation?***
— valid legal authority, compatible with existing legislation, including international norms or agreements, and compliant with obligatory legal principles such as certainty, proportionality and equity before the law (and country specific obligations).

5 Including taxes, charges and tradeable permits.

Question No. 5: ***What is the appropriate level (or levels) of government to take action?***

— does the problem cross jurisdictional boundaries (that is, are there any positive or negative externalities), are there economies of scale, are there sufficient institutional capabilities at various levels of administration, will harmonisation remove regulatory barriers to trade, and should harmonisation override local characteristics? The role of co-operation.

Question No. 6: ***Do the benefits of regulation justify the costs?***

— total costs and benefits, including to business, citizens and administrations, of regulations and feasible alternatives, including sub-element analysis for major regulations, all subject to quality review, and improved centralised review (regard given to resources involved in this process with regulations with potentially large impacts justifying considerable analysis; qualitative assessments may otherwise suffice).

Question No. 7: ***Is the distribution of effects across society transparent?***

— awareness of distribution of costs and benefits.

Question No. 8: ***Is the regulation clear, consistent, comprehensive, and accessible to users?***

— clear, precise, consistent language and format, adequate definitions and logical sequence, plus strategies for distributing information.

Question No. 9: ***Have all interested parties had the opportunity to present their views?***

— open and transparent development with public consultation.

Question No. 10: ***How will compliance be achieved?***

— strategies, often multi-faceted, such as education, assistance, persuasion, promotion, economic incentives, monitoring (possibly empowering third parties), enforcement and sanctions, responsive to various and changing conditions and new information, and continually evaluated and improved.

It is encouraging to observe that the OECD checklist is very similar in its scope and intention to the various principles for good regulation making that are in use throughout Australia, including the requirements that should be met by regulatory agencies when they prepare Regulatory Impact Statements.

Regulatory reform has been given further prominence by a Ministerial Council meeting of the OECD in May 1995. At the meeting Ministers agreed to, among other things, cooperate to promote domestic regulatory reform, particularly when it leads to the further liberalisation of trade and investment flows, and improve the transparency of government regulations.

Ministers also invited the OECD to examine the significance, direction and means of reforming regulatory regimes. In this regard, two projects are to be undertaken by the OECD, in collaboration with member countries. The first is to develop a set of regulatory indicators which will assist countries to gauge their comparative standing on aspects of regulation (Australia, through the ORR, has agreed to be involved in this process). The second is to implement a regular reporting system whereby countries' regulation making and regulation review systems are assessed against the OECD reference check list.

Concerns persist

While such developments are all heading in the right direction of achieving better quality regulatory outcomes, some major concerns persist in many nations, particularly over the structure and organisation of the regulatory environment (OECD 1992), and over the pace of reforms.

One issue that all nations must come to terms with, is the growing exposure of most 'domestic' activities to developments beyond a country's borders. The assumption of national sovereignty is being challenged by the growing interdependence of nations along with the realisation that some problems, such as environmental problems, require integrated global solutions. This has implications for regulation making:

> ...traditional government structures appropriate for stable conditions and well defined problems inside impermeable borders are increasingly ill-suited to economic and social conditions characterised by interaction, complexity, diversity and innovation. Much of the impulse underlying economic privatisation and deregulation, for example, has been a recognition that new technologies and opening world markets have invalidated old assumptions about the need for and benefits of certain varieties of government intervention. Hence, along with private enterprise, regulatory organisations also face a period of structural adjustment. (OECD 1994a).

This reality is the impetus for some countries to reassess the way they formulate and review regulations.

The better organisation of regulatory structures is also needed so that domestic regulations are complementary and do not undermine each other. In many countries there is an obvious need to rationalise multi-layered regulatory systems.

Efforts continue in mutually recognising[6] and/or harmonising regulatory activities within and across nation states.

However, reform is slow and faces many challenges, including the *structural adjustments of governments.* Numerous institutions and personnel in the legislative, executive and judiciary are dedicated solely to writing, interpreting, enforcing and judging traditional styles of regulation. According to the OECD (1992, p. 9) this has often resulted in inertia and rigidity, blocking the path to reform.

Other international concerns which are more specific in nature include:

- improving management and accountability of regulators, while at the same time balancing independence;
- measuring regulatory activity;
- combating the influence of powerful interest groups — some OECD countries have addressed this problem by increasing transparency and the flow of information to counter-balance the efforts of interest groups;
- better communicating regulatory policies, and their costs and benefits to the public, and the role innovative solutions could play; and
- overcoming the lack of analytical criteria or guidelines for decision making in some countries and in certain fields of regulation, such that regulators are guided only by ideas of 'practicality and excessive cost that are not applied in a consistent or informed manner' (OECD 1992, p. 22).

[6] Mutual recognition can often provide better results than harmonisation due to the frequent time delays in harmonisation and the loss of regulatory competition which encourages experimentation and innovation. Mutual recognition allows participating governments to develop their own regulatory details or requirements, as long as they meet the same goal of regulation, and therefore governments face direct incentives to produce the most cost efficient solution, be it a regulation or alternative mechanism — further it gives consumers the greater choice that derives from the differences between countries. One example is the European Communities harmonisation of technical specifications for single products or groups of products (pre-1985) where it took 15 years to pass a single directive on gas containers made of unalloyed steel (OECD 1994, p166).

4 OPERATIONS OF THE OFFICE OF REGULATION REVIEW

The ORR — operating within the Industry Commission since 1989 — has administrative and advisory functions, specified by Cabinet, relating to the review of regulation. These include functions internal to government, such as vetting Regulation Impact Statements and advising Cabinet of the merits of particular regulations, and functions external to government such as commenting publicly on certain regulatory matters.

This chapter describes the work of the ORR, and outlines key features of its expanding role. They include:

- the ORR's role with the Council on Business Regulation to advise on regulatory issues;
- provision of advice to Commonwealth agencies on their programs of review of existing legislation;
- provision of advice to Ministerial Councils on regulation impact statements; and
- assistance to agencies to ensure they meet the requirements of Cabinet and of the Legislative Instruments Bill for regulation impact statements.

4.1 Council on Business Regulation

The Council on Business Regulation has been formed as part of the Commonwealth Government's renewed commitment to regulation review, which was announced in the *Working Nation* statement.

The principal purpose of the Council is to make recommendations through Ministers to the Structural Adjustment and Trade Committee of Cabinet (SATC), on matters relating to business regulation. It will identify areas of government regulation which it considers to have unclear objectives and/or are not achieving their stated objectives; are detrimental to competitiveness and efficiency; or impose costs on business which are not justified when compared with the benefits accruing to the Australian community.

The Council will assist the Commonwealth to comply with its obligations under the Competition Principles Agreement — the development by June 1996 of a timetable for legislative review and, where appropriate, reform by the year 2000 of all legislation that restricts competition. The Council's advice may include priorities for review of these regulations, and the amendment or repeal of specific

regulations. Recognising that this is only one of a number of government-business consultative processes, the Council will not examine taxation or industrial relations issues.

The ORR will provide secretariat services to the Council.

While the Council is to address Commonwealth regulation, in some cases the impact of State regulation on business will be considered. In these cases, the Council (through its Chair) will advise regulation review units in the relevant State and the Assistant Treasurer, who may choose appropriate action.

4.2 ORR's role in vetting regulations and in advising on regulatory review

The ORR has three functions in relation to the vetting of new regulation. Firstly, the ORR can advise departments and agencies on the application of effective review criteria. Secondly, it monitors the use of guidelines for regulation review and, thirdly, it reports on the level of compliance with their application.

Table 4.1: regulatory forms, review processes and guidelines

Form of regulation	*Review Process*	*Available Principles/Guides*
Existing primary legislation	Portfolios to bring forward systematic review program to Cabinet	*Competition Principles Agreement (Legislative Review Principles)*
New or amended business legislation	RIS Statement provided as an attachment to the Cabinet submission	*RIS Guidelines*
Subordinate (legislative) instruments	Preparation of Legislative Instruments Proposal (LIP)	*Legislative Instruments Handbook (administered by the Attorney-General's Department)*
National standards	A regulatory impact assessment must be prepared, and vetted by the ORR before it is certified by the relevant Ministerial Council or standard setting body	*COAG Guidelines on National Standard Setting*

Guidelines for regulators have been established in order to ensure a consistent approach in developing or reviewing different types of regulation. There are four sets of guidelines, each based on the same broad principles and written with the goal of achieving minimum effective regulations, depending on the form of the

regulation. The regulatory forms, review process and guidelines are summarised in Table 4.1.

ORR's role in advising on the applicability and practical application of the four sets of guidelines is discussed below.

Existing legislation

As announced in the *Working Nation* statement, all Commonwealth departments and agencies are to undertake a systematic review by the year 2000 of existing regulation affecting business.

The quality of the assessments must comply with the criteria agreed by Heads of Government at their April 1995 meeting and set out in the *Competition Principles Agreement.* (The Council on Business Regulation will also convey to the government their priorities as to what regulation should be reviewed.)

RIS Guidelines

From 1986 the Government has required the ORR (previously the Business Regulation Review Unit) to advise portfolio departments on the review of new or amended business regulation. When a department or agency proposes to introduce such regulation, the Cabinet Handbook requires that the proposal be referred to the ORR at the earliest opportunity, whether or not it is intended to be considered by Cabinet (Cabinet Office 1994, pp 28-29).

Where a proposal has been developed for Cabinet endorsement, the submission must be accompanied by either a Regulation Impact Statement (RIS), in the form of an attachment to the Cabinet submission containing the proposal, or a statement that a waiver to this requirement has been given by the ORR. The Cabinet Office may reject a submission that has not observed these procedures.

The preparation of a RIS means that the department or agency proposing new regulation is required to:

- identify an economic or social problem which the regulation addresses;
- specify the objectives of the regulation;
- identify the likely costs and benefits of the proposal;
- compare it with alternative measures for addressing the problem and an assessment of those measures; and
- where appropriate, follow a public consultation process. If a public consultation process is not considered appropriate, a statement to this effect, and the reasons for it, should be included in the RIS.

To assist departments and agencies to prepare new business regulation and to comply with the Cabinet procedures for preparing business regulation, the ORR administers a set of *Guidelines for Regulation Impact Statements* setting out the necessary information and methodology in the preparation of a RIS. These Guidelines may be supplemented by the use of a practical RIS Handbook also available from the ORR.

Copies of completed RISs should be provided to the ORR. Contact details are as provided at the front of this publication.

Legislative Instruments Bill

The provisions of the *Legislative Instruments Bill, 1994* are discussed elsewhere in this document (see Section 3.1). Amongst other things the Bill provides for a new process of consultation for new and amended legislative instruments which affect business.

Government agencies proposing such regulations must invite submissions concerning the instrument from representative groups, or if none exist, by public notice, and prepare and make available to representative groups a 'Legislative Instruments Proposal' (LIP), which sets out the need for the regulation, its costs and benefits, and an assessment of any alternative ways of achieving the objectives of the regulation. (If a rule maker seeks an exemption from the prescribed consultation process on the basis that the proposed regulation does not significantly affect business, the rule maker must consult with the ORR.)

A LIP should contain details similar to those provided in a RIS as required for new and amended legislation and regulation which affects business, or in an impact statement for new national standards established by Ministerial Councils of Commonwealth and State Ministers.

In each case there must be a statement of the need for the regulation, its costs and benefits to the Government, and to the affected public of the proposal, and alternative ways, if any, of achieving the proposed objective.

However, it should be noted that in the preparation of a LIP only a broad indication of costs and benefits is necessary; while in relation to RISs for new national standards or business regulation, costs, benefits and alternatives must be quantified wherever possible.

The ORR is able to provide technical assistance on appropriate principles and processes for regulation making. Departments and agencies will find the ORR's RIS Guidelines instructive when preparing LIPs because of the similar processes involved.

A Legislative Instruments Handbook is being prepared by the Attorney-General's Department to assist departments and agencies that are developing these instruments.

National Standard Setting Procedures And Review

As discussed in Chapter 3, Heads of Government agreed in April 1995 to new procedures for the setting of national standards. At that meeting a set of guidelines to assist in understanding and applying the new processes was also released. The guidelines, *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies*, is reproduced at Appendix D.

The Guidelines specify that all national standards which require agreement by Ministerial Councils or national standard setting bodies must be subject to a nationally consistent minimum assessment process consisting of the preparation of a Regulatory Impact Statement.

The purpose of the new processes is to achieve minimum necessary standards, taking into account economic, environmental, health and safety concerns.

The ORR has a role in the oversight of these processes and should be provided with copies of impact statements. The ORR will examine the statements and provide advice to the relevant Ministerial Council on:

- whether the assessment process satisfies the COAG *Principles and Guidelines* document in that an effective risk or other analysis has been conducted that justifies the proposed regulation or changes to regulation; and/or
- technical and other advice on regulation setting issues to assist in improving quality and consistency in the development of standards.

The ORR may also ask for expert advice on these matters from other specialist bodies in the public or private sector, and as necessary will consult State and Territory regulatory units. In some cases the ORR may consider that the assessment of a draft RIS should be more appropriately conducted by a State or Territory regulatory unit. The closer relations between the ORR and those other regulation units in recent times through joint information forums and seminars will facilitate this co-operative approach.

After the ORR has provided its advice, it is then up to the relevant Ministerial Council or national regulatory body to make whatever changes to the development procedures it feels appropriate.

Copies of RISs as agreed formally by Ministerial Councils should be provided to the ORR as soon as possible. The RIS will then be maintained on a Register set up for that purpose and held in the ORR. Other standard setting bodies, or agencies, will be able to peruse this Register and obtain copies of RISs for their

own purposes unless the documents have been classified commercial-in-confidence.

As set down in the COAG guidelines, the ORR will report to COAG's Committee on Regulatory Reform annually on the number and quality of completed RISs and ask the Committee to raise any particular concerns with Heads of Government through meetings of senior officials.

An analysis by the ORR of different aspects of national standard setting, including issues of compliance with the COAG guidelines and the quality of new regulations, will be published regularly by the ORR.

Training and Advice

Information and training sessions on the use of the ORR's RIS Guidelines and RIS Handbook are available on request to the ORR. These sessions will be of value to regulators, rule makers and others involved in the making of regulation of any form.

4.3 Recent ORR output and activities

The following description is not comprehensive but rather representative of the range of work done by the ORR.

submissions on regulatory topics

Amongst other things, the ORR is required to provide public advice on proposals for new and amended regulation, and to comment on overall regulatory trends. This also provides an opportunity to inform more people about the elements of, and the framework underlying, effective regulation making. Over the past year, the ORR has commented on a wide range of regulatory issues. See the Box 4.1 for the list and Appendix F for a summary of their contents.

The ORR also worked with and provided advice to departments on a less formal basis.

Box 4.1: ORR Submissions on Regulatory Issues

- ***The migration agents registration scheme: effects and improvements*, August 1994, Submission to Joint Standing Committee on Migration.**
- ***Country of origin labelling of food*, October 1994, Submission to the National Food Authority**
- ***Compliance with the Road Transport Law*, December 1994, Submission to the National Road Transport Authority**
- ***Broadband cable access regime*, January 1995, Submission to Dept of Communications and the Arts**
- ***Pre-merger notification and the Trade Practices Act 1974*, February 1995, Submission to Treasury**
- ***Australia's visa system for visitors*, February 1995, Submission made to the Joint Standing Committee on Migration**
- ***Competitive Safeguards in Telecommunications*, February 1995, Submission to Telecommunications Policy Review**
- ***Competition and Retail banking*, March 1995, Submission to Prices Surveillance Authority**
- ***The use of cost litigation rules to improve the efficiency of the legal system*, March 1995. Submission to the Australian Law Reform Commission**
- ***Submissions to the Corporations Law Simplification taskforce*, various, Feb—March 1995, submissions to the task force located in the Attorney-General's Department**
- ***Environmental Impact Assessment*, April 1995, Comments to Environmental Protection Agency on its EIA discussion paper**
- ***Review of licensing regime for securities advisers*, April 1995, Submission to the Australian Securities Commission**
- ***Regulation and the direct marketing industry*, May 1995, Submission to a working group of the Ministerial Council on Consumer Affairs**

contributions to the Industry Commission's work

The ORR's public information role is to some extent subsumed within that of the Industry Commission. In particular, the ORR has provided input into Commission inquiries and information papers in the areas of business law, administrative regulation of government business enterprises, and certain areas of social regulation. And the ORR contributed to a number of Commission

documents, such as the report on the growth and revenue implications of Hilmer and related reforms (IC 1992) and *What future for price surveillance?* (IC 1994).

collaboration with the States

Collaboration with the States has been growing, with regular meetings of regulatory review officials and some cooperative efforts, such as the co-hosting (with the NSW Cabinet Office and the New Zealand Ministry of Commerce) of the Conference, titled: *From Red Tape to Results: International Perspectives on Regulatory Reforms.* The Commonwealth ORR has acted as an independent certifying body for RISs prepared for Victorian State regulatory proposals.

presentations at other regulatory seminars

Whenever resources permit, the ORR contributes to seminars dealing with regulatory issues. For example, one staff member presented a paper titled: *Government-wide regulatory reform strategies in Australia* at the *Red Tape* conference and another recently gave a paper: *Safety Regulation by national and Commonwealth agencies: the State Of Play* at a conference — *Risk, Regulation and Responsibility.*

APPENDIX A: REGULATORY REVIEW IN SELECTED OECD COUNTRIES

United States

Background

The United States was one of the first countries to establish formal review processes, with cost benefit analysis, for example, being required since 1981. Public notice and consultation has been required since the Administrative Procedure Act of 1946.

The late 1970s and early 1980s saw a substantial move towards deregulation and supply-side policies, and with it further changes in the regulation making and reviewing process. However, after cost benefit analysis was required in 1981, little further progress was made in rationalising the costs of regulation until 1988 (OECD 1988/89). Since then a number of initiatives have been taken, most recently Executive Order 12866 which, among other things, focuses centralised review on 'significant' regulatory actions rather than all regulatory actions.

Further, in February 1995 the President ordered federal regulatory agencies to review their existing regulations to identify requirements which could be removed, and in May 1995 the Paper Reduction Act (1980) was revitalised, reintroducing explicit funding and including several changes.[1]

Operating under a federal system of government, the US has four regulation making levels of government including federal, state, county and local. Recently there has been a move towards decentralising regulatory decision

[1] The Paperwork Reduction Act (PRA) 1980 established mechanisms to strengthen central agency leadership to reduce public paperwork burdens and to improve the management of information resources in Federal agencies. The Act involves four main tasks; centralised review; paperwork reduction targets; information resource management; and public participation, along with three year sunsets on approved information collection (paperwork) requirements. The 1995 amendments are aimed at strengthening paperwork control, strengthening statistical policy and information dissemination, and providing the opportunity for more effective public participation and additional safeguards against abuse and secretive communications.

making (OECD, 1992). At the federal level, subordinate regulations are issued by executive branch agencies. The extent of regulation making is therefore considerable. For example, in the area of health and safety alone there were '20 Federal agencies with approximately 70,000 full-time employees' (OECD, 1992).

Review bodies

The Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and Budget (OMB), is the main central review body, serving as an adviser to the President on regulatory affairs and overseeing the regulatory activities of federal agencies. Its specific functions include:

- analysing new and existing regulation;
- providing technical assistance to regulatory organisations;
- planning and prioritising regulatory initiatives and review activities;
- rationalising regulatory responsibility among levels of government; and
- managing and coordinating the operation of the Paperwork Reduction Act.

Other bodies involved in regulation review include the Regulatory Working Group (see Box A.1), which was set up by Executive Order 12866.

Review process

If a new Federal regulation is deemed 'significant' (refer to Box A.1) it is required to be reviewed centrally by OIRA, which conducts an impact analysis. (See Box A.2 for a listing of issues considered in OIRA reviews and impact analysis.) A draft is then issued for public comment, disclosing all background information, before finally becoming law.

Regulations not considered significant are required to be reviewed by the issuing agency.

Existing regulations are periodically reviewed by the OMB. Exceptions, however, are regulations requiring citizens, enterprises or sub-national governments to collect, maintain or submit information — so called 'paperwork' under the Paperwork Reduction Act — which are required to be re-published every three years in the national gazette, the *Federal Register*, with

Box A.1: Summary of Executive Order 12866

Goals:

- enhance the co-ordination between OMB and regulatory agencies, and the planning and co-ordination of new and existing regulation more generally.
- restore the 'integrity' and 'legitimacy' of regulatory review and oversight.
- make the process more open and accessible to the public.
- reaffirm the legitimacy of centralised review by distinguishing between 'significant' and 'non-significant' regulations where 'significant' refers to:
    - $100 M of effects on the economy
    - serious inconsistency between regulations' material effects on entitlements
    - raising of novel issues
- set out principles for agencies to follow including:
    - specification of objectives
    - specification of how serious the issue is
    - assessment of what the proposed regulation will do
    - assessment of the likelihood that the regulation will achieve its objective
    - consideration of unintended costs and benefits
    - consideration of counterproductive private incentives
    - consideration of other approaches
    - consideration of possible changes to regulations to make them better.
- create 'Regulatory Policy Officers' (RPOs) in each agency as part of a 'Regulatory Working Group' (RWG).
- create 'White House Regulation Policy Advisers' (WHRPA) as part of RWG.
- create a 'Regulatory Working Group' made up of RPOs, WHRPAs and the OIRA Administrator to discuss regulatory ideas and help co-ordination, and in particular develop innovative regulatory techniques, methods of risk assessment and streamline paperwork.
- establish disclosure requirements for OIRA and agencies.
- impose a 90 day review time limit on OIRA.
- review existing regulations (perhaps by asking the public for ideas).
- continue 'Unified Regulation Agenda' which compiles all regulations under review or development.
- require all agencies to have a yearly 'Regulatory Plan' addressing new and existing regulations.

estimates of the burden imposed, and which, if deemed excessive by the OMB, can be rendered invalid.[2]

Box A.2: Issues for consideration during review and impact analysis.

