B5 Legislation Review and Reform

B5.1 The legislation review and reform commitment

Under clause 5 of the CPA, all governments agreed to review and, where appropriate, reform all legislation which restricts competition by the year 2000. The principle guiding these reviews, set out in clause 5(1), is that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Application of the guiding legislation review principle involves review of both existing legislation that restricts competition and the testing of all new anti-competitive legislation to ensure that it is consistent with the guiding principle. The aim is better regulation rather than less regulation.

Consistent with this, the CPA recognises there will be circumstances where restrictions are justified. However, the justification must be in terms of a net benefit to the Australian community as a whole – not benefits to particular groups or regions.

Clause 1(3) of the CPA sets out a range of public interest matters that governments should take into account, where relevant, in assessing the net benefit of legislative restrictions. These factors include the environment, employment, social welfare and equity, economic and regional development, consumer interests, business competitiveness and economic efficiency.

B5.2 The Council's approach to assessing legislation review and reform progress

All governments established their NCP legislation review programs in June 1996 in accordance with the CPA.[18] These programs list for review all existing legislation considered to restrict competition. The obligation on governments is to complete all reviews and implement required reforms by the end of the year 2000.

Governments are also obliged to ensure that all new legislation restricting competition meets the guiding principles. To provide for this, the Council expects that each government's process for examining the potential impacts of anti-competitive legislation involve a rigorous assessment of the costs and benefits of alternative means of achieving the objective(s) of the legislation.

The Council has assessed jurisdictions' review and reform performance, covering the period to 31 December 1998, against two broad criteria.

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[18] Each government published a legislation review timetable in 1996 and reports progress against this timetable each year. The NCC publishes a consolidated listing of progress against all timetables (NCC 1998b).

First, the Council looks for progress against review timetables as documented through annual reports to be generally consistent with the CPA objective that the whole program be completed by the end of the year 2000.

The CPA specifies that the review program should be complete by the year 2000, but gives governments the discretion to delay the implementation of resultant reforms beyond 2000 through the provision that reform should be 'where appropriate'. However, consistent with this provision, where phasing of reforms takes implementation beyond the year 2000, governments should demonstrate that the more gradual approach provides a community benefit. The Council's discussions with jurisdictions indicate that all accept the need to justify any delays in reform implementation beyond 2000.

Related to this, the Council acknowledges that governments' review agendas are evolving documents and will reflect changes in priorities. Most governments have added to their review schedules where they have identified additional pieces of legislation restricting competition. In other cases, governments have removed legislation from their timetables where preliminary review has shown that the legislation does not contain significant restrictions on competition. It is the evolving review timetable, rather than that published in June 1996, which is the basis for the Council's assessment.

Second, the Council looks for governments to meet the spirit of the legislation review and reform program as set out in the CPA. There are two considerations here: that governments adopt rigorous review processes leading to robust outcomes, and that governments implement reforms in line with review recommendations, except where they can demonstrate a net community benefit from acting differently.

Good review processes require, as a starting point, that terms of reference permit consideration of all competition questions. The CPA contains clear obligations as to the analytical approach to reviews. Without limiting the terms of reference for reviews, a review should:

- 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.

As well as clear terms of reference, and particularly where restrictions are significant or complex, the Council expects review processes to be independent, objective and consultative. Analysis should be rigorous, with recommendations consistent with the evidence. Where reviews are conducted in accordance with these principles, the Council does not comment on the appropriateness or otherwise of review outcomes,

provided the conclusion reached by the review is one that an objective observer might have reached on the basis of the evidence.

Having conducted a robust review, governments are obliged to implement reforms that have regard to review recommendations without undue delay. Nonetheless, where a government decides not to introduce recommended reforms or to introduce new restrictions, it is able to do so under the CPA providing that it demonstrates its approach is warranted on net community benefit grounds. Similarly, where it is necessary to phase a reform beyond the year 2000, the Council does not see an assessment problem provided that there is a robust supporting net community benefit case.

There have been suggestions that the Council, in considering overall NCP implementation, should focus on significant reforms over individual legislation reviews that often have a relatively minor economic impact. The Council does not support this approach. Taken as a whole, successful completion of the legislation review program will produce substantial economic benefits, even though many of the individual reforms may be relatively minor. Disregarding individual legislation reviews or, conversely, disregarding individual compliance failures, would see the downgrading of the importance of much of the legislation review program. Accordingly, in assessing each jurisdiction's progress, the Council has identified every case where it considers that performance has not satisfactorily met its assessment criteria.

B5.3 Jurisdictions' progress against legislation review and reform schedules

The legislation review timetables established in June 1996 scheduled almost 1800 pieces of legislation for review over the period to the year 2000. The timetables have since developed further as governments identify additional restrictions for review and reshape their review and reform priorities.

Up to the end of 1998, which covers the period of the second tranche assessment, there were some 1100 reviews scheduled for completion across all jurisdictions. Of these, almost half were completed, with about another 400 underway. Governments have announced their responses in over 370 cases.