Standard review issues:

- legality;
- economic impact;
- impact on small and medium sized enterprises;
- paper burden;
- enforceability;
- administrative costs to government.

Impact analysis issues:

- alternatives to the use of regulation;
- impact on small and medium-sized enterprises;
- paper burden;
- distributive impact;
- general allocative efficiency impacts;
- administrative costs to government;
- impact on market structure/competition;
- impact on international trade;
- enforceability of the requirements; and
- cost benefit, cost effectiveness and risk analysis.

Federal regulatory agencies are also required to publish regulatory agendas outlining all planned regulatory activities over the ensuing 12 months[3]. The Unified Agenda of Federal Regulations, published twice a year, provides a

[2] In approving an information collection requirement, the OMB requires the regulatory agency to show that the information collection imposes the least burden necessary for the proper performance of the agency's function; will not unnecessarily obtain information already available; is useful; minimises the agency's cost of collection; and satisfies various OMB guidelines. Further, an agency's submission for approval must contain certain materials, including why the collection is necessary and how it will be used; methods of collection; efforts to avoid duplication; time burden imposed on the public; consultations with outside parties; pledges of confidentiality; special justification for sensitive information; annualised cost of collection to the federal government and respondents; and support material to be used in the collection process (eg, interviewer guides).

[3] Some planned regulations are excluded from these agendas by Executive Order 12866, including those concerning military or foreign affairs functions.

summary of these regulatory agendas. The more important regulatory actions under development are summarised in greater detail in the *Plan*[4], now part of the Unified Agenda.

Another form of review involves the public's scrutiny of regulations through well established public consultation processes, including the legislatively required 'public notice and consultation' system which began in 1946[5]. This system requires regulators of 'lower level regulations'[6] to give notice to the general public of any new regulation, and register any comments received in a formal public record. That record then provides the sole source of information that the regulator can rely on, and allows the public, which often have more information about regulatory impacts and alternative solutions than the regulators, to act as both a contributor to the regulatory process and a reviewer.

Executive Order 12866 'Regulatory Planning and Review' is the most recent development[7] in the regulation review process, summarised in Box A.1. It increased resources devoted to regulation review as well as allowing OIRA to exclude specific agencies or categories of regulation from central reviewing in order to focus its resources most effectively. The Order also seeks to improve the consultation process and encourage consensual approaches. According to the OMB the results so far are positive, although it concedes that it is too early to form firm conclusions (OIRA, 1994).

Information technology

All existing and proposed regulations are on computer database, although this is not accessible by the public (private services, however, can provide the same information).

Case study: The City of Indianapolis.

The City of Indianapolis has recently applied regulation review processes to local government. Its task of regulation rationalisation began by preparing a full inventory of the areas which the City regulated, followed by a survey of local

4 Previously called the *Regulatory Plan*, it requires, in addition to the requirements for the Unified Agenda, a statement of regulatory agency objectives and priorities, and how they relate to the President's priorities; a summary of planned significant priorities including alternatives and cost benefit estimates; a statement on the need for action; and a summary of the legal basis of an action.

5 Under the Administrative Procedures Act

6 Those below the level of legislation.

7 Established in 1993 by President Clinton, and implemented by the OIRA, it affects every federal regulatory agency, and builds on previous Executive Orders.

businesses to gauge their impressions of doing business in Indianapolis. The Mayor also created the Regulatory Study Commission (RSC) in July 1992. Its subsequent work has been cited nationally as the most comprehensive and successful local regulatory reform effort of any city in the US[8].

RSC principles include:

- regulate only as last resort.
- cost-benefit analysis is required.
- regulations must be simple, fair and enforceable.
- regulation must be written such as to minimise possible constraints on business and individuals.
- regulations should never exceed State or Federal minimums unless overwhelming local reasons can be demonstrated.

The City of Indianapolis is also moving towards performance standards, such as performance based building regulations.

Canada

Background

While government and academic scrutiny of Canada's regulatory systems began in the mid-1970s, resulting in some reforms[9], the real catalyst for the regulatory changes that form Canada's present regulatory system was the 'Agenda for Economic Renewal'. This began in 1984 and coincided with the election of a new government. The resulting Regulatory Process Action Plan of 1986 established a central regulation review agency, called the Office of Privatisation and Regulatory Affairs (since 1991 the Regulation Affairs Directorate), the requirement for Regulatory Impact Analysis Statements (RIAS)[10] for all new regulations, public notice and comment processes, a *Guiding Principles* document, and the *Citizen's Code of Regulatory Fairness* which addresses issues of fairness and accountability.

8 Goldsmith, S. (1994).

9 Including the creation of a central agency in 1979 to coordinate regulatory reform activities and provide policy advice.

10 RIAS describe the objective of a proposed regulation, its likely economic and social effects, the outcome of consultations and all alternatives considered. This is similar in many ways to the regulatory impact statement requirements in Australia.

In 1992, facing concerns of a lack of international competitiveness[11], the Canadian government broadened the focus of regulation management and review away from the rulemaking process (involving issues of consultation, early notice and centralised case-by-case oversight) to a system wide, internal reform focus, which involves greater emphasis on training regulators and looks more at issues of compliance and competitiveness. Further, while the 1986 policy applied only to proposed regulatory additions and amendments, the 1992 Regulatory Policy also applies to the stock of existing regulations, as well as adding a requirement relating to enforcement and resourcing.

Since then, several regulatory reform initiatives have taken place, including:

- a package of reforms in the Government's microeconomic action plan *Building a More Innovative Economy* in December 1994;
- extensive cost recovery for regulatory programs[12];
- a revision of the statutory Instruments Act to help streamline the regulatory process; and
- the Regulatory Efficiency Bill (1995) — which allows individuals or companies to submit 'compliance plans' which replace existing regulatory requirements with other ways of achieving regulatory goals,[13] and forms part of Canada's move to Performance Oriented Regulatory Programs (PORPs)[14].

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[11] Due to poor export performance; international trade agreements (including the Free Trade Agreement with United States and various GATT agreements); and a 1991 study critical of Canada's government intervention in the economy which, in particular, found that government intervention had "magnified industry's dependence on government (and) contributed to the creation of systematic barriers to innovation and upgrading throughout the economy". Porter, M. (1991).

[12] It is expected that tens of millions of dollars (Canadian) of new fees will come on stream for mandatory regulatory services in 1995-96. Cost recovery programs have to be approved by the Treasury Board which attaches certain conditions, including that departments specify and improve service standards to regulatees.

[13] Under the proposed Regulatory Efficiency Act (REA), an applicant would have to submit a compliance plan to the responsible minister for approval. The minister would be required to assess the proposal according to published decision making factors, and procedures, with the overriding requirement that the proposed compliance plan would be at least as effective in attaining the regulatory goals as the existing regulation(s). The minister would also have to consult with potentially affected parties. Notice of any approved compliance plans would need be published in the *Canada Gazette*, and an environmental assessment performed if required under the *Canadian Environmental Assessment Act.* Any breach of a compliance plan would be an offence punishable in the same way as a breach of the original regulation which it replaces.

[14] PORPs is aimed at making regulations *...expressed as functional outcomes or performance objectives rather than detailed specification of the means of compliance,* House of Commons Standing Committee on Finance, Canada (1993).

The legal framework in Canada at the federal level is split up into Parliamentary law and subordinate regulation. Subordinate regulations may be made by the Governor in General (the Cabinet in practice), ministers, independent regulatory agencies, or 'officials'.

Review bodies

Central review bodies include the Regulatory Affairs Directorate (RAD), the ministerial Special Committee of Council, the Privy Council Office (PCO), the Privy Council Office Section of the Department of Justice, and the Parliamentary Standing Joint Committee on Regulations and Other Statutory Instruments.

The RAD, located within the Treasury Board Canada Secretariat (TBS) since 1991, has the main responsibility for ensuring that departments and regulatory agencies comply with government regulatory policies.[15] It is responsible for overall regulatory strategy, providing advice on good regulatory practice, liaising with the private sector and international bodies on regulatory matters, and evaluation and possible intervention regarding regulatory proposals. Since 1992, the RAD has focused on system-wide regulatory problems and promoting the government's regulatory policies within the federal bureaucracy through training, and developing support documents and guides.

The ministerial Special Committee of Council, composed of 12 Cabinet ministers, reviews all Orders in Council (which represent the bulk of federal regulation). Orders in Council typically include regulatory impact analysis statements performed by the issuer of the regulation. Approval of a proposed regulation must be given by the Council both before pre-publication (draft) and final publication in the Gazette.

The Privy Council Office, which expanded its regulatory oversight in 1991, reviews regulatory proposals to ensure they are consistent with other government initiatives.

Legal review is conducted by the Privy Council Office Section in the Department of Justice, ensuring the regulation has proper legal authority under the Statutory Legal Instruments Act and the 1982 Charter of Rights and Freedoms.

The Standing Joint Committee on Regulatory and Other Statutory Instruments is responsible for *ex post* review of regulations once they have been published in the Gazette. In practice, this review focuses on legal and drafting issues rather than on substantive requirements.

[15] In Canada, regulatory reform goals are pursued via government policy, rather than incorporated into legislation.

Review processes

New regulations are subject to various reviews as outlined above.

The economic review of new regulations, by RAD, is aimed at screening regulatory proposals only for significant problems, including areas where regulation impedes the government's operations, fails to meet the government's regulatory objectives, fails to consider alternatives, or fails to provide adequate consultation with the public or co-operation with the provinces. This reflects the RAD's 1992 shift in focus from dealing with regulations on a case-by-case basis to focusing on general problem areas and education.

Part of this approach is to change the culture of regulatory departments and agencies so as to internalise the government's regulatory principles. This has involved the RAD in developing 'best practice' guides for regulators (compiled in a reference volume called *Regulating in the 90s*), including *A Guide to Regulatory Alternatives, Regulatory Impact Analysis Statement Writer's Guide,* and *Cost-Benefit Guide,* as well as arranging training courses and workshops developed in conjunction with departments and various training institutions. Introducing 'quality management standards'[16] to change incentives within regulatory bureaucracies is another area of recent RAD activity, along with developing innovative ways to reduce the burden of the consultation process on business, including the use of diskettes which make it easier for business to enter likely impact information, and suggestions[17].

As discussed above, legal reviews are conducted by the:

- Standing Committee on Regulatory and Other Statutory Instruments; and
- Privy Council Office in the Justice Department.

These economic and legal reviews are complemented by a general parliamentary review by the Special Committee of Council, and a review for consistency with other government policies by the Privy Council Office.

Public consultation is widely used in Canada as a regulatory control mechanism, both in order to improve the quality of regulations and to improve accountability. Approaches for non-legislative regulation include: the use of 'notice and comment' procedures; publication in the Federal Regulatory Plan or 'Notices of

[16] Which establish standards for departmental performance in creating regulation (such as standards for communication, consultation, and policy development and analysis). Audits would then be used to compare performance against the standards.

[17] These diskettes contain standardised questions, and are mailed to participating firms who insert responses and data at the correct locations as prompted by the program. The information is then easily down loaded for analysis by the regulator. The system uses what is called 'Business Impact Test' software.

Intent' in the Canada Gazette; advisory committees and panels; newsletters; and other informal consultations.

The 'notice and comment' process was adopted, by directive, as part of the 1986 Regulatory Progress Action Program, and requires departments to publish draft regulations and regulatory analysis (RIAS) in the Canada Gazette at least 30 days before sending a final regulation to the Special Committee of Council for approval.[18] Departments can, however, request exemption if the change is administrative rather than substantive or extensive consultation has already occurred. Approximately half of the regulations issued each year are not republished.

When prepublication does occur the RIAS should include:

- the policy objective of the regulation;
- the need for regulation;
- the content of the regulation;
- changes from existing regulation;
- timing of consultation and implementation of the regulation;
- results of previous consultation;
- a summary of the impact analysis; and
- a contact person.

The department's response to any comments are required to be summarised in the final RIAS.

The annual Federal Regulatory Plan, established in 1986 (replacing similar regulatory agendas which had been published bi-annually since 1983), gives notice of planned regulatory developments, as well as how the responsible department or agency plans to consult with the public. The Plan includes the discussion of a proposed action, its potential impact and expected date of publication, and the need for it.

Another vehicle for consultation are 'Notices of Intent' published in the Canada Gazette. These invite participation or request information that may be helpful in defining and analysing a problem.

While there are no legal consultative requirements for legislative initiatives, with departments given discretion as to the scope of consultation, informal consultations occur and are monitored by the Communication and Consultation branch in the Privy Council Office.

[18] Except regulations subordinate to the Canada-US Free Trade Agreement or the Canadian Environmental Protection Act which must be prepublished for 60 days, or regulations affecting standards that products must meet which require prepublishment for 75 days.

Existing regulatory programs are subject to regulatory evaluations at least every seven years under the Program Evaluation System, in which programs are evaluated for efficiency and effectiveness, and possible review by the Auditor General. Further, regulations have recently been reviewed by two major, system-wide reviews initiated in 1985 and 1992.

In 1985, a Ministerial Task Force on Program Review, made up of representatives from both the private and public sectors, conducted a 'top-to-bottom' review of over 100 regulatory programs. The review suggested the reform of two thirds of the federal programs studied, some of which were subsequently implemented. In 1992, the Treasury Board announced a government-wide review[19] of all existing regulations to identify programs which significantly reduce the competitiveness of Canadian industry or impose excessive costs on consumers.

In 1994, the government announced a review of regulations in six key sectors[20] of the economy, and a joint private and public sector forum for reducing government information requirements of small and medium sized businesses.

Information systems

The annual Regulatory Plan is available to the public on diskette or through electronic access to the federal InfoSource database. A private sector on-line system provides weekly data on regulations including regulatory requirements, proposals for new regulations, impact analyses, and reviews of new and existing regulations. Within the Regulatory Affairs Directorate, a computerised system is used to track all regulations through the formal review process.

United Kingdom

Background

Regulatory reform has been an important part of government policy in the United Kingdom since the early 1980s. Privatisation and deregulation have been extensive, and with it has come a number of reforms to the structure and process of the regulatory system.

The Deregulation Initiative launched in 1985, and relaunched in 1993, has provided the catalyst for several regulatory reforms. It has involved, among other

[19] The findings of this review process were released on the 6th December 1994 in the Government of Canada's Regulatory Review Report.

[20] Including biotechnology; health, food and therapeutic products; mining; forest products; automobiles; and aquaculture.

things, the rationalising and simplifying of regulations; the removal of many regulations; the introduction of Compliance Cost Assessment; and changes to the consultation process — in particular, the introduction of the Small Business Litmus Test which requires an assessment of the impact of regulations on small businesses. In doing so, the Initiative established a number of advisory bodies and Task Forces which have reviewed various regulations and presented numerous recommendations, affecting the broad regulatory structure as well as specific regulations.

Complementing the Deregulation Initiative was the "Citizen's Charter"[21], which was established to increase the public accountability of government activity.

In 1994, the Deregulation and Contracting Out Act was introduced, allowing the government to more easily amend or repeal primary legislation. It also highlighted rights of appeal of those being regulated, and addressed specific deregulatory measures, contracting out arrangements, and enforcement practices (promoting their transparency and proportionality to the issue under consideration).

Further, in May 1995 the British government produced a White Paper on competitiveness which provided some initiatives in the deregulation area.

However, while there has been a move towards deregulation and greater regulatory review, there has also been a significant growth in European Community regulation applying to the UK and regulation flowing from the privatisation of numerous Government Business Enterprises.

The UK has a unitary system of government, although local councils have been delegated certain law making powers. Apart from government departments and local councils, a number of regulatory agencies also have regulation making power (eg, National Rivers Authority and Medicines Control Agency).

Review bodies

The central body for regulatory review in the UK is the Deregulation Unit, located within the Department of Trade and Industry. It receives all final drafts of Compliance Cost Assessments (CCA) for the purpose of monitoring their quality and ensuring a consistent approach across government. The unit also provides advice on preparing CCAs, and meets quarterly with the Prime Minister.

[21] The Charter sets out standards and principles for Government policy across all public services. It includes requirements for standards of service provision, information accessibility, service choice and consultation, courtesy and helpfulness, correcting mistakes, and value for money.

The Deregulation Unit has also released several information booklets to assist regulators in the preparation of regulations. These include *Checking the Cost to Business: A Guide to Compliance Cost Assessment*; *Regulation in the Balance: A Guide to Risk Assessment*; and *Thinking about Regulation: A Guide to Good Regulation.*[22] These booklets identify relevant principles and are presented in a user friendly manner. For example, *Thinking About Regulation: A Guide to Good Regulation* identifies three themes regulators should address; 'Proportionality' (that regulatory action should be proportional to risk), 'Think Small First' (looking at the impact of regulations on small businesses), and 'Go for Goal-Based Regulations'. The guide also provides a "Good Regulation" checklist.

The Deregulation Unit, in conjunction with the Citizens Charter Unit, also produced, in 1993, a Code for enforcement agencies that establishes broad principles for regulatory conduct and requires enforcement agencies to establish their own Code of Practice, incorporating these broad principles. The principles include:

- publication of levels of service, such as the time taken to respond to queries;
- openness and information, such as being open about work performed and providing clear distinctions between requirements that are mandatory and those that are not, using plain language;
- consultation and communication, to help the enforcement agency to understand business concerns;
- courtesy and helpfulness;
- complaint systems that are effective, swift and publicised; and
- value for money, keeping compliance costs to a minimum and making sure they are proportional to the risks, and providing clear information and focused enforcement.

Reviewing regulation is also a responsibility of departmental deregulation units located in each department. They receive all their department's proposals to introduce or amend regulation, and ensure that Compliance Cost Assessments are prepared when a proposal is likely to affect business. The departmental units also produce six-monthly reports summarising departments' forthcoming regulatory activity. This departmental level of regulation review is supported at the political level in that each major department has a junior minister responsible for regulatory matters.

[22] Other like publications include, *A layman's guide to the Deregulation Bill* and *Small Business Litmus Test.* Publications of a more general kind are also produced, such as the *Deregulation: Cutting the Red Tape* booklet and leaflet.

A Deregulation Task force (consisting mainly of business representatives) has also been established to review regulations, replacing seven sectoral Business Task Forces[23], Charities and Voluntary Organisation Task Force and the Advisory Panel on Deregulation. Its task is to provide an independent channel for concerns about excessive regulation, domestic, European or international, and identify priorities for the repeal and simplification of existing regulation and enforcement practices.[24] It is also responsible for developing and maintaining consultation after the introduction and enforcement of new regulation.

There is also a Cabinet Committee on Deregulation which is chaired by the President of the Board of Trade.

Review process

All new regulations or amendments that are likely to affect business, including EC regulations applicable to the UK, must involve the preparation of Compliance Cost Assessments by the responsible department. It is a structured analysis to identify and assess all likely costs to business of complying with proposed regulations or amendments. It must include the full cost to business, including recurring and non-recurring costs, as well as outline the purpose of the proposed regulation and how it would remedy a specific problem (although, notably, benefits do not have to be formally assessed). Regulators are specifically required to consider the effect of regulations on international competitiveness and, under the Small Business Litmus Test, small businesses.[25] The assessment must also describe the extent of consultation, and establish mechanisms by which the estimated cost of compliance can be compared to the actual costs business experience once the regulation or amendment is in effect. Alternatives must also be identified and, in some cases, risk assessment is recommended.

Further, since 1988, Environmental Impact Statements have been required for certain projects.

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[23] Where each Task Force was responsible for a given sector of the economy, such as Transport and Communication. The final report of these Task Forces was handed down in January 1994, setting out 605 specific proposals. Apart from these specific proposals, the Task Forces also made some general proposals affecting all regulators, putting forward three principles; make sure small firms can cope with the new and amended regulation; avoid regulations that are out of proportion to the benefits to be obtained; and make regulations goal based, rather than overly prescriptive.

[24] The steering committee of the task force meets with Departmental Deregulation Units every two weeks.

[25] The Small Business Litmus Test requires departments to identify two to three small business representative from the sector affected and discuss with them the impact any proposed regulation or amendment might have on them, unless the Department feels an alternative approach to such impact assessment is more effective. The process of these consultations must be documented in the CCA.

As part of the Deregulation Initiative, existing regulations across all departments that affect business have recently been reviewed by various Task Forces, and reform proposals presented (many of which have been accepted). This review process involved affected businesses and other interested parties.

The government is also working with the EC to tackle the problem of excessive EC regulations and their implementation in the UK. The Anglo-German *Deregulation Now* project, completed in early 1995, also addressed the issue of EC regulations.

In terms of the enforcement of regulations, the government has begun a program of educating inspectors to make them more sensitive to the business environment. Codes for enforcement agencies (discussed above) are part of that program.

Consultations also play an important role in the process of regulatory development and review. Reflecting this importance, in 1985 the Deregulation Initiative changed both the purpose and procedures for public consultation.[26] In particular it:

- broadened the range of groups to be consulted, especially increasing consultation with small businesses;
- standardised information presented to and collected from affected groups;
- opened up the process of consultation by making the results of consultation more accessible to the administration and the public; and
- began consultation processes for the *ex post* review of existing regulations by affected groups.

Consultations in the UK may take the form of informal consultation, consultative papers[27], advisory groups[28], or preparations for Compliance Cost Assessments, and take place at all stages of regulation making, including after implementation. The consultation process is required to be documented.

Both the central Deregulation Unit and departmental deregulation units have some responsibility for encouraging regulatory administrations to improve consultation with business.

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[26] Prior to the Deregulation Initiative, consultation had not been required by law or government policy since the 1940s.

[27] These papers vary in detail, some may consist of a basic study of regulatory issues while others are more extensive and include reasoned and detailed proposals. Further, sometimes the publication of consultation papers are mandatory and at other times they are not.

[28] Including the seven sector-specific Business Task Forces.

Information systems

The departmental deregulation units prepare six-monthly reports summarising their departments' upcoming regulatory activities. In terms of data collection from businesses, the Central Statistical Office is developing an interdepartmental database to enable departments to share rather than duplicate information collection.

Japan

Background

Regulations have been extensively used in Japan, creating trade barriers and contributing to Japan's relatively high cost of living (OECD 1994b). Licensing, and authorisation and permission regulations, have been a particularly dominant feature of the Japanese economy.

By 1980, when the growth rate had fallen from previous high levels, a widespread view developed in Japan that sustained growth required fundamental reforms in administrative activities and structures. However, it is only recently that attention has turned to regulations (OECD 1990/91). This has been evident in the 1987 agreement 'On the Examination and Periodic Review of New and Existing Permissions, Authorisations, Etc.', the 1988 'Principles of Deregulation'[29], the 1994 Guidelines for Promotion of Deregulation, and the March 1995 Deregulation Action Program.[30] Domestic deregulation has also become a key element in trade policy reform under the Japan-US Structural Impediment Initiative Talks.

In Japan, regulations may take the form of a Parliamentary law; execution or mandatory order; Cabinet Order; ministerial notification or ordinance, which are published in the official gazette; or local or regional by-laws, which are published in the official bulletin of the issuing government. As in most OECD countries, regulation can also take the form of administrative procedures (or guidance as they are called in Japan)[31] .

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[29] From *The Report on Deregulation* 1988, of the Second Provisional Commission for the Promotion of Administrative Reform.

[30] Further, the Japanese government announced steps to ease regulation in 94 areas as part of its April 1995 economic stimulus package.

[31] 'Plans', such as economic or urban plans, although not usually referred to as regulations, are widely used to direct private sector behaviour. They may be included as a Parliamentary law or an 'administrative guidance'.

There are over 3000 local governments, 47 prefectural (regional) governments, 12 ministries, and numerous semi-independent commissions and agencies attached to the ministries, all of which make regulations.

Review bodies

The central body for regulatory review is the Administration Inspection Bureau (AIB), part of the Management and Co-ordination Agency in the Prime Minister's Office. Among other functions, it analyses existing regulations, monitors administrative organisations and corporations, rationalises regulatory responsibility between levels of government (for which their has been a recent move towards regional levels (OECD 1992)), receives private sector input, and prepares packages of bills (omnibus bills) to implement regulatory reform.

Other bodies, responsible for the day-to-day review of new regulations in their respective jurisdictions, include the Administrative Management Bureau, Cabinet Legislation Bureau, and Budget Bureau of the Ministry of Finance, along with the individual ministries. The Administrative Management Bureau is responsible for, among other things, administrative reform and, along with promoting more rigorous procedures for reviewing new and existing regulations by individual ministries, it reviews new regulatory programs from the viewpoint of reducing the burden on the public. The Cabinet Legislative Bureau reviews Cabinet Orders and draft bills for legal quality, and the Budget Bureau reviews draft regulation related to public finance and government accounting proposed by ministries and their attached agencies.

Selected review is also conducted by the Fair Trade Commission which reviews regulation from the viewpoint of competition policy.

However, a series of independent advisory councils reporting directly to the Prime Minister, including the Provisional Commission for Administrative Reform and the 1st, 2nd and 3rd Provisional Councils for the Promotion of Administrative Reform, appear to have been, since 1981, the 'locomotion' of change, motivating and directing regulatory reform effort.

Review process

Since 1987, new Parliamentary laws, Cabinet Orders, and executive and mandatory orders, are reviewed by the Administrative Management Bureau, Cabinet Legislation Bureau and the Budget Bureau as appropriate (refer above). At the same time these regulations are sometimes subject to impact analysis prepared by the agency or ministry responsible, although they are not required to

be made available to the public[32]. Further, there are no fixed standards or requirements in the analysis regarding content or methods[33], and no enforcement mechanism has been set up to ensure adequate reviews are in fact performed. The OECD reported that the implementation of regulations often:

> takes no account of compliance costs, either direct, or in terms of the loss of consumer welfare deriving from an infringement of competition (OECD 1991/92).

Further, ordinances and notices, and by-laws, are not normally subject to external review at all, and are usually wholly the province of the regulating ministry[34] or government.

Public consultation is achieved by holding meetings with members of the public most concerned with a proposed regulation and appointing representatives from them to an advisory council, and with informal consultations and a centralised public input facility within the AIB. Indeed, a series of rolling three year councils including representatives from business, academia and journalism have been established to make recommendations to the Diet. However, a Japanese advisory council, in developing a reform program, stated that:

> ...domestic vested interests in some areas have become so entrenched and adjustment of different interests has become so difficult that efforts to respond flexibly to domestic and foreign demands and to effect the necessary reforms have been far from adequate (OECD, 1992).

In 1994, guidelines were issued on the operation of advisory councils.

Certain existing regulations are required to be periodically reviewed by the agency or ministry responsible, including all regulations which establish permission or authorisation requirements, as well as being subject to AIB review. Impact analysis forms part of these reviews, with AIB reviews made public.

In addition to these management bodies, some high-level advisory councils have been behind regulatory reform and review, as mentioned above, including the current 'Third Provisional Council for the Promotion of Administrative Reform',

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[32] There is no general requirement in the Japanese government that impact analysis be conducted for new regulation, although two Cabinet policies refer to its use and imply that some form of cost/benefit analysis should be performed. The 1988 '*Guideline for the Promotion of Deregulation*' requires ministries and agencies to review social regulation regarding their objectives, means, effects, costs and benefits, and the 1987 Agreement '*On the Examination and Periodic Review of New and Existing Permissions, Authorisations, Etc.*' requires that the burdens of such regulations be smaller than the benefits.

[33] Including risk assessment where no established framework exists, with risk decisions usually made through the deliberations of expert advisory bodies attached to the responsible ministry or agency.

[34] Ministries in Japan have traditionally had a lot of independence and autonomy.

and the Administrative Reform Committee which is responsible for monitoring deregulation by the government under the 1995 Deregulation Action Plan. These bodies play an important role in the overall regulation review process, reviewing regulations across all departments.

The Deregulation Action Plan is a five year plan aimed at opening up the Japanese economy. Specifically, it has the 'objective of making the Japanese socio-economy internationally open and creating a free socio-economy built on the principle of self-responsibility and market principles' (Management and Coordination Agency, 1995). The program involves measures to enhance public awareness and understanding of deregulation, assess the actual state of regulation in Japan, provide new regulations with a specified time frame for their review, and actively use the Office of Trade and Investment Ombudsman to improve market access. There is to be a formal review of the program, the publication of progress, and a channel established in each ministry and agency to receive opinion and requests from interested parties (Management and Coordination Agency, 1995).

Information systems

A registry of all existing laws, Cabinet Orders and Prime Minister's Orders, and their texts, are contained on computer database which is revised annually. This database, however, cannot be accessed by the public.

All new laws, Cabinet Orders, and Prime Ministerial or ministerial ordinances and notices are published in the official Gazette, while new regional and local by-laws are published in the official bulletin of the issuing local or regional government.

APPENDIX B: CHANGES IN REGULATIONS AS REPORTED BY COMMONWEALTH DEPARTMENTS AND AGENCIES

In order to obtain a broad overview of the extent and nature of regulatory change, the ORR contacted 39 Commonwealth departments and agencies with regulatory responsibilities. Of these, 20 responded of which three stated that there had been no relevant changes in regulation in the past 12 to 18 months. Extracts of the responses are presented in this appendix.

The responses of departments are listed in alphabetical order, and each is followed by notes on any regulatory agency within that portfolio.

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B.1 Attorney-General's Department

The Attorney-General's Department plays an important role in formulating and implementing regulations governing the operations of corporations. Recent developments in the regulation of corporations include amendments to regulations governing bankruptcy, and companies and securities law including the Corporations Law Simplification Program.

Amendments to the Bankruptcy Act 1966 (relevant to retirement income policy)

The Department stated:

> On 1 July 1994, amendments to the *Bankruptcy Act 1966* by the *Superannuation Industry (Supervision) Consequential Amendments Act 1993*, No 82 of 1993 (the SISCA Act) came into operation. The amendments revise the treatment accorded to policies of life assurance, endowment assurance and interests in superannuation and approved deposit funds, consistent with the Government' s retirement income policy.

These changes also removed:

> ... from the category of protected property, certain types of investment such as policies of pure endowment and annuities which are no longer commonly available and are not within the regulatory framework established under the *Life Insurance Act 1945* and the *Superannuation Industry (Supervision) Act 1993.*

As a result of these amendments, upon bankruptcy a bankrupt is now able to retain as property not divisible amongst his or her creditors such as:

- policies of life assurance or endowment assurance in respect of the life of the bankrupt or the spouse of the bankrupt;
- the proceeds of such policies received on or after the date of the bankruptcy; and
- the interest of the bankrupt in a regulated superannuation fund or an approved deposit fund to the extent that the total value of such property does not exceed the bankrupt's pension Retirement Benefits Limit (RBL).

Amounts in excess of the pension RBL are available for distribution to creditors according to the formulae. Key definitions, including 'income' and 'pension', were also clarified. In addition:

> ... as a result of the amendments, where the administration of an estate commenced before death of a bankrupt, the divisible property includes the proceeds of superannuation payments and payments from a regulated superannuation fund or approved deposit fund.

The Bankruptcy Act now provides that any provision in the governing rules of a superannuation fund or approved deposit fund is void:

> ... where the effect of the provision is to cancel, forfeit, reduce or qualify the interest of a person in such fund or to allow another person to exercise a discretion relating to the member's interest, if the member has become bankrupt, commits an act of bankruptcy or executes a deed of assignment or arrangement under the Bankruptcy Act.

Reform of companies and securities law

The *Corporate Law Reform Act* 1994 imposes:

> ... enhanced disclosure obligations on entities in which members of the public invest (disclosing entities). The approach taken by the Act builds on the existing framework for disclosure by listed entities to the Australian Stock Exchange, in accordance with the Exchange's Listing Rules, of any matter necessary to prevent investors being misled or deceived. The Act retains and reinforces the role of the Exchange in this regard and also requires unlisted disclosing entities to lodge information with the Australian Securities Commission likely to have a material effect on the value of the entities' securities. Disclosing entities are also required to prepare half-yearly accounts which are to be reviewed, but not audited, by an auditor.

The Corporate Law Reform Act also:

> ... relaxes the prohibitions in the Corporations Law on companies providing indemnities or insurance to directors and other officers. The provisions allow companies to provide insurance for their officers, except where they have wilfully breached their duty to the company or gained an improper advantage. Companies will

also be able to indemnify their officers in respect of liability to persons other than the company, provided that liability does not arise out of conduct involving a lack of good faith.

The *Corporations Law (Securities and Futures) Amendment Act 1995* amends the Corporations Law to enable certain new and innovative financial products traded on the Australian stock and futures markets to be prescribed and regulated as if they were securities or futures contracts. This amendment will ensure that there is adequate regulation of such new products, while not retarding market innovation.

The Corporations Law Simplification Program commenced in late 1993. There is a four member Task Force which comprises an experienced private legal practitioner, a well known expert in plain English, a senior legislative drafter and a senior policy lawyer from the Attorney-General's Department. The Task Force is assisted by a 14 member Consultative Group, comprising leading private sector users of the Law from all over Australia.

The Attorney-General has described the Program as having two essential aims:

- to improve the language, structure and layout of the Law so as it make it more accessible and easier to understand; and
- to improve the actual operation of the Law, especially by removing or modifying rules which are no longer suited to modern conditions.

The Task Force places great emphasis on consultation with peak business and professional organisations and individual experts. In addition, it makes extensive use of testing sessions, which involve testing proposals with groups of users of the Law at various stages — from policy formulation to the actual text of the draft legislation.

The First Corporate Law Simplification Bill 1994 is presently before the Parliament. The Bill represents Stage One of the Simplification Program and contains amendments dealing with share buy-backs, proprietary companies and company registers. Following its introduction, the Bill was examined by the Parliamentary Joint Committee on Corporations and Securities. That Committee made only one relatively minor recommendation for change to the Bill and called for the Bill to be passed by the Parliament. The Committee also expressed its approval of the processes used in the preparation of the Bill. The Bill was passed by the House of Representatives in March and is currently before the Senate.

The Task Force is now finalising a Second Simplification Bill which will deal with seven topics including share capital, accounts and audits, annual returns, deregistration of companies, company meetings and company formation. The Attorney-General released this Bill for public exposure in June 1995.

The Attorney-General has recently announced the topics to be dealt with by the Task Force in Stage 3 of the Program. They are:

- company officers;
- related party transactions;
- corporate fundraising;
- takeovers; and
- the application of s.52 of the TPA to prospectuses and related matters.

Australian Securities Commission (ASC)

Key regulatory issues related to the ASC are discussed in Chapter Two (Section 2.3.1).

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B.2 Department of Foreign Affairs and Trade

The Department of Foreign Affairs and Trade stated:

> Part of the Department of Foreign Affairs and Trade's portfolio responsibility is the negotiation of international agreements to ensure Australia's interests are accounted for in the international arena. To date, Australia has become party to agreements concluded in a diverse range of areas, including international trade, disarmament, the environment and human rights. The Department of Foreign Affairs and Trade works together with domestic Commonwealth departments and agencies to advise Ministers on Australia's negotiating position. It is often the domestic departments and agencies which have carriage of any resultant domestic legislation or regulation. Consultations with the State, Territories and industry representatives take place to brief them on Australia's position on issues under negotiation and provide an opportunity for their views to be considered. Following the negotiating sessions they are debriefed on the outcome and are provided the opportunity to inject their views regarding the further development of Australia's position. A similar process applies to consultations with non-government organisations.

Further, the Department indicated that:

> The impact on domestic regulation arising from Australia acceding to international agreements varies, depending on the nature of the agreement under consideration. The ratification process includes consideration of the need to amend existing legislation and regulations or the introduction of new legislation or regulations to ensure conformity to an agreement's obligations. Recent activities in multilateral trade negotiations provide an example of the need for regulatory change: accepting the 1994 Agreement Establishing the World Trade Organization involved making some changes to a number of pieces of domestic legislation.

> The Asia Pacific Economic Cooperation (APEC) process demonstrates how regional agreements relate to domestic regulations. A major focus of APEC's trade facilitation work program has been to encourage member economies to align their national regulatory regimes with appropriate international norms. In the product standards area for example, APEC has identified four priority sectors (electrical products, rubber products, plastic piping and food labelling) where divergence from international standards represents a potential impediment to expanded trade within and outside the region. Work is under way on case studies in these sectors to identify the scope for closer alignment with prevailing international standards. Similar efforts are proceeding on aspects of members' approaches to customs procedures, while considerable emphasis is being given to effective implementation of the disciplines agreed in the Uruguay Round.

Enhanced internationalisation of the Australian economy is likely to increase the role and importance of international agreements on domestic regulations and regulation making processes.

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B.3 Department of Environment, Sport and Territories; and the Environment Protection Agency

The Commonwealth Environment Protection Agency (EPA), on behalf of itself and the Department of the Environment, Sport and Territories, provided information on developments in the following areas of the environment portfolio:

- the National Environment Protection Council;
- Review of Commonwealth Environmental Impact Assessment Legislation and Procedures;
- amendments to Commonwealth Hazardous Waste Legislation;
- *World Heritage Properties Conservation Act 1983*; and
- changes to the *Ozone Protection Act 1989.*

Comments on two of these developments are presented in Chapter 2. Here the information provided by the EPA is presented verbatim.

National Environment Protection Council

> It is anticipated that, before the end of 1995, the Commonwealth Government will meet its commitments under Schedule 4 of the Intergovernmental Agreement on the Environment (IGAE) by introducing legislation to apply to itself national environment protection measures (NEPMs) as they are developed by the National Environment Protection Council (NEPC).

These measures, which will be implemented by appropriate legislation in all States and Territories except Western Australia, will set nationally harmonised pollution control goals, standards and guidelines. NEPMs will apply to all business and public sector activities which meet the limited criteria for measures set out in the IGAE.

Commonwealth legislation, tentatively called the National Environment Protection Measures Implementation Bill, will apply to those Government Business Enterprises which are not required to comply with State or Territory environment protection legislation.

It is not expected at this stage that there will be subordinate legislation to regulate Commonwealth activities but this situation may change as drafting progresses.

Review of Commonwealth Environmental Impact Assessment Legislation and Procedures

A comprehensive public review of the Commonwealth's environmental impact assessment (EIA) legislation and process was announced by the then Minister for the Environment in October 1993.

The review is being undertaken by the Environment Protection Agency (EPA) in recognition of the need for the EIA process to evolve to reflect changing environmental imperatives and industry expectations. The object of the review is to ensure that EIA continues to be a relevant tool for environmental protection and for achieving ecologically sustainable development while ensuring that this is achieved at the lowest cost to society.

Throughout the review, the EPA has been committed to full and ongoing consultation with all stakeholders, including government, industry and the community. The EPA has also proposed eight guiding principles to be used to assess the performance of the current legislation, to guide the development of options for changing and strengthening the process, and to evaluate the performance of any revised EIA process. Following consultation with stakeholders, the following principles have been adopted. The EIA process should provide:

- participation
- transparency
- certainty
- accountability
- integrity
- cost-effectiveness
- flexibility, and
- practicality.

In December 1994, the EPA released its main discussion paper proposing a range of options for reforming the EIA process. The discussion paper was available for a four month public consultation period.

Following appraisal of the submissions, the EPA will put proposals for reforming the EIA legislation and process to the Commonwealth Government for consideration.

On 5 May 1995, the Government made minor amendments to the EIA process in light of the Federal Court decision in Tasmanian Conservation Trust v Minister for Resources. The changes enable the Commonwealth to fulfil its environmental responsibilities in a practical way, without disruption to environmentally acceptable development projects. In particular, the amendments ensure that once a project has been assessed at the Commonwealth level, it will not be subject to further assessment unless the project changes in an environmentally significant manner.

Amendments to Commonwealth Hazardous Waste Legislation

Australia ratified the Basel Convention on Transboundary Movements of Hazardous Wastes on 5 February 1992, and also has obligations under various OECD Council Decisions on trade in hazardous waste. Australia's implementing legislation is the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Hazardous Waste Act).

In March 1995, recognising that the existing Commonwealth legislation fails to meet Australia's obligations under the Basel Convention, the Government decided to amend the Hazardous Waste Act.

The amendments will ensure that Australian exports of hazardous wastes are managed in an environmentally sound manner.

Currently, the Act only regulates imports and exports of hazardous wastes that have no value; that is wastes intended for final disposal. The amendments will extend regulation to trade in hazardous wastes destined for recycling and recovery operations.

These changes will provide greater certainty to industry and meet our international obligations under the Basel Convention.

In proceeding to amend the Act, the Government has consulted extensively with industry, environment and other non Government organisations. A Policy Reference Group has been formed to give continuing advice.

An expert Technical Group is being formed to advise the Government on difficult matters raised in implementing the Hazardous Waste Act such as:

- how to define a hazardous waste in law;
- how to distinguish between products and wastes; and
- how to determine the level of contamination by hazardous constituents which renders a waste hazardous.

Australian policy is that such wastes should only be exported for final disposal under exceptional circumstances. This policy will now be made explicit in the Act.

A Draft Amendment Bill is expected to be introduced into the Winter session of Parliament in 1995.

World Heritage Properties Conservation Act 1983

As the Great Barrier Reef is one of Australia's World Heritage Properties, the Commonwealth has an international obligation to protect it. This obligation is reflected in the *World Heritage Properties Conservation Act 1983* (the Act).

On 15 November 1994, parts of the World Heritage Property within the Hinchinbrook Channel were Proclaimed under the Act. Attendant regulations were made on 18 November 1994. This Commonwealth action was prompted by a concern that seagrass, and other important features of the Channel, could be damaged by mangrove removal and other works at the Port Hinchinbrook development site.

The Proclamations require corporations to obtain Ministerial consent before undertaking any activity which damages or destroys the Proclaimed area.

The Regulations require individuals to also obtain Ministerial consent for any such activity. They also specify the activities that are prohibited under the Proclamations (unless Ministerial consent is given). In summary, these activities are destruction or damage of native vegetation, specific construction and excavation works and the discharge of materials into the ocean which are likely to adversely affect the adjacent seagrass beds in Hinchinbrook Channel.

Changes to the Ozone Protection Act

Changes to the Ozone Protection Act were agreed by Cabinet in October 1994. The Bill is expected to be introduced in the Winter sittings 1995.

The *Ozone Protection Amendment Bill 1995* will incorporate new controls on hydrofluorocarbons (HCFCs), hydrobromofluorocarbons (HBFCs) and methyl bromide into the *Ozone Protection Act 1989*.

HCFCs are substances commonly used in refrigeration and airconditioning. Methyl bromide is a fumigant used in agriculture, horticulture and buildings for pest control. The new controls will be implemented through a licensing scheme under which a 'controlled substances licence' will be required for the import, export and manufacture of these substances.

In addition, the amendments will ban the import, export and manufacture of CFCs, halons, methyl chloroform and carbon tetrachloride, as the phase out of these substances is now complete. From 1 January 1996 licences will only be granted for these substances for "essential uses" as defined by the Montreal Protocol, and where the substances have been or are destined to be recovered or recycled.

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B.4 Department of Housing and Regional Development

This information provided by the Department is presented mostly verbatim, with a few minor changes in presentation.

The Australian Model Code for Residential Development (AMCORD)

AMCORD was developed as a result of initiatives arising from the Special Premiers' Conference held in 1989. AMCORD is a set of guidelines encouraging more integrated approaches to land and building development particularly focussing on the quality and design of housing.

The earlier AMCORD documents have recently been incorporated into the one draft document *AMCORD 95: A National Resource Document for Residential Development.* The aim of the new document is to facilitate the supply of better and appropriate housing and residential developments by:

- achieving national objectives of sustainable development, social justice, micro-economic reform and efficiency in land use;
- proposing innovative approaches to design and regulation and encouraging more integration of planning and control process; and
- disseminating nationally the results of current housing research as well as information on good practice throughout Australia.

Local Approvals Review Program (LARP)

LARP was another initiative arising from the 1989 Special Premiers' Conference. The aims of LARP include:

- to achieve an integrated approach to all aspects of land development;
- reduce delays, which are a significant cost to industry;
- increase certainty;
- improve the quality of decisions; and
- create an environment conducive to more innovative building and development proposals.

LARP B — business regulation

The program has been managed in each state by broadly based LARP Reference Groups comprising representatives of local and state governments, industry, professional bodies and unions. The LARP program will be finalised during 1995.

The Local Government Review of Business Regulation (LARP - Business Regulation) was announced in *Working Nation*, the White Paper on Employment, as part of a Business Regulation Reform Package. The program is allocated $1.8 million over three years and is intended to improve the regulatory environment for business investment and operation at the local level.

The program builds on recommendations made in a study of Local Government regulatory processes and business development commissioned by the Office of Local Government in 1992. It will fund a mixture of research and pilot projects at the local, regional, state and national levels and is expected to achieve the following outcomes:

- recognition of the impact of Commonwealth, State and Local government regulations on the operation of business at the local level;
- streamlining local level information, application, referral and approval processes which reduce or remove impediments to business; and
- a more efficient and effective role by local councils in business regulation leading to an increased awareness of the role of local government in business regulation.

Local Approvals Review Program Computerisation Project (LARP-C)

LARP C was announced in *Working Nation*, the White Paper on Employment, as part of a Business Regulation Reform Package. The program is allocated $1.98 million to reduce delays in the processing of building and development applications by making better use of information technology.

LARP-C aims to facilitate the computerisation of the approval and regulatory process to enable development of performance criteria and benchmarks.

There are four stages of LARP-C. The preparatory stage of LARP-C was completed in June 1995.

Phase 2 will include a trial with 50 Councils of the performance measures and the computerised approval systems and further development of the computer network. Phase 3 will develop benchmarks to improve performance in the approvals process.

The aim of the phase 4 will be to introduce the software version of appropriate codes, best practice and guidelines into local council's building and planning approval systems.

Benchmarking and efficiency in Local Government

The 1995-96 Commonwealth budget provides for an amount of $2 million to be set aside for the development of a national benchmarking and efficiency sub program.

The project will develop national benchmarking and performance indicators for specific services of functions, which measure not only unit costs but also quality and appropriateness of services. This project will also identify processes of continuous improvement that enable councils and their staff to identify best practice through informal networks of councils.

A strategic plan is currently being developed to provide a statement of a long term vision for the achievement of Local Government efficiency gains based on continuous improvement techniques and cultural change. Objectives, timeframes and key indicators on the achievement of outcomes consistent with the stated vision will then be developed.

Local Government Development Program (LGDP)

The 1995-96 Commonwealth Budget provided $62 million to implement the Commonwealth's new agenda for local government: to promote a partnership

approach to Local Government reform, to facilitate systemic change, and to catalyse local government delivery of national priorities.

The new LGDP will assist Local Government to improve its effectiveness in urban and regional development and in promoting and achieving economic growth. The new program will incorporate a range of smaller existing programs including AMCORD and LARP and will build on these initiatives in regulatory reform.

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B.5 Department of Industry, Science and Technology

Duty Drawback and Tariff Export Concession (TEXCO) schemes

As part of the "Working Nation" statement, the Government decided to simplify the administration of the Duty Drawback and TEXCO schemes.

The changes will improve access to the Duty Drawback and TEXCO schemes and streamline their administration by minimising routine investigations and checking procedures. The various measures, for example the removal of the security requirement in TEXCO, are intended to shift the balance of the usage of the two schemes away from Duty Drawback towards TEXCO so that companies take advantage of an "up-front" benefit, rather than seeking refund of duty. The measures are also aimed at changing the orientation of the schemes towards a greater industry development role.

The cost to revenue from greater use of the schemes is expected to be $1.5 million in 1994-95 but will decrease as duty rates phase down in 1996.

The new "user friendly" approach to duty drawback and TEXCO is expected to significantly cut the administrative burden and costs for firms, particularly small to medium sized firms, attempting to use the schemes, and thereby to improve their competitiveness.

New legislation for preferential trading arrangements

To gain duty free entry under preferential trade arrangements, goods imported from a preference country (New Zealand, the Forum Islands including Papua New Guinea, Developing Countries, Malaysia and Canada) must have a minimum specified percentage of Australian and/or preference area content. The last process of manufacture must be performed in the country for which a preferential rate is claimed.

Australia put in place new legislation on 1 April 1994 to:

- give effect to our 1992 understanding with New Zealand on changes to CER rules of origin arrangements; and

- apply the definitions and interpretations from that agreement to all Australian preference arrangements.

The legislation provides some new concessions for all preference countries, particularly in determining the expenditure on overheads. For CER, we have provided a margin of tolerance of 2 per cent below the 50 per cent requirement in special circumstances and more permissible rules in relation to the treatment of local content in materials of mixed origin used in the manufacture of the final product which have not, at this stage, been included in the legislation relating to other preference countries.

Overall, the legislation liberalises and therefore encourages trade between New Zealand and Australia, and confines the benefits of that trade to CER producers. By making the boundaries of permissible expenditure clearer, the legislation will, however, make it harder for unintended concessions to be obtained.

Export Finance and Insurance Corporation Act 1991

In March 1994, the Executive Council agreed to an amendment to Regulation 6 of the Export Finance and Insurance Corporation's (EFIC) regulations which limit the total amount of loans that EFIC can make under Part *4* of the *Export Finance and Insurance Corporation Act 1991*. The limit was increased from $2,200 million to $2,500 million. (Statutory Rules 1994 No. 41, gazetted on 11 March 1994.)

There are no costs associated with the amendment to the Regulation. The benefits are that EFIC is not restrained - given the expected level of demand for export credits — from supporting the export of Australian capital goods and related services.

Australian Industry Property Organisation (AIPO)

Industry Technology and Regional Development Legislation Amendment Act 1994 No. 58 of 1994

In part, the Act was to account for the incorporation of the Patent, Trade Marks and Designs Office into the Australian Industrial Property Organisation (AIPO). The amending Act also made a number of individual changes to the Patents Act 1990, the *Trade Marks Act 1955* and the *Designs Act 1906* which included removing the limitation on which countries can be declared "Convention Countries" for the purposes of the Trade Marks and Designs Acts.

Patents (World Trade Organization Amendments) Act 1994 No. 154 of 1994

The *Patents Act 1990* was amended to bring it into line with the standards and principles prescribed for patents in the Agreement Establishing the World Trade Organization. The Act increases the term for a standard patent from 16 to 20 years, with effect from 1 July 1995, and modifies the conditions under which compulsory licences and crown use are allowed.

Trade Marks Act 1994 No. 156 of 1994

The *Trade Marks Act 1994* introduced new trade marks legislation which is consistent with the minimum standards and principles prescribed for trade marks under the World Trade Organization Agreement. This Act incorporates provisions implementing the Government's response to the July 1992 report of the Working Party to Review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation.* This new trade marks legislation also reflects international trends in trade marks law and provides streamlined procedures for obtaining and maintaining trade marks registration.

The *Trade Marks Act 1994* received the Royal Assent on 13 December 1994. It is not intended that a Proclamation be made before 1 January 1996. It is proposed that this Act be repealed, and be replaced in its entirety by the Trade Marks Bill 1995, which is proposed to commence on 1 January 1996.

Olympic Insignia Protection Amendment Act 1994 No. 44 of 1994

The *Olympic Insignia Protection Act 1987* (OIP Act) was amended to provide a mechanism for the protection of the Olympic torch and flame designs for a limited time around each Olympic Games by way of the protected designs provisions of the OIP Act. This Act also prohibits registration of trade marks that contain or consist of the English version of the Olympic motto ("faster, higher, stronger") in the same manner as those that contain or consist of the motto in Latin ("citius, altius, fortius"). The amending legislation also inserts a provision into the OIP Act advising that remedies are also available under the *Trade Practices Act 1974* in relation to conduct generally that is misleading and deceptive, and in relation to false or misleading representations as to sponsorship, affiliations and approval.

Australian Customs Service

There has been extensive change in legislation and regulation. Acts passed include:

Customs Tariff (Uranium Concentrate Export Duty) Act Repeal Act 1994

- to repeal the Uranium Export Duty

Excise Tariff Legislation Amendment Act 1994

- to amend the *Excise Tariff Act 1921*:
- to correct an anomaly in respect of the granting of exempt offshore oil status for crude oil excise purposes; and
- to correct cross references to the *CELA Act 1993* in ETAA (No.2) 1993

Departure Tax Amendment Act 1994

- to introduce a passenger processing charge and short term visa charge

Customs Legislation (WTO Amendments) Act 1994

- to amend the *Customs Act* and the *Anti-Dumping Authority Act* to ensure Australia's Anti-Dumping and countervailing schemes are consistent with the new WTO Agreement

Customs Tariff (Anti-Dumping) (WTO Amendments) Act 1994

- amendments to ensure Australia's Anti-Dumping and countervailing schemes are consistent with the new WTO Agreement

Customs Tariff (WTO Amendments) Act 1992

- amendments to implement new WTO Agreement after the conclusion of the Uruguay Round

Departure Tax Collection Amendment Act 1994

- to provide for the administrative provisions for the passenger processing charge and to repeal existing departure tax collection legislation

Customs Tariff Amendment Act 1995

- amendments to the Customs Tariff Act 1987 to reduce the duty payable on fuel oil and topped crude, and to remove Developing Country margin of preference for all but the least developed countries

Excise Tariff Amendment Act 1995

- to amend the Excise Tariff Act to reduce the excise on fuel oil and topped crude; to increase the excise on avgas and avtur; and to provide producers of crude oil and condensate exemption from new excise arrangements in certain circumstances.

In addition, the ACS made a wide range of new and amended regulations covering tariff concession orders, prohibited exports, excise and departure tax.

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B.6 Department of Primary Industries and Energy

Fisheries Management Act 1991

Amendments were made to the *Fisheries Management Act 1991* as part of the *Primary Industries and Energy Legislation Amendment Act 1993* following legal advice indicating doubt as to whether the provisions of the Act supported the level of flexibility needed to implement some fishery management arrangements. Accordingly, provision was made for a fisherman to hold a number of statutory fishing rights as a discrete package of rights authorising a particular fishing activity. The purpose of the amendment was to ensure that provisions are unambiguous, enabling fishermen to have confidence in current management arrangements.

Customs (Prohibited Exports) Regulations

Schedule 9 to the *Customs (Prohibited Exports) Regulations* was amended to reflect Australia's nuclear non-proliferation obligations to control nuclear specific goods and technology and also to rationalise responsibility for controlling exports of strategic duel use items by transferring nuclear dual use items to the Department of Defence.

Agricultural and Veterinary Chemical Products (Collection of Interim Levy) Act 1994

The Interim Levy Act imposes a levy on the agrochemicals industry to fund the operations of the National Registration Authority for Agricultural and Veterinary Chemicals.

The Levy has been introduced with the agreement of the industry and establishes a central agency responsible for the registration of agricultural and veterinary chemicals in Australia. The introduction of the levy is offset by legislative time-frames for the evaluation of chemicals products proposed for registration and the administrative efficiencies gained by dealing with a single authority.

Australian Quarantine and Inspection Service (AQIS)

The Australian Quarantine and Inspection Service (AQIS) operates a regulatory regime in what could be termed the area of social regulation, setting standards for food processing and the importation of goods that may adversely affect our agricultural industries image as a "clean, green produce".

AQIS is responsible for the inspection of food exports and imports and the quarantine of a wide range of goods which may affect Australia's industries. These responsibilities are achieved through the application of the following Acts and relevant associated legislation:

- *Export Control Act* 1982
- *Quarantine Act* 1908
- *Meat Inspection Act* 1983
- *Imported Food Control Act* 1992

Over the past five years, AQIS has undergone significant reform in the way it approaches regulation and its inspection methods and is gradually moving away from traditional end-point inspection to Hazard Analysis and Critical Control Point (HACCP) and Quality Assurance (QA) based systems. In addition, the potential duplication caused by State Authorities undertaking quarantine functions on behalf of the Commonwealth is being reduced by the Commonwealth resuming full responsibility in NSW, Queensland, Victoria and South Australia (progressively, by the end of 1995).

Quarantine

There have been no changes to Quarantine regulations or their application which impose additional requirements on industry. Rather, there have been moves to deregulate by allowing greater self regulation, at least at the point of application requirements. Under the Quarantine Programs, there have been moves to introduce a wide range of Approved Quarantine Directives (AQDs) and Certification Assurance Arrangements (CAs) whereby industry clients become responsible for quality based processes to ensure compliance with Quarantine Regulations and AQIS moves back from a role as direct provider to that of an auditor of the efficiency of the systems approved. The result is a reduction in duplication and reduced costs to industry.

Over the past two years, there have been only small changes made to legislation/regulations relating to AQIS's Quarantine role, primarily aimed at clarifying the way in which Government decisions relating to cost recovery are applied.

In addition, the Agricultural Resource Management Council of Australia and New Zealand (ARMCANZ) — a joint Commonwealth-State Ministerial Council — recently agreed that AQIS should pursue, in cooperation with industry, the use of Third Party Providers for the application of certain regulations.

Food inspection

In the area of imported foods, the Act relies on a risk-based approach. In addition, it is proposed that the quarantine and imported foods inspectorate be progressively amalgamated so that imported food is only inspected once by AQIS.

Food export inspection methods are moving to HACCP and QA systems. For processed foods, slow industry uptake meant that the original twelve months change-over period from end-point inspection had to be extended to eighteen months. The system offers significant benefits in self regulation to companies who meet the performance standards and allows AQIS to focus its resources on high risk areas or non-complying processors.

These measures was introduced with full consultation with industry and included parallel changes in food, premises construction and operational standards. All market quality parameters have been removed from fish, dairy and egg standards, with the exception of abalone where they have been retained at industry request. Functional requirements for premises construction as it relates to hygiene replaces old prescriptive rules, and operational practices are now founded on defined 'Good Manufacturing Practice' criteria.

Meat inspection

Meat based commodities are regulated primarily under the *Export Control Act 1982* and the *Meat Inspection Act 1983* (a summary of these regulations and associated orders is provided in the Box). Programs based on QA principles, in particular the use of HACCP methodology, continue to be utilised in the promotion of self-regulatory arrangements. Under these, the responsibility of industry to comply with nominated

legislated provisions is formally transferred following application and approval of the arrangements sought.

Under the Export Meat Orders, approvals in most cases apply only to a particular process or operation (or an aspect of these) at a registered establishment (premises registered under the *Export Control Act 1982*). The approval covers two kinds of arrangement:

- alternative regulatory arrangements (programs for operation without, or with a reduced, official inspection presence); and
- those that are establishment specific (programs tailored to special production needs of the particular establishment — ie may provide for implementation of other procedures that are at variance to (but comparable with) those prescribed).

In upgrading existing approvals, increased emphasis is being given to ensuring meat safety. The approved arrangements will complement any already established systems of Quality Management.

Similar arrangements are available under the *Meat Inspection Act 1983* to domestic premises in those States or Territories where AQIS continues to have responsibility for the delivery of official inspection services.

The management of national issues continues to evolve in consultation and in conjunction with industry. National control measures, directed at maintaining access to overseas markets which are put at risk (potential or real) when problems associated with chemical residues are detected, have relied on, and benefited from, the active cooperation of the various sectors of Australian agricultural industry involved.

SIGNIFICANT BUSINESS REGULATION for MEAT BASED COMMODITIES

Export Control Act 1982

This Act permits the making of Ministerial Orders that regulate the export of agricultural products. During 1994, the following significant changes were made to Ministerial Orders:

Export Meat Orders — these Orders, which govern the eligibility of cattle and buffalo for slaughter processing for export to certain destinations, were revised to implement changes to official controls recommended by a joint Commonwealth/ State/Industry working party. These controls relate to whether or not an animal has been treated with a class of veterinary pharmaceuticals known as hormonal growth promotants (HGPs) during its life. The special requirements apply to the European Union (EU) and several other countries that have placed bans prohibiting the entry of meat derived from treated animals.

Meat Inspection Act 1983

This Act permits the making of Ministerial Orders that regulate the preparation of meat on premises licensed by State authorities in States where AQIS has undertaken inspection on the State's behalf. During 1994, the following significant changes were made to Ministerial Orders:

Meat Inspection (General) Orders — these Orders provide legislation applicable to all States that have entered into an agreement with the Commonwealth whereby AQIS undertakes meat inspection services on the States behalf. Orders were made clarifying provisions and reflecting changes in AQIS's administration of the *Meat Inspection Act.*

Meal Inspection (New South Wales) Orders — these Orders-provide legislation specific to New South Wales. Orders were made replacing existing Orders by a set of new Orders that brought into effect a decision by NSW authorities to change the system of official identification used in that State to identify and control the movement of meat in that State.

Meat Inspection (Australian Capital Territory) Orders — these Orders provide legislation specific to the Australian Capital Territory. Orders were made replacing existing Orders by a set of new Orders that bring the ACT into line with the meat inspection system operating in NSW. The Orders remove problems associated with the movement of meat in both directions and reflect major reforms agreed to by Agricultural and Resource Management Council of Australia and New Zealand.

Regulatory action at the Federal and State/Territory level is focussed as much at underpinning industry systems as implementing the necessarily legislative provisions. This was the ease in 1994 when the existing control system in regard to the use of hormonal growth promotants (HGPs) needed to be upgraded to meet the official requirements of the European Union (EU).

More recently, in 1995 an industry system for maintaining the identity of "clean" and "at risk" livestock was introduced following the detection of chlorofluazuron (CFZ) residues in cattle fed cotton trash. This system provided the basis that enabled the AQIS public health certification, necessary for meat exported from Australia to be inspected and cleared at import, to be issued.

Market access is the subject of a joint program with industry — the International Market Access Project (IMAP). IMAP is directed at developing strategies and priorities for increasing Australia's access to overseas markets by reducing or eliminating technical barriers to trade. The participation of industry on commodity-specific panels is crucial to the success of the program if Australia is to build on the leverage provided by the General Agreement on Tariffs and Trade (GATT) on sanitary and phytosanitary measures. It will also assist in setting national priorities for the coordination of AQIS's work programs both within Australia and at the international level.

In this regard, the focus scope and application of the Export Meat Orders is currently the subject of a joint review with industry. It is expected that the review will result in an extensive revision of this set of orders that will provide a legislative base better suited to the changing needs of the industry.

Overall approach

AQIS, whilst being required to act as a regulator, is also working both internationally and with its industry clients to promote self regulation wherever practical. This trend will be maintained, although AQIS must remain cautious that revised systems remain effective in protecting Australia's export markets and "disease free" domestic status.

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B.7 Department of Transport

According to the Department of Transport, the major regulatory developments for which it is responsible are as follows.

Air Navigation (Aerodrome Flight Corridors) Regulations

The above Regulations (Statutory Rules 1994 No.428) were gazetted on 20 December 1994. The Regulations provide for designated flight corridors for the parallel runways at Sydney (Kingsford-Smith) Airport, with penalty provisions for aircraft failing to adhere to the flight corridors.

Air Navigation (Aerodrome Flight Corridors) Determination No. 1 of 1995

The Minister for Transport made the above Determination on 16 March 1995. The Determination identifies the location and dimensions of the designated flight corridors at Sydney (Kingsford-Smith) Airport.

Air Navigation (Aerodrome Curfew) Regulations

Recent amendments under this Regulation include:

- penalty provisions for aircraft operators who operate in contravention of the Regulations;
- allocating specific quotas to freight aircraft operators; and
- only permitting the use of runway 34R/16L for operations during the curfew.

Air Navigation (Aircraft Noise Regulations)

A recent amendment under this Regulation provides that operators of supersonic aircraft may only engage in air navigation subject to specified conditions of approval.

Occupational Health and Safety (Maritime Industry) Act 1993

On Royal Assent (18 January 1994), the Seafarers Safety, Rehabilitation and Compensation Authority became responsible for administering the modernised health and safety arrangements for seafarers under the *Occupational Health and Safety (Maritime Industry) Act 1993*.

Occupational Health and Safety (Maritime Industry) Consequential Amendments Act 1993

This Act amended the Seafarers Rehabilitation and Compensation Act 1992 primarily to reflect the Authority's additional functions under the *Occupational Health and Safety (Maritime Industry) Act 1993*.

Part X of the Trade Practices Act 1974

On 13 October 1994 the Minister for Transport announced that, flowing from the review of Part X of the *Trade Practices Act* 1974 conducted by Mr P Brazil, amendments would be made to the Act to enhance the existing regulatory regime.

These proposed amendments primarily relate to penalties and civil remedies; the treatment of accords and discussion agreements; the provision for low cost dispute resolution; and exemptions for collective negotiation of stevedoring contracts by shipping lines.

Coasting Trade Provisions of the Navigation Act 1912

The Federal Government recently reaffirmed its commitment to supporting existing cabotage arrangements (whereby coastal cargoes are carried in Australian controlled and crewed ships, whenever possible) and the existing single voyage permit system.

Land transport

The Interstate Road Transport legislation has been amended to apply relevant national heavy vehicle regulations and charges developed by the National Road Transport Commission to vehicles registered under the Federal Interstate Registration Scheme (FIRS).

Regulations made under the *Road Transport Charges (Australian Capital Territory) Act 1993* were approved by the Minister on 7 March 1995. The Northern Territory and the States are in the process of adopting complementary legislation so that these regulations will form the basis of a national charging regime.

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B.8 Treasury

National Competition Policy

The national competition policy implementation package consists of the following elements:

- the Commonwealth Competition Policy Reform Bill,
- the Competition Principles Agreement,
- the Conduct Code Agreement;
- the Agreement to Implement the National Competition Policy and Related Reforms; and
- the State and Territory application legislation.

Major elements of the policy will be administered by a general regulator, the Australian Competition and Consumer Commission (ACCC), supported by the National Competition Council (NCC).

- The ACCC will be formed from a merger of the TPC and the PSA. In addition to performing the existing functions of those two bodies, the ACCC will perform functions under the new national access regime.
- The NCC will be a high level advisory and research body, with a legislatedrole in the national access regime and prices oversight of State businesses. The NCC will also be able to assist governments with the implementation of other elements of the competition policy in accordance with an agreed work program.

The national competition policy consists of six essential elements:

(1) Universal application of the competitive conduct rules in the Trade Practices Act to all sectors of the economy.

These conduct rules have covered most of the economy since 1974. Coverage will now be extended to include the unincorporated sector and State and Territory government business enterprises.

As part of this new national competition policy, these rules will be updated to enable them to better cope with modern business practices. Specific changes include:

- extending the resale price maintenance prohibition to services;
- allowing for the authorisation of conduct which would otherwise contravene the prohibitions against price fixing agreements involving goods and resale price maintenance;
- allowing for notification of third line forcing conduct; and
- repealing the prohibition against price discrimination.

The means by which firms can be exempted from the rules will also be revised. Conduct can be exempted from the competitive conduct rules by way of authorisations, notifications or legislative exemptions. The amendments will make the legislative exemptions (section 51 of the Trade Practices Act) more transparent.

(2) Competitive neutrality principles which neutralise any net competitive advantage enjoyed by government businesses by reason of their public sector ownership.

Broadly this will involve subjecting government businesses to the same tax and regulatory regimes as private sector competitors (or imposing other measures which neutralise any net advantage arising from public sector ownership).

(3) Review of legislation which restricts competition to ensure that such restrictions are necessary to achieve the objectives of the legislation and that there is a net benefit to the community as a whole.

All legislation (including Acts, enactments, Ordinances and regulations) will be reviewed, and where appropriate, reformed by 2000.

(4) Structural reform of public monopolies where a government has decided to introduce competition or undertake privatisation.

Governments are required to adhere to certain principles, including structural separation of regulatory and business functions if they introduce competition into a market served by a public monopoly or privatise a monopoly. The policy does not advocate privatisation.

(5) Enabling access to services provided by means of significant infrastructure facilities.

The policy will provide for a legislative access regime - Part IIIA of the Trade Practices Act. It sets out a process for declaration of services, at the initiation of a person seeking access, backed up by compulsory arbitration powers. In addition, in order to encourage the parties to establish their own access regimes, the legislation:

- sets out a process whereby providers of services, at their initiative, can give undertakings setting out the terms on which they are willing to provide third party access; and
- provides for the accreditation of State and Territory access regimes which meet effectiveness criteria.

Services which are covered by an undertaking accepted by the ACCC or by an effective State or Territory regime cannot be declared under the national regime. The

Commonwealth, States and Territories have also agreed on a set of principles for State and Territory based access regimes.

(6) Prices oversight of firms (including government businesses) with a high degree of market power.

The policy involves extending coverage of the Prices Surveillance Act to State and Territory government business enterprises in certain circumstances. It also involves the addition of a formal prices monitoring function.

The notification requirements of declared companies seeking to increase the price of a declared product have also been amended where a business proposes to set a price higher than it supplied the good or service over the previous twelve months, it will need to notify the ACCC prior to setting the new price.

Foreign Investment

On 30 August 1994, Regulation 3(q) of the Foreign Acquisitions and Takeovers Regulations was amended to preserve an existing exemption, for permanent residents and other persons entitled to remain in Australia indefinitely from the need to seek foreign investment approval to acquire residential real estate, following changes to the *Migration Act 1958.*

Taxation

The following regulatory developments in the field of taxation have been identified:

(1) Regional headquarters (RHQ) tax concessions — where eligible RHQs are able to deduct certain relocation costs and obtain an exemption from wholesale sales tax for certain imported computer equipment. These measures were enacted in *Taxation Laws Amendment Act No.3* 1994 which received Royal Assent on 28 November 1994.

The amendments to the law require that a company's eligibility for the concessions is tested against guidelines published in the Commonwealth gazette. These guidelines were determined by the Treasurer and are contained in *Guidelines for the Determination of Regional Headquarters Companies No.1 of 1994* which was published in a special gazette of 1 December 1994. Companies that meet the guidelines are named in a RHQ Company determination. Both the guidelines and company determinations are disallowable instruments for the purpose of section 46A of the *Acts Interpretation Act 1901* and require tabling in accordance with those provisions; and

(2) Infrastructure borrowings — where the *Taxation Laws Amendment (Infrastructure Borrowings) Act 1994* required two regulations to be put in place. The regulations were drafted following consultation between the Treasury, the Australian Taxation Office and the Development Allowance Authority Secretariat.

The purpose of the regulations is to:

- prescribe a list of investments for Infrastructure Borrowings raised, but not immediately spent;

- inform the public of the intended maximum cost to the Commonwealth for a financial year of the taxation consequences of the issue of (Infrastructure Borrowing) certificates.

Insurance and Superannuation Commission

The ISC is responsible for the prudential supervision of the life, general and superannuation industries. The ISC consults extensively with industry representatives, consumer groups and professional associations to obtain technical advice and community views on its legislative and administrative proposals. The intention is to reduce compliance costs, to emphasise the responsibility of the institutions' directors and management, and to improve market competition and innovation.

Life insurance

The main areas of reform to life insurance regulation have involved a new life insurance Act *(Life Insurance Act 1995)*, improved disclosure rules, and development of a Code of Practice.

The *Life Insurance Act 1995* (which replaces the *Life Insurance Act 1945)* received Royal Assent on 23 February 1995, and is expected to commence in July of this year. When the new Act comes into effect, it will strengthen prudential supervision and improve consumer protection.

Key elements of the new Life Insurance Act include:

- new solvency and capital adequacy standards;
- increased responsibilities of directors, auditors and actuaries;
- improved reporting requirements; and
- requiring life companies to establish compliance committees for consumer protection purposes.

A compulsory life insurance Code of Practice has been developed for the life insurance industry to govern the relations between life companies, intermediaries and consumers. The Code is intended to improve industry standards relating to sales practices, intermediary competencies and complaint handling.

General insurance

The main amendments to the ISC's general insurance supervisory legislation are as follows:

The *Insurance (Agents and Brokers) Act 1984* was amended to:

- give the Commissioner increased powers to investigate intermediaries, and cancel or suspend their registration under the Act;
- clarify the responsibilities of insurers for the actions of multi-agents selling insurers' products;

- raise the standard of professional indemnity insurance required of registered intermediaries.

The *Insurance Act 1973* was amended to:

- provide consistency between the method of valuation of shares in related bodies corporate and that used for calculating their value for solvency purposes;
- allow more commercial and administrative flexibility in Commissioner directions on insurers' assets; and
- update provisions of the Act dealing with an insurer's principal banker.

The *Insurance Contracts Act 1984* was amended to:

- make the Commissioner responsible for the general administration of the Act, and
- allow him to take representative action on behalf of insureds in the public interest;
- require statutory information notices to be given to purchasers of consumer credit insurance at pre-sale, point-of-sale and post sale; and
- clarify the rights of insureds to seek redress for pre-contractual unconscionable conduct by insurers.

Superannuation

A number of significant amendments to ISC superannuation legislation have been made since late 1993. The main developments are outlined below.

The *Superannuation Industry (Supervision) Act 1993* came into operation in December 1993 and is primarily aimed at enhancing the security of superannuation savings. In particular, the legislation:

- makes trustees of superannuation entities (ie. regulated funds, approved deposit funds and pooled superannuation trusts) more accountable for their actions;
- allows for greater member participation in superannuation fund management; and
- strengthens the ISC's investigation and enforcement powers.

The *Superannuation (Resolution of Complaints) Act 1993* came into effect on 1 July 1994, and established an independent statutory body known as the Superannuation Complaints Tribunal. The objectives of the Tribunal are to provide a low cost, informal and speedy disputes resolution mechanism for members of large funds who cannot have their complaints about trustee decisions resolved internally by the fund.

Prices Surveillance Authority (PSA)

In line with the spirit of the National Competition Policy Review inquiry (the Hilmer lnquiry), the Assistant Treasurer directed the PSA in December 1993 to conduct a review of declarations under the *Prices Surveillance Act 1983*. This general review of some 17 declarations is to be completed by 2 December 1995.

In addition, in November 1994, the Minister set out in a statement the Government's new directions for pricing policy for both the public and private business sectors. The aim of these arrangements is to achieve price restraint in markets where there is little or no effective competition without restraining business innovation, investment, employment growth and efficiency.

As part of the strategy for implementing the new National Competition regime, the Australian Competition and Consumer Commission (ACCC) will be established by merging the Trade Practices Commission and the Prices Surveillance Authority. The PSA's existing functions of prices surveillance and public inquiries will be retained within the ACCC, and a price monitoring function will be added.

Under prices monitoring, the Minister may request the PSA (ACCC) to undertake ongoing monitoring of prices, costs and profits in any industry or business. It is envisaged that price monitoring will be employed where there is:

- concern about the effectiveness of competition;
- a history of pricing problems;
- community concern about price levels or movements; or
- where industries have been recently reformed or deregulated.

It is envisaged that price monitoring will be less intrusive and involve less of an administrative burden for businesses than prices surveillance. If monitoring fails to resolve unacceptable pricing practices or reveals structural problems in a market, firms may be declared for prices surveillance.

The powers of the PSA (ACCC) will be extended to permit, in certain instances, price oversight of State and Territory Government businesses. Prices surveillance will be possible if the State or Territory agrees, or where the National Competition Council has, on request of an Australian government, recommended declaration of the government business and the Commonwealth Minister has consulted the appropriate Minister of the State or Territory concerned. The reach of prices oversight will also be extended to cover a wider range of consumer services such as, the prices for legal services and Pay TV.

The PSA (ACCC) will also have a greater range of methods for assessing price movements for firms under surveillance. These include price-based as well as traditional cost-based approaches. While the ability to apply flexible approaches will ensure price restraint, it should also not discourage firms seeking cost efficiencies or productivity improvements. With these new powers, the form and extent of prices surveillance can be tailored more effectively to the particular characteristics of the individual firm and markets.

In early January 1995 the Government directed the PSA to hold a public inquiry into fees and charges that financial institutions charge on retail bank accounts. The inquiry received a large number of submissions from the public. It reported in June 1995.

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B.9 Australian Broadcasting Commission (under the Communications and the Arts portfolio)

Anti-Siphoning list

On 6 July 1994 the Minister for Communications and the Arts issued a notice pursuant to section 115(1) of the *Broadcasting Services Act 1992* listing the events of kind, the televising o£ which, should be available free to the general public. Pay TV licensees must not acquire the right to the events on the list unless a national or commercial broadcaster has acquired the right to broadcast that event. These events include the Melbourne Cup, the Australian Football League Premiership, Australian Open Tennis etc.

The *Broadcasting Services Act 1992*

The introduction of the *Broadcasting Services Act 1992 (BSA)* has led to further self--regulation in planning the technical specifications for radio and television transmission facilities.

Before the introduction of the *BSA*, the then Department of Transport and Communications specified all of the details of the transmission facilities so that the licensee could build the facility according to the Department's detailed design. This deregulation allows the broadcaster some flexibility in the way they implement the approved specifications within the guidelines established by the ABA.

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B.10 National Food Authority (part of the Human Services and Health portfolio)

The National Food Authority (NFA) has responsibility for developing and amending food standards for all foods sold within Australia and was established by the *National Food Authority Act 1991* . Under a 1991 Premiers Agreement, food standards agreed by the National Food Standards Council (Commonwealth and State/Territory Health Ministers) are adopted (by reference and without amendment) and enforced by the States and Territories.

During its first three years of existence the NFA concentrated on processing a backlog of inherited applications, completed a major policy review and commenced planning for a five year review of food standards. These activities were largely driven by an agenda established by Cabinet.

Over the past year, however, the NFA has redirected its focus to issues of regulatory reform. It has developed and clarified its major priorities, improved its consultative arrangements with industry stakeholders and increased its role in developing alternative forms of regulation such as voluntary industry codes of practice.

The review of the Food Standards Code has been identified as a key priority for the next two years. The review will be a major vehicle for the NFA to implement its

revised regulatory arrangements. These revised arrangements start with a commitment to the use of voluntary industry codes of practice instead of prescriptive legislation wherever this is feasible. This alternative to regulation will be used wherever it can be effectively implemented. It relies on close work with industry and strong industry commitment. Already the NFA has developed two codes of practice: one for self-serve take-away salad bars and another for the use of nutrient claims on labels. It has also worked closely with the smallgoods industry to develop a code of hygienic production for smallgoods, which although currently mandated by law, will become a voluntary code of practice as soon as the industry demonstrates an ability to voluntarily regulate these matters themselves.

The NFA has also been working closely with the Office of Regulation Review to implement a formal system of regulatory impact assessment. These procedures involve the identification of all stakeholder groups effected by regulation and some quantification (where possible) of the impacts on each of these groups. Evaluation of this information for each of the regulatory approaches possible helps in the decision making process.

While the NFA is required by its legislation to consider the effects of its activities on industry and trade, a more formal process of evaluating impacts will improve its responsiveness to industry needs. These procedures will also be incorporated progressively into the review of the Code.

Because of its role in managing public health risks, the NFA has during the past year, reviewed and clarified its risk assessment and management procedures. The recent outcome of the Uruguay Round of GATT discussions (the SPS and TBT Agreements) has reinforced the need for member countries to use appropriate risk analysis techniques and the Authority has also been participating in recent discussions in the Codex Alimentarius Commission on risk analysis methodology for elaboration of future Codex food standards.

The risk management procedures used by the NFA are broadly consistent with those of other regulatory agencies and with principles established both under the Joint FAO/WHO Food Standards Program of Codex and by the International Program on Chemical Safety in cooperation with the Joint FAO/WHO Expert Committee on Food Additives (JECFA).

Another important activity of the NFA recently, has been its negotiations with the States and Territories on the need for national co-ordination of surveillance. The States and Territories have agreed in principle to the development of a national surveillance strategy and work is now underway to develop a set of enforcement priorities, which will need to be reviewed regularly, for national implementation (resources permitting). This process will enable the NFA to better co-ordinate the operations of the imported foods inspection program with the enforcement work done at the domestic level, as required by the new WTO Agreements which resulted from the Uruguay Round of GATT.

APPENDIX C: SELECTED DEVELOPMENTS IN REGULATION

This appendix covers areas of regulation which have received some attention by the ORR in the past year and have not been covered elsewhere in this paper:

- pre-merger notification
- Corporations Law Simplification Program
- broadcasting (anti-siphoning and broadband cable access)
- regulatory institutions in Australia's financial system
- changes in the regulation of franchising
- Australia's visa system for visitors.

C.1 Pre-merger Notification

The *Trade Practices Act* 1974 has never required firms initiating a merger or takeover to provide advance notice to the Trade Practices Commission (TPC). Parliamentary reviews of merger practices have produced differing conclusions as to the need for a mandatory pre-merger notification scheme: the Griffiths Report (1989) in opposition and the Cooney Report (1991) in favour.

As part of a wide-ranging response to the Griffiths and Cooney Reports, the Government in 1992 agreed in principle to adopt an administratively simple pre-merger notification scheme for substantial mergers (Duffy 1992).

On 22 November 1994 the Assistant Treasurer released for public comment a discussion paper by the Treasury canvassing options for the introduction of a pre-merger notification scheme.

The Treasury's proposed scheme seeks to reduce the cost of merger litigation by:

- providing the TPC with enough time to seek an interim injunction and hence overcome the problems that can arise when attempts are made at divestiture following any anti-competitive 'midnight' mergers — expense, complexity and only partial success;

providing greater certainty for potential merging parties, so reducing the possibility of litigation by the TPC; and

bringing Australia into line with other OECD countries.

Under the scheme outlined by the Treasury, the *Trade Practices Act* would be amended to require anyone proposing to acquire shares or assets in excess of a threshold, to notify the TPC and to wait 21 days before actually making the acquisition.

The Treasury has identified two possible notification thresholds.

The first proposal (Proposal A) would require notification if:

- the combined value of the target and acquirer is $150 million; and
- the target company has a value in excess $25 million; and
- the acquisition is for 5 percent of voting power; and
- after the acquisition, the acquirer has more than 10 percent of the voting power of the target.

The second proposed scheme (Proposal B) is more demanding. It would require notification if:

- the combined value of the shares and assets to be acquired exceeds $25 million; and
- after the acquisition the acquirer has more than 10 percent of the voting power of the target.

Either of these proposals would require that the TPC be given 21 days notice of major mergers. This advance notice would enable the TPC to assess the competitive effects of all such mergers and, if necessary, to allow it time to seek a court injunction or to obtain undertakings from the concerned parties.

In its submission (ORRc 1995) to the Treasury, the ORR argued that the proposed pre-merger notification schemes would be an undue burden on the market for corporate control. It considered the proposed asset and control thresholds to be too low and the 21 day delay excessive. The proposed thresholds lack an empirical basis and are likely to catch many share acquisitions with no antitrust concerns — including those simply for passive investment. This would increase investors' costs. It would require the TPC to examine mergers with no anti-competitive implications. And it would reduce the incentives to undertake mergers and acquisitions.

The ORR proposed as an alternative and less burdensome way to provide better and more timely merger information to the TPC that:

- the onus to notify the TPC be a duty imposed upon the corporation; and
- upon notification the TPC should have five working days to determine whether it will challenge the merger.

Under such an alternative it was suggested that, even when the merger is in breach of the *Trade Practices Act*, there should be no corporate liability for a failure to notify the TPC as long as the corporation had judged that the TPC would not challenge the merger and that it is reasonable for the corporation to have made that judgement.

Such an alternative seeks to set a flexible notification standard that will not require notification by the overwhelming majority of mergers that are competitively neutral, but would penalise firms that fail to show due corporate responsibility.

The Government has not yet announced its decision on the proposals for mandatory pre-merger notification.

C.2 Corporations Law Simplification Program

In October 1993, the Attorney-General's Department created the Corporations Law Simplification Task Force to review the Corporations Law. The Task Force is assisted by a Consultative Group comprising private sector representatives.

The central objective of the program is to make the Corporations Law capable of being readily understood by users, including small business, persons not professionally qualified in law or accounting, and directors of companies, shareholders, auditors and managers.

The focus of the Task Force has been on those areas of the Law where policies are: unclear or uncertain; do not cater for the needs of small business; place undue regulatory burden on business; impede the efficient operation of the law and do not achieve their intended objectives. The plan of action (December 1993) states that:

> 'The objective is to streamline the law, procure consistency and coherence, strip away unnecessary complexities, maintain effective protection for investors, and bring significant cost benefits both to business in complying with the law and to relevant authorities administering it.'

The Task Force identified and released for public comment — as part of stages one and two of the review — proposals for simplification of fourteen priority areas. These included: share buy-backs; small business, propriety companies; company registers; share capital rules; annual reporting provisions; company names; company meetings; accounts and audits; forming a company; defunct companies — deregistration and reinstatement; officers; related parties; fundraising and takeovers.

The ORR provided five submissions to the Task Force for stage two of the program, dealing with accounts and audit, share capital rules, company names,

forming a company and company meetings. Points made in these submissions include the importance of defining objectives and identifying necessity for regulation. These ORR submissions — while often supporting proposals of the Task Force — also suggested that the Task Force give more consideration to alternative ways of attaining objectives; identifying more clearly the costs and benefits of each alternative approach to regulation and focusing on the importance of consistency of proposals with other rules and regulations.

Issues currently under consideration by the Task Force — as part of stage three of the program — include officers; related parties; charges; insolvency; and the application of section 52 of the Trade Practices Act to prospectuses and other related matters.

The First Corporate Law Simplification Bill (1994) — which deals with the first stage of the program — has passed the House of Representatives and is currently before the Senate. The exposure draft of the Second Corporate Law Simplification Bill was released in June 1995. The Corporations Law simplification process, and presentation to the Parliament of Bills outlining proposed changes, is ongoing, and is expected to be completed by October 1997.

C.3 Broadcasting

The two main developments in broadcasting regulation over the past year are:

- the announcement of the details of the anti-siphoning regime to prevent events of national significance being shown exclusively on Pay TV; and
- the announcement of the draft broadband cable access regime.

Anti-siphoning

The *Broadcasting Services Act* contains provisions allowing the Minister for Communications and the Arts to declare events for which a free-to-air broadcaster must obtain rights before they can be shown on Pay TV (s115). The objective of the provision is to ensure that events of national significance are not lost from free-to-air television.

On 31 May 1994 the Minister announced a list of declared events. The list comprises events from most major sports including: the Melbourne Cup, Australian Football League, Rugby League, Rugby Union, Test Cricket, Soccer, Tennis, Netball, Basketball, Golf and Motor Sport. In all cases the list applies to events taking place from the year 1994 to 2004 inclusive. A ‘watch list’ was also published which includes events from the forthcoming Olympics (Summer and Winter to 2004), and Commonwealth Games (to 2002).

This list followed a report to the Minister by the Australian Broadcasting Authority (ABA) outlining options for protecting events of national significance. The options included.

- an extensive list of all events nominated by the free-to-air broadcasters;
- a 'short' list; and
- not declaring any events at all but rather creating a 'watch list' which would be monitored.

Overall the ABA's investigation found:

> that the concerns about the migration of events exclusively to pay television are not supported by the medium to long-term arrangements currently in place between free-to-air broadcasters and the owners of the rights to major events. (p. 5)

The Minister's list is not as comprehensive as the extensive list provided by the ABA, but contains many more events than the ABA's short list option. The regime represents a prescriptive approach to the siphoning issue.

The regime may lead to anti-competitive conduct. This possibility was raised by the Trade Practices Commission in its submission to the ABA. The TPC submitted that:

> denial of the right to broadcast an event under s.115 places an artificial constraint on competition in the relevant markets for programming, and potentially has the effect of placing Pay TV service providers at a competitive disadvantage in relation to free-to-air television broadcasters. (ABA, 1994, p.25)

However, the potential for strategic (anti-competitive) behaviour is in theory limited because if free-to-air broadcasters have had the opportunity to obtain the rights to an event on fair and reasonable terms, but have chosen not to do so, the Minister can remove the event from the anti-siphoning list.

Broadband cable access regime

The Government released a draft broadband cable access regime for comment on 23 December 1994. The regime is designed to set rules and conditions on which service providers, such as pay TV operators, can gain access to the developing broadband cable network. Under the proposal, the access regime is to ensure:

> that broadband services will comply with the provisions of the Telecommunications Act, relating to interconnection and non discriminatory access.

This effectively means that there would be an 'open access' policy for the broadband network.

However, in the case of Pay TV services delivered via broadband cable, if there is sufficient competition in the delivery of Pay TV using cable, the cable

operators will be exempt from the open access provision until 1999. After 1999, open access will apply for pay TV.

The Government's approach to regulating broadband cable has been to design an industry specific access regime. An alternative approach would be to rely on the general access regime established by the 'essential facilities' provisions of the recently passed *Competition Policy Reform Act 1995.*

C.4 Regulatory Institutions In Australia's Financial System

This section provides some background on recent institutional developments in the regulation of Australia's financial system (supporting section 2.3.1 of Chapter Two.)

Reserve Bank of Australia (RBA)

The RBA regulates the Australian banking system to limit risks to prudent levels and ensure that standards are observed and adjusted with changing circumstances. The RBA issues Prudential Statements covering banking activities, with which banks have undertaken to comply with. These Statements deal with issues such as ownership and control, capital requirements, liquidity management, auditor arrangements and limits of exposures (Council of Financial Supervisors 1994, p. 42).

Recent developments include issuing of guidelines dealing with banks' associations with non-banks, banks involvement in funds management and securitisation programs, and the composition of the boards of banks. The RBA has also enhanced disclosure rules governing banks' use of derivatives.

Australian Securities Commission (ASC)

The ASC administers the Corporations Law to maintain the efficiency and performance of markets and firms, including those operating in the securities and futures markets. It seeks to enhance confidence in the integrity of markets and corporations by monitoring and promotion of compliance with regulation of rules and regulations, modifying regulation — within the ambit allowed under relevant legislation — through policy statements, education and consultation programs with interested organisations, and maintenance of public information systems and other reporting entities which enhances the availability information (Council of Financial Supervisors 1994).

Recent developments include a major review of the regulation of securities/financial advisers and release of discussion papers on short selling. Draft amendments to policy statements have included investment in unapproved schemes, stock market provisions of the Corporations law and approval of

trustees for unit trusts and other prescribed interest schemes. The ASC also released a final report on over-the-counter derivatives.

Insurance and Superannuation Commission (ISC)

The ISC was established in 1987 to supervise insurance and superannuation entities in the interests of policy holders and fund members, and ensure compliance with Commonwealth Government's retirement income policy. The ISC employs a market-oriented approach involving regular consultation with interested organisations and minimum effective regulation (Council of Financial Supervisors 1994). The ISC approach in broad terms is characterised by use of licensing restrictions for entry and ownership and a focus on solvency of entities through regular reporting, audits, rules and standards. These roles were enhanced by the *Superannuation Industry (Supervision) Act 1993* (SIS).

Recent developments include enhanced disclosure rules for life insurance policies with risk cover, and Gazettal of regulations under the *Superannuation Industry (Supervision) Act 1993* which provide for more rigorous information disclosure. On 23 March 1995 amendments to the *Superannuation Industry (Supervision) Regulations* introduced restrictions on exit fees from superannuation funds. In May 1995 the Australian National Audit Office (1995) released a report dealing with administrative arrangements for the *Superannuation Industry (Supervision) Act*. It recommended areas for improvement, including records handling and regulation of accountants and auditors.

The *Life Insurance Act 1995* will strengthen prudential supervision and improve consumer protection of life insurance. A compulsory Code of Practice is was released in August 1995 for the life insurance industry to govern their relations with intermediaries and consumers. The ISC also assisted the Insurance Council of Australia in the development of a voluntary Code of Practice for general insurance. In broad terms, ISC reviews of regulations have conformed with the approach outlined in Cabinet-endorsed guidelines for the preparation of regulatory impact statements.

Council of Financial Supervisors (CFS)

The goals of the Council are to establish and facilitate closer coordination between the supervisors of the Australian financial system. The Council comprises the Reserve Bank of Australia (Chair), Insurance and Superannuation Commission, Australian Securities Commission and AFIC. CFS is not a supervisory or policy making body. Rather, its principal functions are to ensure adequate communication between regulators and facilitate the exchange of information and opinions. Together these agencies have authority over

institutions managing about 95 per cent of financial systems assets.[1] It has overseen a review of disclosure standards for similar products and how they might be brought into line. CFS has also coordinated various studies dealing with the regulation of derivatives and a review of financial conglomerates (Reserve Bank of Australia 1995, p. 33). Some of the most significant developments have been in the area of funds managers and insurers (see Council of Financial Supervisors 1994).

Australian Financial Institutions Commission (AFIC)

AFIC was established in 1992 through template legislation enacted by the Queensland Parliament and adopted by all other Australian States and Territories. For the first time, building societies and credit unions became subject to the supervision of a national standard-setting and coordinating agency. The AFIC reports to a Ministerial Council, comprising State and Territory Ministers responsible for building societies and credit unions (Australian Financial Institutions Commission 1995). State agencies provide day-to-day supervision. The AFIC is responsible for maintaining effective prudential and other standards and for ensuring uniform standard setting, similar to that applying to banks. Major developments since 1993 include: extension of the jurisdiction of AFIC to friendly societies; gazettal of comprehensive standards for building societies and credit unions; communication programs; and various changes in regulations such as aligning liquidity standards more closely with those applying to the banking sector.

Australian Transactions Reports and Analysis Centre (AUSTRAC)

AUSTRAC identifies tax evasion and major crime by establishing a regulatory program to ensure compliance with the Financial Transaction Reports Act. It monitors financial transactions and where applicable provides such information to taxation and law enforcement agencies (Australian Transactions Reports and Analysis Centre 1994).

Self regulation organisations and regimes

A number of self-regulatory organisations operate in Australia's financial sector, including the Australian Stock Exchange and the Sydney Futures Exchange. Some industry associations also provide dispute resolution mechanisms, including the Bank Ombudsman and complaints resolution schemes operated by

[1] There are approximately 1700 financial institutions with assets of $44 billion — including some public sector insurers, private health funds, some funds managers and intermediaries — that are outside the Council framework (Council of Financial Supervisors 1994, p. 38).

the Financial Planning Association of Australia Ltd and the Life Insurance Federation of Australia. Self-regulation is also undertaken by professional associations such as the Institute of Chartered Accountants and the Australian Society of Certified Practicing Accountants.

C.5 Changes in the Regulation of Franchising

The regulation of franchising — which involves a franchisee purchasing a group of services from a franchisor under specific conditions — is currently being reviewed.[2] In 1991, the Franchising Task Force issued a report on franchising and as a result a voluntary Code of Practice was introduced in 1993, with development funding provided by the Commonwealth Government. The Code is administered and maintained by the Franchising Code Administration Council. The aim of the Code is to provide minimum prior disclosure standards, improve business practices and better dispute resolution processes between franchisors (who issue franchise contracts) and franchisees who purchase such contracts.

In 1994, as part of a review of the Code by the Minister for Small Business, Customs and Construction and the Department of Industry, Science and Technology, Mr R. Gardini undertook — at the Minister's request — a review of the Code of Practice. This review concluded that compliance with the voluntary Code — which was unlikely to exceed 70 per cent — was too low, especially for some sections of the industry such as real estate and motor vehicles. It found that franchisors not participating in the Code sometimes did not adhere to provisions of the Code, such as disclosure and a cooling-off period for new franchise agreements. In addition the review found that the Code had not been effective in addressing serious disputes between franchisors, who issue franchise licences, and franchisees who purchase such licences. This report recommended that mandatory self regulation (ie. co-regulation) be introduced, with non-participating franchisors no longer being exempt from Corporations Regulations.

In its submission to the Department of Industry, Science and Technology, the ORR noted that this review did not articulate the goals of regulation of franchising. Rather, the main goal of the report was to increase compliance with the Code, which might not attain the key goals of regulation, such as harmonious, orderly and efficient relations between market participants. The report also did not consider alternatives to co-regulation, such as establishing a small business small claims tribunal and enhanced unconscionable behaviour provisions in the Trade Practices Act. In addition, the report did not demonstrate that the benefits

[2] It usually involves leasing the right to use the franchisor's trademark, access to a standardised business system and participation in generic marketing and training.

of co-regulation would outweigh the costs imposed on regulators, franchisors and society.

The Government is expected to respond to this review soon.

C.6 Australia's Visa System for Visitors

Australia's *Migration Act 1958* (as amended) requires any person who is not an Australian citizen to have a visa in order to travel to, enter into and stay in Australia. The current system is referred to as a 'universal' visa system, as all non-citizens, regardless of nationality, are required to obtain a visa.

In December 1994, the Joint Standing Committee on Migration released an Issues Paper for its Inquiry into Australia's Visa System for Visitors. Amongst other issues, the Committee was asked to consider the efficiency and cost effectiveness of the visitor visa system and to consider possible alternative arrangements to the existing system, including visa-free travel or multiple entry visas.

One of the main objectives of the visa system is to provide border integrity and minimise the entry of people who may pose a threat to the Australian community. In its submission to the inquiry, the ORR stated that the type of visa arrangement chosen should be one that maximises this benefit while minimising the costs of achieving it. Some evidence presented to the inquiry suggested that the universal visa requirement may not significantly reduce the number of 'undesirable' visitors entering the country or have a significant impact on maintenance of Australia's security.

In terms of costs, evidence to the inquiry suggested that the indirect costs of the current system could potentially be quite high if visas deter 'desirable' visitors from coming to Australia. This is because tourism is a major Australian export. Export revenue forgone (in addition to the costs of administering a universal visa system) is expected to escalate as the number of visitors coming to Australia increases.

As it appears that the costs imposed by the universal visa requirement are likely to outweigh the benefits, the ORR recommended that the visa requirement be removed for visitors from some countries (or for visitors of some types). Exemptions from the visa requirement could be granted on the basis of criteria such as:

- low historical rates of overstay (where the benefits of the visas are lowest);
- costs imposed by overstays from certain countries;
- low rejection rates on visa applications (where the effectiveness of visas is lowest);

- the extent to which visitors are deterred by visa arrangements; and
- the average expenditure per stay by visitors from each country.

The Committee is expected to report on the outcome of its inquiry towards the end of 1995.

COUNCIL OF AUSTRALIAN GOVERNMENTS

PRINCIPLES AND GUIDELINES FOR NATIONAL STANDARD SETTING AND REGULATORY ACTION BY MINISTERIAL COUNCILS AND STANDARDS SETTING BODIES

PRINCIPLES AND GUIDELINES FOR NATIONAL STANDARD SETTING AND REGULATORY ACTION

A. INTRODUCTION

In its report to the Council of Australian Governments in February 1994, the Committee on Regulatory Reform reported on key issues related to the setting of national standards in Australia. Consideration of this issue was initially prompted by a paper which was released by major business associations in September 1992 which argued that Australia's regulatory system requires a major overhaul if the nation is to compete successfully in world markets and attract overseas investment. It suggested that our regulatory system is unnecessarily complex, generates delays, inconsistencies and additional costs for business investment as well as inhibiting risk-taking and enterprise.

The operation of the Mutual Recognition Agreement has also highlighted discrepancies in standards between jurisdictions and has created an impetus for the development of national standards. Under that Agreement, Ministerial Councils can potentially be called upon to make a standard on any product in the marketplace or develop nationally uniform criteria for the registration of any occupation. Given this mechanism for the development of nationally applicable standards, there is a need to ensure that where new standards are considered, they are subject to sufficient scrutiny to guard against the imposition of unnecessary regulation. It is also important to ensure that new standards do not impose excessive requirements on business. The aim of any national standards setting process should be to achieve minimum necessary standards, taking into account economic, environmental, health and safety concerns.

Other matters which were regarded as requiring further consideration were the need to move away from overly prescriptive standards towards performance based standards, the desirability of avoiding duplication in the impact assessment procedures of different jurisdictions when national standards are set, the monitoring of the appropriateness of proposed national standards to ensure that they conform to accepted regulatory principles and the possible adoption of procedures to encourage compliance with national standards.

Ministerial Council agreements are commonly translated into laws and regulations. Rather than create an artificial boundary between the different forms of regulatory control there is a need for a set of consistent principles that can

govern the approach of Ministerial Councils and intergovernmental standard-setting bodies in developing all proposals which have a regulatory impact.

These guidelines consider the best processes to follow in determining whether a set of standards and their associated laws and regulations are the appropriate course of action for a Ministerial Council or other standard-setting body to take. They describe the features of good regulation and conclude by recommending a set of principles for standard setting and regulatory action.

The principles of good regulatory practice apply to decisions of Ministerial Councils and intergovernmental standard-setting bodies, however they are constituted, and includes bodies established statutorily or administratively by government to deal with national regulatory problems .

The principles apply to agreements or decisions to be given effect through principal and delegated legislation, administrative directions or other measures which, when implemented, would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done (but this does not include purchasing policy or industry assistance schemes).

Development of voluntary codes and other advisory instruments should take account of these guidelines and principles where there is a reasonable expectation that their promotion and dissemination by standard-setting bodies or by government could be interpreted as requiring compliance. For example, should non-compliance with provisions of a voluntary code be considered as evidence by a court or an administrative body when determining compliance with statutory obligations, such advisory documents are subject to the review process.

It is important to note that regulatory review was considered as part of the Hilmer report on competition policy. Of particular relevance to this exercise is the principle adopted by COAG in February 1994 that:

> Proposals for new regulation that have the potential to restrict competition should include evidence that the competitive effects of the regulation have been considered; that the benefits outweigh the likely costs; and that the restriction is no more restrictive than necessary in the public interest.

The principles for national regulation making and assessment which are included in the guidelines are consistent with the objectives of national competition policy.

B. REGULATORY IMPACT ASSESSMENT

Commonly, Ministerial Councils and other regulatory bodies reach agreement on standards or main elements of a regulatory approach which are then given force through principal or subordinate legislation. Regulation, for the purposes of these guidelines, refers to the broad range of legally enforceable instruments

which impose mandatory requirements upon business and the community as well as to those voluntary codes and advisory instruments, noted above, for which there is a reasonable expectation of widespread compliance.

The most appropriate form of analysis should be applied to the identified costs and benefits and a conclusion drawn on whether regulation is necessary and what is the most efficient regulatory approach.

Potential regulators should identify the need for regulation and quantify the potential benefits and costs of regulation. The attached Regulatory Impact Statement Guidelines provide guidance on how to undertake such analysis. A number of State and Territory Governments have produced similar documents which may be of use in assisting the regulatory impact assessment process.

(i) The Need for Regulation

Before deciding upon a path of government imposed regulation, a number of questions need to be asked. These questions form a framework from which to decide upon the course of action that a Ministerial Council or standard-setting body needs to take.

- **Is regulation needed?**

What is the problem that needs addressing? Where is the market failure? Is it a type of market failure that can be addressed without recourse to government regulation? When assessing the need for regulation, an essential first step is to review the adequacy of existing bodies of law (eg trade practices, consumer protection and product liability) which, wherever possible, should be used instead of industry specific regulation. What are the costs, risks or benefits of maintaining the status quo?

- **Regulatory failure**

Is regulation likely to improve upon market outcomes? Could regulation lead to worse outcomes?

- **Alternative solutions**

What are the alternative approaches to dealing with the problem, including non-regulatory action?

- **Benefits of regulating**

What are the likely benefits, including risk reduction, of the proposed regulation? Who will reap these benefits and how certain are they?

- **Costs of regulating**

What are the likely costs of the proposed regulation? Who in the community will bear these costs?

- **Public consultation**

What is the feedback from public consultation on the points above?

- **Support for regulation**

What support is there for the proposed regulations, including support from suppliers and consumers and other parties bearing the costs of regulation?

- **Impact on competition**

What is the impact of the proposed regulatory measure on competition, including the introduction of new processes and techniques?

(ii) The Need for Quantitative Analysis

Where a possible need for regulation is identified, quantitative analysis is needed to support this position and to establish the most efficient form which this regulation might take.

The basic feature of economic appraisal is its systematic examination of all the advantages and disadvantages of each practicable alternative way of achieving an objective. As set out below, there are a number of different approaches to quantitative analysis. Depending on the circumstances, one or more of the following techniques may be employed.

Risk analysis. This methodology is of use in addressing the threshold issue of whether or not to regulate. In making such an assessment, risk analysis should involve: an appraisal of the current level of risk to the exposed population due to the specific cause under consideration; the reduction in risk which will result from the introduction of the proposed measures; consideration of whether the proposed measures are the most effective available to deal with the risk; and whether there is an alternative use of available resources which will result in greater over all benefit to the community. Risk assessment should be used in conjunction with other quantitative assessment techniques.

Cost-benefit analysis. This technique requires that all the major costs and benefits of a proposal be quantified in money terms and is generally preferred over cost-effectiveness analysis. In this way, the outcomes of a range of options are translated into comparable terms in order to facilitate evaluation and decision-making.

Cost-benefit analysis is most effective in instances where there is sound information on which to base the analysis. However, it should also be noted that

cost-benefit analysis should involve consideration of the distribution of benefits and costs, as well as taking account of impacts which cannot be valued quantitatively.

Cost-effectiveness analysis. This type of appraisal compares the costs of different initial project options with the same or similar outputs and can be used where it is difficult to place a dollar value on the major benefits of a proposal. This method therefore only allows a decision maker to compare options that have similar objectives and is somewhat limited in that it only enables comparisons of cost in only one dimension of benefit. However, it may be more readily applicable to social and community services (eg. an anti-discrimination legislative proposal) than cost-benefit analysis. Nonetheless, it should be noted that cost-effectiveness analysis still requires the valuation of as many benefits of a proposal as possible.

Two additional points can be made. Firstly, impact assessment should attempt to assess all costs and benefits to the greatest extent possible, that is, not just economic ones. For example, social and environmental, public health and consumer safety effects should be considered. Secondly, the level of assessment will depend upon an estimation of the likely impact. Regulations with significant net costs or benefits will need detailed quantitative assessment.

As a general principle, the level of detail within the analysis should be commensurate with the impact of proposed regulatory measures and should adequately identify and where appropriate, quantify, the major costs and benefits of the proposal.

C. PRINCIPLES OF GOOD REGULATION

This section outlines the principles of regulation in a general sense and the broad parameters within which standards and regulations should be developed. The first of these is that, as a general rule, the burden of proof that a regulation is necessary remains with the proponents of regulatory action.

Minimising the impact of regulation

Working from an initial presumption against new or increased regulation, the overall goal is the effective enforcement of stated objectives. Regulatory measures and instruments should be the minimum required to achieve the pre-determined and desirable outcomes. It may be necessary to introduce new regulation which replaces existing and less satisfactory regulation

Legislation should entail the minimum necessary amount of regulation to achieve the objectives. Only those parts of a product standard originally developed for voluntary compliance by private standards writers which are necessary to satisfy regulatory objectives should be referenced in mandatory regulatory instruments adopted by government. Referencing of such voluntary standards should only occur following the application of these guidelines and principles.

Any assessment process for the development of regulations and/or standards should be scientifically rigorous, including, where appropriate, a risk assessment process which takes into account public health and safety and environmental protection.

Minimising the impact on competition

Regulation should be designed to have minimal impact on competition. Although it may be necessary, for example, to regulate some aspects of commercial practice, regulation should avoid imposing barriers to entry, exit or innovation.

Predicability of outcomes

Regulation should have clearly identifiable outcomes and unless prescriptive requirements are unavoidable in order to ensure public safety in high-risk situations, performance-based requirements that specify outcomes rather than inputs or other prescriptive requirements should be used. This principle should also apply to any standards that might be referred to in regulation.

International standards and practices

Wherever possible, regulatory measures or standards should be compatible with relevant international or internationally accepted standards or practices in order to minimise the impediments to trade. Compatibility in this context does not necessarily imply uniformity, however.

National regulations or mandatory standards should be consistent with Australia's international obligations. Australia has obligations under the GATT Technical Barriers to Trade Agreement (Standards Code) and the World Trade Organisations Sanitary and Phytosanitary Measures (SPS) Code. Regulators may refer to the Standards Code relating to the International Standards Organisation's

Code of Good Practice for the Preparation, Adoption and Application of Standards.

Regulations should not restrict international trade

There should be no discrimination in the way regulatory measures, mandatory standards or conformity procedures are applied between domestic products or imported products, nor between imports from different supplying countries. Regulations should not be applied in a way that creates unnecessary obstacles to international trade. Even if they differ, standards from other countries should be accepted as equivalent to Australian standards if they adequately meet the objectives of Australian standards.

Regular review of regulation

Regulation should be reviewed periodically. Review should take place at intervals of no more than 10 years. This may be achieved through agreements to incorporate sunset provisions in legislative instruments.

Flexibility of standards and regulations

Specified outcomes of standards and regulatory measures should be capable of revision to enable them to be adjusted and updated as circumstances change. However, it is important to ensure that amendments to regulatory measures and instruments do not result in undue uncertainty in business operations and in so doing, impose excessive costs on that sector.

The exercise of bureaucratic discretion

Good regulation should attempt to standardise the exercise of bureaucratic discretion, so as to reduce discrepancies between government regulators, reduce uncertainty and lower compliance costs. This, however, should not preclude an appropriate degree of flexibility to permit regulators to deal quickly with exceptional or changing circumstances or recognise individual needs. Nor should it ignore the danger of administrative action effectively constituting regulation and thus avoiding disciplines of regulation review. There is a need for transparency and procedural fairness in regulation review and administrative decisions should be subject to effective administrative review processes.

D. FEATURES OF GOOD REGULATION

In formulating national standards and regulatory measures according to the above principles, Ministerial Councils and other regulatory bodies should also take into account the following practical objectives.

Minimising regulatory burden on the public

Legislation should entail the minimum necessary regulation to achieve the objectives. When designing measures or standards, regulators should ensure that the potential regulatory burden of alternative measures on the community is identified. Non-regulatory alternatives to regulation should be explicitly considered, including the option of not introducing new regulation.

Minimising administrative burden

Regulators should develop standards or regulatory measures in a way that minimises the financial impact of administration and enforcement of regulation on governments and the sectors of the community which will be affected by them.

Particular attention should be paid to minimising financial impact in instances where different levels of government are involved. A regulator at one level of government may impose enforcement responsibilities on another level of government that the latter does not have the resources to carry out. This may undermine the effectiveness of regulation.

Regulatory impact assessment

Proposed regulation should be subject to a regulatory impact assessment process, which quantifies the costs and benefits of the proposal to the greatest extent possible. Incentive effects should also be made explicit in any regulatory proposal.

Accountability

As set out in the protocols for the operation of Ministerial Councils, it is the responsibility of Ministers to ensure that they are in a position to appropriately represent their Government at Council meetings. Therefore, to the greatest extent possible, Ministers should obtain full government agreement on matters which may involve regulatory action before they are considered at Ministerial Council level.

Where a Minister is dissatisfied with the outcome of the impact assessment process, the Minister may seek the agreement of his/her Head of Government to request an independent review of the assessment process.

Compliance strategies and enforcement

Regulatory measures should contain compliance strategies which ensure the greatest degree of compliance at the lowest cost to all parties. Incentive effects should be made explicit in any regulatory proposals. Measures to encourage compliance may include regulatory clarity, brevity, public education and consultation and the choice of alternative regulatory approaches with compliance in mind.

The special characteristics of process regulation need to be considered. For example, the number of licences, certifications, approvals, authorities etc. should be kept to the minimum necessary to achieve the regulatory objectives.

The regulatory burden can be reduced if the public is required to undertake a minimum level of interaction with government to, for example, renew permits/licences or file information. This can be achieved through measures such as 'one stop shops', mutual recognition of approval processes within government as well as between governments; better forms and process design.

Having taken these steps to facilitate compliance, regulators also need to consider the feasibility of enforcing regulatory requirements through the detection of non-compliance.

Mandatory regulatory instruments should contain appropriate sanctions to enforce compliance and penalise non-compliance. However, enforcement options should differentiate between the good corporate citizen and the renegade, to ensure that 'last resort' penalties are used most effectively (rarely) but model behaviour is encouraged. Enforcement measures should not have the effect of encouraging otherwise good corporate citizens to subvert compliance measures.

Consideration of secondary effects

Regulatory measures should be designed and/or alternative approaches to regulation chosen with explicit consideration of secondary effects and the nature of these effects outlined.

Inclusion of standards in appendices

Standards should be referenced as current editions in appendices to regulatory instruments rather than embodied in such instruments themselves. It may be appropriate in some circumstances for regulations to reference a specific standard (eg AS 1234).

A disadvantage of only referencing the title of a standard (eg AS 1234) is that impact assessment is carried out only on the initial instrument and referenced standard. The standard, however, may be subsequently changed or updated. This may result in significant changes to the costs or benefits of regulation, with no

opportunity to review the implications of such a change. This can have the effect of transferring regulatory power from governments to standard setters. To prevent this, it may be appropriate in some circumstances for regulatory instruments to reference a specific version of a standard by referring to its date (eg AS 1234, 1993). If an amended version of a standard is to be adopted any changes to this standard would then require amendment of the regulatory instrument and hence further impact assessment.

Performance-based regulations

Regulatory instruments should be performance-based, that is, they should focus on outcomes rather than inputs. Deemed to comply' provisions may be used in instances where certainty is needed. In such cases, regulations might reference a standard or a number of standards deemed to comply with the regulation. There should be no restrictions on the use of other standards as long as the objectives of the regulation are met.

Plain language drafting

Where possible, regulatory instruments should be drafted in plain language to improve clarity and simplicity, reduce uncertainty and enable the public to understand better the implications of regulatory measures.

Date of effect

The dates of commencement of proposed standards and regulatory measures should be carefully planned to avoid or mitigate unintended or unnecessary market consequences, such as the necessity to discard non-complying stock and to allow transition to compliance with new regulatory requirements.

Advertising the introduction of standards and regulations

Public consultation usually only involves interested parties. Therefore, once produced, new regulatory measures should be advertised to bring them to the attention of the wider community.

Public consultation

Public consultation is an important part of any regulatory development process. Consultation should occur when the course of regulatory action is being considered and a draft impact assessment statement is being produced. This will give interested parties a firm proposal to consider. Consultation should occur as widely as possible but at the least, should include those most likely to be affected by regulatory action (eg consumer and business organisations) which might provide valuable feedback on the costs and benefits of regulation and on the impact assessment analysis generally. Consultation will also provide feedback on the level of support for the proposed regulation.

E. ASSESSMENT OF NATIONAL STANDARDS PROPOSED TO BE ADOPTED BY A MINISTERIAL COUNCIL OR OTHER INTERGOVERNMENTAL STANDARD-SETTING BODY

All national (inter-governmental) standards which require agreement by Ministerial Councils or standard-setting bodies (including standards developed by other bodies) should be subject to a nationally consistent assessment process. The process is set out below.

(i) Minimum Assessment Requirements

Where a Ministerial Council or standard-setting body proposes to agree to regulatory action or adopt a standard, it must first certify that the regulatory impact assessment process has been adequately completed. The assessment process does not necessarily have to be carried out by the Ministerial Council but the Council or body should provide a statement certifying that the assessment process has been adequately undertaken and that the results justify the adoption of the regulatory measure. Most governments have regulatory impact assessment processes in place. The completion of regulatory impact assessments by Ministerial Councils and standard-setting bodies should remove the need to duplicate this analysis.

Adequate completion means that:

1. an impact statement for the proposed regulatory measures has been prepared which:

- demonstrates the need for regulation,
- details the objectives of measures proposed,
- outlines the alternative approaches considered (including non-regulatory options) and explains why an alternative approach was not adopted,
- documents which groups benefit from regulation and which groups pay the direct and indirect costs of implementation,
- demonstrates that the benefits of introducing regulation outweigh the costs (including administrative costs),
- demonstrates that proposed regulation is consistent with relevant international standards (or justifies the extent of inconsistency), and
- sets a date for review and/or sunsetting of regulatory instruments;

2. advertisements have been placed in all jurisdictions to give notice of the intention to adopt regulatory measures, to advise that the impact statement is available on request and to invite submissions;

3. a list of persons/groups who made submissions or were consulted and a summary of their views has been prepared; and

4. the Council or other intergovernmental standard-setting body has considered the views expressed during the consultation process.

A copy of the completed impact statement should be forwarded to the Commonwealth Office of Regulation Review for information. The Office may be called upon to advise Ministerial Councils on technical issues so that a consistent approach is adopted.

(ii) Review

If, at the conclusion of the impact assessment process outlined above, there is some dissatisfaction with the process or adequacy of the analysis by which its conclusions were reached, two or more jurisdictions may request a review of the proposed national standard. The Ministerial Council or other intergovernmental standard-setting body must then defer its consideration of the standard and commission a review.

The process of independent review would be triggered if two Heads of Government write to the Chair of the Ministerial Council or standard-setting body requesting an independent review of the assessment process. Upon completion, the review body will report back to the relevant Ministerial Council or standard-setting body.

The Ministerial Council is to nominate an independent body to conduct the review. This might include a regulatory review body in any jurisdiction, an appropriate specialist body or a consultant. Jurisdictions which request the review will meet its cost and agree to make resources available for the conduct of the review if the Ministerial Council decides to use State or Territory Government regulatory review units to conduct the review.

The review body's task is to reassess the impact statement and report on whether it can be demonstrated that the assessment process has been carried out according to the guidelines for adequate completion noted above. It is not intended that the independent review should necessarily repeat the quantitative analysis. The review body may also comment on any aspect of the proposed regulation and will have access to public submissions made in the course of the assessment process.

The report of the independent review body would become a public document and will be considered by the Ministerial Council or standard-setting body in its discussion of the adoption of the proposed regulatory measures. Once the report

has been considered, the Council or standard-setting body's consideration of whether or not the regulation should be adopted by member governments can proceed.

The initial impact assessment and any review of that assessment are designed to provide the best possible information for decision-making by the Ministerial Council or standard-setting body. The impact assessment will not usually bind them or the participating governments since most Ministerial Councils are not formally established and do not have formal and binding voting arrangements. Their purpose is to develop a national consensus in relation to the matters which they consider.

If, upon the advice of the review body, a State or Commonwealth regulatory review body or other advice, the impact assessment is found to have been faulty, the Council retains discretion in its use of the impact assessment to inform its decision making.

If a Ministerial Council or standard-setting body fails to act on the recommendations of the review, the matter may be further examined by Heads of Government.

APPENDIX E: REGULATORY REVIEW IN THE STATES AND TERRITORIES

This appendix presents a brief summary, for each State and Territory, of regulation review mechanisms and related activities over the last twelve months, together with some comments on prospective activities.

New South Wales

Regulatory review mechanisms

New South Wales has a number of regulatory review mechanisms in place. These include a Regulatory Review Unit (RRU) which, following a recommendation of the Sturgess Inquiry into Red Tape (1994), was re-established and commenced operation in the Cabinet Office in July 1994, and the *Subordinate Legislation Act 1989* (SLA).

The RRU is responsible for simplifying and streamlining New South Wales' regulatory environment consistent with the needs of the community, business and the New South Wales Government's micro-economic reform program. The Unit provides policy advice on regulatory reform issues to the Premier, the Minister assisting the Premier and to the Cabinet. The Unit has both a monitoring and educative role with regard to Government agencies.

The *Subordinate Legislation Act* progressively repeals existing regulations and subjects new regulations (including those being re-introduced following repeal) to cost-benefit analysis to ensure they generate the greatest net benefit (or impose the least net cost) for the community when compared to other policy options.

A major review of the *SLA* will be undertaken over the next twelve months. The intention is to improve the legislation so that regulations with the greatest economic impact are given priority in the review program.

Recent activities

All Cabinet minutes proposing new regulatory controls must now identify the costs and benefits of the particular proposal, feasible alternatives to the proposal and clear justification for any Government intervention proposed.

The proposals must also demonstrate that the controls are well designed. Expected benefits to the community must outweigh expected costs, bearing in mind the impact of the proposal on the economy, consumers, relevant interest groups and any sector of industry and commerce that may be affected. Issues such as the need to protect health and safety, the environment, or consumers need to be identified.

The Government has issued 'best practice' guidelines which all agencies are required to comply with when proposing regulatory measures. New regulation is to be subject to these guidelines which are set out in *From Red Tape to Results: A Guide to Best Regulatory Practice*. The guidelines require that a regulatory response does not restrict competition (consistent with the National Competition Policy Agreement), is of net public benefit and minimises costs while ensuring that Government regulatory objectives are met.

Departments and agencies will be offered training in applying best practice principles and in finding 'smarter' and cheaper solutions to regulatory problems. Such solutions make greater use of commercial incentives and performance standards, where they are feasible and effective, in place of traditional prescriptive regulation.

The training program will be provided as part of the National Competition Policy legislative review (see Chapter 3). All departments undertaking major reviews will participate in this training program over the next 12 to 18 months.

Ministers are already required to provide the Premier with annual 'regulatory plans' which set out anticipated reforms to the existing stock of regulations. Commencing with the 1994–95 year, Ministers are also required to provide an annual report to the Premier on regulatory reforms achieved during the year. The Government will use these plans to set targets for the reduction of unnecessary regulation.

Other major policy initiatives of the NSW Government include its commitment to introduce merit exemption from existing regulation for business where it is clear that the underlying purpose of the regulation can be met by other means. If a firm is able to satisfy Government that it meets regulatory objectives it need not comply with prescriptive regulations. Merit exemption has the potential to significantly reduce the costs to business of complying with regulation.

In addition, the costs of regulation to business will be reduced by the 'Guarantee of Prompt Service'. Under this initiative, agencies are required to estimate and set timeframes for processing applications for licences and approvals. The guarantee of prompt service will give as much certainty as possible to the process of government licensing and approvals while ensuring that policy objectives are not compromised.

Prospective activities

The RRU will be involved in several initiatives in the near future. These include a licence review, streamlining the development approvals process and making greater use of information technology to reduce unnecessary regulatory burdens.

In September 1995, the Government will commence a 12 month review of all licences imposed on small business. The objective will be to remove unnecessary licences and ensure that remaining licences minimise business compliance costs.

Efforts will also be focused on reforming the planning and development approvals process in NSW. The intention is to streamline approvals, reduce delays and produce a more coherent and consistent system that also gives effective protection to the environment. This program will include the following projects:

- a pilot scheme in the Hunter Valley aimed at streamlining land use and planning approvals;
- a model customer charter project with the NSW Chamber of Manufactures which will commit agencies to coherent policies and time standards; and
- central policy work to remove unnecessary referral and supplementary approvals.

The RRU is also working to expand the Business Licence Information System (BLIS) to incorporate computerised information on the planning approvals process. In addition, the RRU will consult with the Department of Public Works and Services in its development of a government-wide information technology strategy. It will assist in developing a strategy which will help reduce the paper burden on those regulated and streamline regulatory systems.

Victoria

Regulatory review mechanisms

The *Subordinate Legislation Act 1994* provides for similar requirements to the, now revoked, *Subordinate Legislation Act 1962* with respect to the scrutiny of new regulations and the sunsetting of existing regulations. The fundamental provisions shared by both Acts are:

- the need to prepare a RIS setting out regulatory objectives and a cost-benefit analysis of the proposed regulation including similar analyses of all practicable alternatives to the proposal; and
- automatic 'sunsetting', or repeal of all regulations on the tenth anniversary of their making.

The major changes with the introduction of the new Act are:

- a changed focus to emphasise the responsibility of regulating Ministers to meet the objectives and requirements of the Act (including Ministerial certification of each RIS and of the extent to which consultation has occurred); and
- opening of the market for provision of independent advice as to the adequacy of RIS. Private agencies may now perform this function, previously statutorily reserved to the Victorian Office of Regulation Reform.

While the Office will continue to provide advice on a large percentage of RISs, the change to the Act will result in a changed focus of its activities with regard to subordinate legislation. The focus will shift to the provision of early advice to Departments and agencies on policy options and RIS requirements, authorship of some impact statements and the provision of training, including a range of guidance material on regulatory policy issues.

Recent activities

Significant progress in regulation reform has been made in a number of areas including:

- building and planning, with the effective implementation of the provisions of the new Building Control Act which allows for the private certification of design and building work, and significant changes to planning and zoning laws to reduce delay and uncertainty and to enhance flexibility;
- agriculture, with deregulation in major industries including tobacco, eggs and margarine;
- the environment, with the introduction of environmental performance assurance schemes which allow for a significant element of self-regulation;
- occupational health and safety, with significant progress in the long-term shift toward performance-based regulation and the consolidation and rationalisation of regulatory requirements;
- the legal profession, where a working party will soon provide detailed recommendations to the Attorney-General on its future regulation. A new Legal Profession Practice Act is expected at some time in 1995; and

- the Licence Simplification Program which has led, to date, to a 12 per cent reduction in the number of business licences required. A target of a 25 per cent reduction by the end of 1995 has been set.

Prospective activities

As noted, the Victorian Office of Regulation Reform has recently been focusing much attention on achieving improved processes, both in terms of regulatory analysis and scrutiny. New initiatives in this area include:

- developing, in conjunction with the Commonwealth ORR and at the request of the National Food Authority, a process for economic impact assessment of proposed changes to national food standards;
- assisting in the development of a similar process (as part of a national steering committee) to apply to proposals for change in national building regulatory standards; and
- authorship of a handbook on 'best practice' in occupational regulation, taking into account the recently agreed National Competition Policy principles.

Other initiatives under development include:

- publication of a series of guidelines on aspects of best regulatory practice. These will include principles of good regulation, appropriate non-regulatory alternatives and a revised RIS handbook, in addition to the regulation-making procedures manual already published;
- publication of a regulatory plan. This will be a compendium of all proposed new regulatory activity for the forthcoming 12 months for each government department. The plan is aimed at facilitating consultation with groups affected by a regulatory proposal at early stages of the proposal's development; and
- investigating the possibility of creating a database as a single point of reference for regulatory compliance requirements.

Queensland

Regulatory review mechanisms

The Business Regulation Review Unit (BRRU) was established in May 1990 to facilitate the Queensland Government's aims in regulatory reform. The BRRU was required to carry out three main functions:

- co-ordinate a systematic review of all legislation and regulation which affects business in Queensland (the Systematic Review);
- provide a service for regulatory complaints; and
- promote the harmonisation of Commonwealth and State/Territory regulations with those in Queensland.

The initial functions given to the BRRU have been expanded over the past three years so that the BRRU now provides a whole-of-government approach to the reform of regulation in Queensland. This includes a role in co-ordinating the GATT Technical Barriers to Trade (Standards Agreement) issues for the Queensland public sector.

The Systematic Review, commenced in 1991, involves a review of 470 pieces of legislation and regulation and was due to be completed by 31 December 1994. The Review is almost complete as only 10 to 15% of legislation and regulation, relating mainly to national issues such as transport and health, remain to be reviewed. The Review is now expected to be completed by 30 June 1996.

The Review has provided a mechanism for reducing the burden of regulation on business, achieving substantial savings and promoting a culture within the public sector which focuses on efficient and effective regulation. Net benefits to date from the review process are estimated at over $370 million per annum (Goss, 1995, p. 23). Other benefits include a reduction in the number of licences and certificates required of business and the simplification of forms and compliance procedures.

In establishing the review methodology, BRRU was required to provide an extensive range of training courses in topics such as RIS, cost-benefit analysis, risk assessment and review certification.

In addition, assistance was provided to Departments in developing effective consultation protocols. These services are now provided on an 'as needs' basis to departments either during reviews or the establishment of legislation and regulations.

An important part of the Review process is the 'certification' of reviews by the BRRU. This incorporates agreement on the process used, adequate consultation

with affected stakeholders, preparation of a RIS and cost-benefit analysis. BRRU reports to Cabinet on a regular basis on the results of reviews, certification and other regulatory issues and a Ministerial Committee monitors progress and where necessary requires agencies to improve progress of reviews.

Recent activities

In May 1994, BRRU completed a study of regulatory impediments in the retail sector. This study identified about thirty issues concerning regulations which were deemed to be unnecessary or inefficient. Progress has been made on resolving almost all of these issues.

As part of its training function, the BRRU, early in 1994, commissioned a consultant to develop a cost-benefit methodology for inclusion in each RIS. The result was a computer model which the Queensland Cabinet has approved to apply to all new significant subordinate legislation and all regulatory reviews under the Systematic Review program.

In November 1994, the Statutory Instruments and Legislative Standards Amendment Act was approved. This new act, which came into effect on 1 July 1995, contains the Government's long term legislative reform agenda. Among other things, it legislates RIS requirements and the need for them to be made public, and includes a sunset program which requires new subordinate legislation to be reviewed after it has been in operation for ten years.

During March/April 1995, BRRU co-ordinated a comprehensive review of the regulation of butcher shops. As a result of that review:

- a Memorandum of Understanding between Queensland Health, Queensland Livestock and Meat Authority (QLMA) and the Local Government Association of Queensland has been signed which will reduce the overlap in inspection of butcher shops, delicatessens and other food premises;
- the QLMA has agreed to streamline its quality assurance requirements for small butchers and will consider extending the deadline for Quality Assurance Accreditation from 1 January 1997 to 1 January 2000;
- a common application form for assessment of a workplace and registration of a business name will be used for all businesses; and
- BRRU will develop a policy for adoption of risk assessment criteria for inspection, sampling and audit programs for monitoring regulated activities.

Prospective activities

A regulatory complaints service is provided as an ongoing function so that business or consumers can raise significant issues of regulation which are seen to be discriminatory or poorly administered. This service is an effective means of discerning inefficient regulation and is viewed, by the business community, as a genuine commitment by the Queensland Government to regulatory reform.

BRRU will continue to provide a service to public sector agencies, peak industry bodies and other specific stakeholders in the development and progress of issues associated with national standards setting, co-operative Commonwealth/State approaches to legislation or regulation and the harmonisation of regulations across Commonwealth and State/Territory jurisdictions.

BRRU has historically been given direct responsibility for projects involving harmonisation, such as the Review of Partially Registered Occupations, the development of mutual recognition legislation (including the current proposal to extend mutual recognition to New Zealand), the development of genetically modified organisms legislation and the establishment of guidelines for the development of national standards by ministerial councils. The majority of these projects have been carried out under the auspices of the Commonwealth/State Committee for Regulatory Reform which reports to the Council of Australian Governments (COAG). BRRU participates as a member of this committee in conjunction with the Office of Cabinet.

A further service which is provided by BRRU is the co-ordination of issues under the GATT Technical Barriers to Trade Agreement (the Standards Code). This agreement, which is established under Commonwealth arrangements, ensures that regulations made within the Commonwealth, States or Territories are consistent with Australia's international trade obligations. BRRU's role is to provide a co-ordination point for Queensland public sector agencies and liaise with the Department of Foreign Affairs and Trade on trade related regulatory issues.

BRRU will also represent Queensland on the Australian Building Codes Board (ABCB) Economic Evaluation System Project Advisory Committee. The ABCB has suggested that Queensland's cost-benefit methodology be adopted as the future template for the evaluation of amendments to the Building Code.

South Australia

Regulatory review mechanisms

Following the State elections in December 1993, the Business Regulation Review Office (BRRO) was re-established as the new Deregulation Office in the Department of the Premier and Cabinet. A new director was appointed in July 1994.

The main function of the Office is to improve South Australia's regulatory environment by acting as a co-ordinator and specialist adviser to Departments and agencies proposing or reviewing regulations. This work falls into two main areas:

- systematic examination of legislation using an industry-by-industry approach; and
- the automatic revocation of regulations.

The automatic revocation or expiry of regulations occurs under the *Subordinate Legislation Act 1978*. This 'Sunset Program' has been operating since 1988 and is monitored by the Deregulation Office.

Under the provisions of the *Act,* new regulations are automatically revoked after 10 years and existing regulations are revoked according to a timetable set by Parliament. The objective of automatic revocation is to stimulate the consolidation and simplification of regulations which have become outdated. All regulations have a limited life and must be reviewed prior to expiry so they can be re-made or safely allowed to expire.

Recent activities

Recently the Deregulation Office has been engaged in three main tasks:

- gaining Cabinet endorsement of a statement of deregulation policy and the underlying guiding principles. The policy, released in February 1995, commits the Government to regarding regulation as a last resort and to seeking possibilities for self and co-regulation wherever possible;
- identifying strategically important industries where South Australia has, or could achieve competitive advantage and focusing attention on the regulatory environment in which these industries operate. The strategic areas identified include automotive components, information management, the food and wine industries, key tradeable services (such as tourism, education, health care, engineering and research) and elaborately

transformed manufactures (computing and communication equipment, motor vehicles, other transport equipment, and pharmaceuticals);

- Under this industry-by-industry approach, a number of issues of concern to the motor trades industry have already been addressed by a consultative forum comprising Ministers and the industry association. The forum, which was convened by the Premier, is chaired by the Minister for Industry, Manufacturing, Small Business and Regional Development and is supported by the Deregulation Office; and
- focusing attention on the automatic revocation program so it is seen as part of the Government's micro-economic reform agenda. This includes identifying regulations on which Departments and agencies should concentrate their review efforts. By focusing attention on certain regulations, reviews should be made more manageable and speedier progress should occur. To date, the task commenced in 1988 is behind schedule and has led to a backlog of reviews to be completed.

Prospective activities

As is the case for the motor trades industry, the Office will continue to assist in the industry-by-industry approach to review which will usually be led by the appropriate Minister. The Office is now commencing work with the agribusiness and mining industries. In addition, the Attorney-General is reviewing all consumer legislation and has already introduced new legislative arrangements for the real estate industry, and for car dealers, which envisage the delegation of regulatory powers to industry bodies.

In consultation with relevant parties, the Office will identify and address important issues in the small business sector. Small business is one of several sectors identified as priority areas for reform by the government.

The Office's work in the small business sector will include trying to rationalise or abolish licences, permits and certificates as recommended in a licensing review conducted by the BRRO in 1992.

The Office will investigate the opportunity to develop one-stop-shop facilities for small business. A project on an integrated licence approval package, jointly funded by the Commonwealth, will be piloted in the aquaculture industry which requires approvals from all three tiers of government.

Expansion of the State's Business Licence Information System to better identify Local Government requirements is also under consideration.

Under the automatic revocation program, approximately 100 sets of regulations are due to expire before September 1996. As not all regulations are equally

important, or warrant the same review effort, 20 of these sets of regulations have been identified as strategically significant and warranting full economic review. In addition, the Office will co-ordinate reviews of anti-competitive legislation as required by the Competition Principles Agreement.

In addition to its planned activities, the Office receives queries from industry bodies and the general public. After consideration, the Office may intervene with the relevant agency on behalf of the person making the inquiry. The Office will also be involved in educating Departments and the public on the Government's approach to regulation reform. The Office is concerned about the cost, accessibility and appropriateness of the trend of including standards and codes of practice in regulations. It is also concerned about regulations which include requirements for accreditation.

Western Australia

Regulatory review mechanisms

As part of the Government's commitment to regulation review and reform there has been a requirement, since the mid 1980s, for sunset clauses to be inserted on new or amending legislation where appropriate. These clauses generally require acts to be reviewed at the end of five years.

In addition, all departments are required to consider the impact on business of all new and amending legislative proposals submitted to Cabinet. Where appropriate, the Ministry of Premier and Cabinet provides specific advice on the need for cost-benefit analysis and the consideration of alternatives to legislation to accompany these proposals.

Since the beginning of 1993, the regulation review function has primarily been undertaken as part of the Government's public sector reform program. The Cabinet Sub-Committee on Public Sector Management oversees progress in this program and is supported by the Ministry of the Premier and Cabinet. Responsibility for reform rests with the Ministers.

In addition to the functions performed by the Ministry of Premier and Cabinet, the Small Business Development Corporation (SBDC) convened the Regulation Review Panel in August 1993. This Panel comprises industry and business representatives who meet monthly on a voluntary basis. The Panel acts as a point of contact for small business on regulatory issues. It considers State regulatory concerns and may recommend, via the Deputy Premier, Minister for Small Business, actions to remedy problems.

The aim of the Panel is to act as a catalyst in simplifying legislation; removing unnecessary duplication and obsolete regulatory practices; and developing positive recommendations directed at encouraging deregulation.

Recent activities

Significant progress in regulation review and reform, resulting from the input of these bodies, has occurred in a number of areas. Some of these are:

- development of a statutory framework for the review and automatic repeal of subordinate legislation in Western Australia in the form of a draft Bill;
- the introduction of business name registration facilities into five regional areas throughout WA, resulting in a 24 hour business name registration process rather than the pre-existing service of approximately one week;
- a statutory review of retail trading hours, completed in November 1994;
- review and amendment of Planning Legislation which empowers the Minister to direct local councils to review and update their town planning schemes — there is a requirement for schemes to be reviewed every five years;
- reform in several areas of primary industry including re-structuring the WA Meat Marketing Corporation, a major review of the Grain Pool of WA, a review of pricing arrangements by the Potato Marketing Authority, and deregulation of milk distribution arrangements;
- reform in the transport sector with the removal of Westrail's monopoly on passenger services and freight transport of certain grains, ores and mineral freight, the abolition of the State's metropolitan bus monopoly, and reform of the taxi industry;
- continued reform in the provision of utilities — a Bill is being drafted to corporatise the WA Water Authority and to separate its service delivery and regulatory functions, the energy industry has also been deregulated with SECWA being split into Alintagas and Western Power; and
- participation in the review of partially registered occupations under COAG.

Prospective activities

In future, activity in the area of regulatory reform will include:

- developing a formal regulatory management program for consideration by Cabinet;
- completion of the policy and regulatory instruments database as a single point of reference;

- implementation of the findings of the Strategic Management Committee relating to the reduction of 'red tape' within government, that is, reducing the reporting requirements between departments and central agencies;
- review of several Acts and bodies including the Public Trust Act and operations, the Law Reform Commission, and progressing the review of the Education Act.

Tasmania

Regulatory review mechanisms

In December 1992, the Tasmanian Parliament passed the *Subordinate Legislation Act.* However, due to various concerns the *Act* was not proclaimed and a Bill was introduced to amend it. The *Subordinate Legislation Amendment Act 1994* was passed by Parliament and given the Royal Assent in mid December 1994. The amended *Subordinate Legislation Act 1992* commenced on 13 March 1995.

The Act provides for:

- a RIS to be prepared and public consultation to occur only where proposed subordinate legislation will impose a 'significant' burden, cost or disadvantage on any sector of the public;
- the impact of subordinate legislation on competition policy to be properly considered;
- a schedule to repeal existing subordinate legislation over the period from 1 January 1996 to 1 January 2005.

The proposed amendments will focus the review process on areas where detailed consideration of proposed subordinate regulation will have the most significant benefit for the Tasmanian community.

Under the provisions of the Act, the Regulation Review Unit (RRU), which has existed in the Tasmanian Treasury portfolio since February 1993, is required to provide a certificate stating that the review requirements of the Act have been properly complied with.

Recent activities

The Mutual Recognition (Tasmania) Act was proclaimed on 1 September 1993. Progress with Mutual Recognition has, to date, reduced regulatory duplication and barriers most significantly with regard to occupations, particularly lawyers and tradespeople and appears to be working smoothly. However, a temporary

exemption to the application of mutual recognition in Tasmania has been implemented for agricultural and veterinary chemicals.

A review of business licensing, initiated jointly by the Tasmanian Treasury and the Commonwealth Department of Industry, Technology and Regional Development (now Department of Industry, Science and Technology) was completed in late 1993. The final report found little evidence of overlap by the Commonwealth and State Governments in licensing the same activities for the same reasons. However, the findings noted that there is considerable overlap (primarily by State agencies) of the administrative processes involved in obtaining and renewing licences.

Prospective activities

In August 1992, the Tasmanian Government endorsed a program for the systematic review of business legislation over the period to December 1995. A Business Legislation Review Committee was established to develop a consolidated review program and to oversee its implementation. This involved taking an inventory of all legislation on the statute books and preparing an indicative program of review which focuses on legislation that imposes the greatest imposts on business.

A final program for the review was approved by the Tasmanian Government in late November 1994.

Agencies have now commenced reviewing legislation covered by the program and the Legislative Council will soon consider a Business Legislation Repeal Bill which repeals a number of acts no longer required.

In conducting reviews, agencies are required to have explicit regard to the Government's economic and employment objectives; the legislation's impact on competition; and to consult with the RRU throughout the review process.

In addition to the review program, the Tasmanian Government is participating in a range of Commonwealth-State Working Groups considering economic reform in the following areas:

- the implementation of impact assessment arrangements to support the development of uniform national standards;
- the extension of mutual recognition arrangements to include New Zealand; and
- the establishment of a national electricity market.

Australian Capital Territory

Regulatory review mechanisms

The ACT has in place a Business Regulation Review Unit (BRRU). This unit evolved from the Regulation Review and Policy Co-ordination Section of the Chief Minister's Department which used to undertake some regulatory review functions. The key functions of the BRRU are to:

- review regulatory proposals from all areas of government and identify their impact on the ACT's business community;
- advise the Government on regulatory reform issues;
- undertake specific reviews; and
- participate in national fora which develop national regulatory frameworks.

Recent activities

In May 1995, the ACT Government agreed to a framework which involves an integrated and coherent approach to the reform of business regulation in the ACT.

The framework principally comprises the following regulatory review mechanisms:

- establishment of a Red Tape Task Force to inquire into 'red tape' and excessive legislation that impedes economic growth in the ACT;
- a systematic review of all Government regulations with a view towards eliminating unnecessary business impacts and fulfilling commitments under the National Competition Principles Agreement, including the reform of anti-competitive regulations; and
- implementation of regulatory review guidelines for agencies, including a Business Impact Statement (BIS) requirement for new regulatory proposals impacting on the private sector.

In June 1995, the Government established the Red Tape Task Force which consists predominantly of business sector representation. Submissions from the public have been received identifying areas of overlapping, inconsistent or excessively burdensome regulations. The Task Force is to report to Government by October 1995.

A number of specific reviews are also underway or are about to be implemented. For instance, the Government has issued a public discussion paper on the *Review of the Agents Act 1968* and has announced a review of ACT trading hours.

In addition to these activities the BRRU has participated in a number of national fora, such as various committees reporting on microeconomic reform issues to COAG. Notably these include the:

- Microeconomic Reform Working Group;
- Legislation Review Working Group; and
- Commonwealth-State Committee on Regulatory Reform which has developed a framework for national standards setting, and the extension of mutual recognition arrangements to New Zealand.

As an outcome of the National Competition Principles Agreement, the BRRU is developing an implementation strategy to assist agencies in implementing the reforms. The BRRU has overall co-ordination responsibility for these reforms in the ACT.

Prospective activities

The BRRU will be managing specific reviews, either existing or proposed, such as the Red Tape Task Force, Review of the *Agents Act 1968*, and the review of trading hours in the ACT.

It will also continue to be involved in a number of intergovernmental activities. Of recent note, these have included participation on working party reviews associated with third party insurance, the Retail and Commercial Tenancies Code of Practice and petrol pricing.

The BRRU will also provide a co-ordination and resourcing role for the implementation of regulatory review guidelines.

Northern Territory

Regulatory review mechanisms

The Northern Territory Government has a stated policy of minimum regulation and the removal of 'red tape'.

Relative to the other states, the Territory has a small volume of regulation, most of which was created recently, following the establishment of self-government in 1978. Additionally, a systematic review of regulations made before 1987 was undertaken during the period 1987 to 1989.

A regulation review unit does not exist in the Northern Territory, but a similar role to that of state units is played by the Department of Asian Relations, Trade and Industry and by the Cabinet Office of the Department of the Chief Minister.

These bodies ensure that regulatory proposals are properly considered by relevant agencies.

The regulatory review process in the Northern Territory works fairly effectively and with a high level of consultation. This process culminates in the consideration of issues by the Co-ordination Committee which consists of Department chief executive officers. Nonetheless, it is considered that potential benefits exist, for both government agencies and the community, if current practices can be further improved and common standards established.

Recent activities

A comprehensive report entitled, *Regulatory Reform and the Systematic* R*eview of Business Regulation in the Northern Territory* has recently been completed but is yet to be considered by the Northern Territory Government. The report essentially addresses the issue of whether new and amended regulations are dealt with as effectively as possible. It makes a number of recommendations, including that :

- a subordinate legislation act be enacted to facilitate the making and consolidation of subordinate legislation and that this act contain provision for the automatic expiry of regulations after a period of ten years;
- a systematic review should **not** be carried out on all Northern Territory regulatory regimes, but that industry and the public be invited to make submissions on particular regulations that are causing concern — these are to be prioritised and dealt with by administering agencies;
- a timetable for longer term review of regulations be developed in consultation with agencies to ensure an achievable spread of review dates;
- a set of guidelines for the review of regulatory regimes be developed in consultation with administering agencies, to ensure that the review process is undertaken in the most consistent and effective way possible;
- the existing regulatory review function of the Department of Industries and Development (now Department of Asian Relations, Trade and Industry) be formalised and performed by a specific business regulation review unit (BRRU);
- the Government, via the proposed BRRU, identifies needs and develops suitable training for Government officers involved in the regulatory review process; and
- a campaign be undertaken to promote awareness of the regulatory process and the opportunity to provide input.

The Northern Territory Government is expected to consider the report during 1995.

APPENDIX F: DOCUMENTS PREPARED BY THE OFFICE OF REGULATION REVIEW

The following documents were prepared by the ORR in 1994-95.

1. *The migration agents registration scheme: effects and improvements*, August 1994, Submission to Joint Standing Committee on Migration.

The Committee conducted a review of the scheme, commenced in 1992, which requires those providing migration advice to register as migration agents. The ORR's submission described the economic effects of the scheme's registration fees and its quality assurance objectives, and the potential for it to be a barrier to potential new agents. Some alternative approaches to a registration scheme, such as consumer warnings and negative licensing, were presented.

2. *Developments in business regulation and its review: 1993-94*, September 1994, Appendix to IC Annual Report

3. *What future for price surveillance?*, September 1994, Submission to the PSA's review of declarations; IC Information Paper

The Industry Commission's submission to the Prices Surveillance Authority's (PSA) general review of goods and services subject to surveillance evaluated the costs and benefits of prices oversight. The submission set out criteria that identify markets where prices surveillance results in net benefits to the community. The Commission then applied these criteria to the PSA's current price surveillance declarations.

4. *Country of Origin Labelling of food*, October 1994, Submission to the National Food Authority

In June 1994, the National Food Authority released a *Discussion Paper on the Country of Origin Labelling of Foods* which sought public comment on draft variations to the origin labelling provisions in the Food Standards

Code. The ORR's submission to the Authority examined the economic rationale for country of origin labelling, the demand from consumers for country of origin information, and the costs and benefits of the NFA's draft variations.

5. *National Competition Policy: Draft Legislative Package*, December 1994, Response to the draft legislative package: submission to Treasury

The ORR commented on the policy goals of the proposed new institutions — the National Competition Council (NCC) and the Australian Competition and Consumer Commission (ACCC); and on three aspects of access declarations: the setting of time limits, establishing principles for access pricing, and the use of "final offer arbitration" to resolve access disputes.

6. *Compliance with the Road Transport Law,* December 1994, Submission to the National Road Transport Commission

The National Road Transport Commission released a discussion paper looking at aspects of compliance with the Road Transport Law. That paper took a largely legalistic view of compliance. In this submission, the ORR discussed how the enforcement of road law, rather than being an end in itself, needs to undertaken with moderation, flexibility and discretion in order to promote the safety-cost-efficiency objectives which underlie the law. Key conclusions are:

- performance and prescriptive standards, rigidly enforced, are unlikely to achieve optimum safety-cost-efficiency outcomes;
- the objective of compliance strategies should be to augment standards to promote optimality. In some cases, this will involve less than complete compliance with standards;
- traditional on-road deterrence systems, if intelligently applied, provide a means of achieving these goals; and
- exclusionary sanctions such as licence suspensions, while having a role for some classes of breaches, can provide inappropriate disincentives for low-level breaches of some standards.

7. *Broadband cable access regime*, January 1995, Submission to Department of Communications and the Arts

A brief submission was made to the Department of Communications and the Arts on the issue of open access to broadband cable for pay TV. The ORR argued that sufficient competition may emerge to make open access unnecessary, that cable infrastructure probably will not be a natural monopoly or an essential facility, and that if an access regime is needed it should be under the National Competition Policy legislation rather than under any industry-specific arrangements.

8. *The analysis and regulation of safety risk by National/Commonwealth agencies*, February 1995, ORR Information Paper

This information paper presents the results of a survey conducted by the ORR on how Commonwealth and National agencies assess and regulate safety risk. It reports widely varying approaches among agencies but, with a few exceptions, there is limited reliance on economic analysis to evaluate safety regulations.

9. *Pre-merger notification and the Trade Practices Act 1974*, February 1995, Submission to Treasury

This submission to Treasury canvassed proposals for the introduction of a pre-merger notification scheme into the *Trade Practices Act* 1974 (Cth). It considered problems associated with the present merger oversight and then considered whether the pre-merger notification schemes suggested by Treasury would correct any deficiencies in a least cost manner.

The ORR suggested other ways to provide merger information to the TPC in a timely manner.

10. *Australia's visa system for visitors*, February 1995, Submission made to the Joint Standing Committee on Migration's inquiry into Australia's visa system for visitors.

The submission draws on evidence presented by others to the inquiry in order to examine the current universal visa system and assess the options of universal and selective visa free arrangements.

11. *Competitive Safeguards in Telecommunications*, February 1995, Submission to Telecommunications Policy Review

This submission to the Department of Communications and the Arts was in response to their issues paper "Beyond the duopoly — Australian telecommunications policy and regulation". The submission focused on:

- criteria for determining market dominance;
- the use of price controls as a response to market power; and
- pricing principles for access to the network.

12. *Competition and Retail Banking,* March 1995, Submission to Prices Surveillance Authority

"Competition and Retail Banking" was the ORR submission to the PSA inquiry into fees and charges imposed on retail transaction accounts by banks and other financial institutions. In the submission, the ORR looked at the effects of the increased utilisation of fees and charges, including their impact on those with low incomes, such as social security beneficiaries and students. The ORR looked at the role that could be played by a "community service obligation" on banks to provide specific groups of customers with fee-free basic banking services, with the Commonwealth Government reimbursing the banks for the costs of doing so.

13. *The use of cost litigation rules to improve the efficiency of the legal system*, March 1995. Submission to the Australian Law Reform Commission

The Attorney-General asked the Australian Law Reform Commission (ALRC) to examine whether changes should be made to how costs are awarded in proceedings before federal courts and tribunals. The general rule that presently applies to civil litigation is that the loser pays the winner's legal costs. In this submission to the ALRC, the ORR analysed whether changes to the cost indemnity rule and legal aid could improve the efficiency of the legal system, and in the process improve access to justice (whether that be through litigation or settlement).

The ORR looked at the role for explicit public funding of litigation.

14. *Submissions to the Corporations Law Simplification taskforce,* various, Feb—March 1995, submissions to the task force located in the Attorney-General's Department

The ORR lodged a series of brief submissions to the second stage of the task force's work on: share capital rules, accounts and audit, company names, forming a company and company meetings.

15. *Environmental Impact Assessment*, April 1995, Comments to Environmental Protection Agency on its EIA discussion paper

The Commonwealth Environment Protection Agency released a discussion paper *Public Review of Commonwealth Environmental Impact Assessment Process.* The ORR offered comments on two specific aspects: an option to change the objective of EIA, and options that would expand the jurisdiction of the Commonwealth EIA process.

16. *Review of licensing regime for securities advisers,* April 1995, Submission to the Australian Securities Commission

The Australian Securities Commission sought input to its review of the licensing regime for securities advisers who provide investment advice to individual and institutional investors. The ORR's submission emphasised that the necessity for regulation should be clearly articulated, that costs and benefits of any regulation must be assessed, that there should be consistency between any licensing regime and other rules and regulations, and that there should be periodic review of the regime.

17. *Regulation and the direct marketing industry,* May 1995, Submission to a working group of the Ministerial Council on Consumer Affairs

A working group of consumer affairs officials sought comment on a discussion paper on possible regulation of the direct marketing industry. It was to report to the Commonwealth/State Ministerial Council on Consumer Affairs. The ORR's submission drew attention to the need to justify any regulatory scheme, to consider various alternatives to traditional direct regulation, and the fact that any increased business costs attributable to regulation are likely to be passed on to consumers.

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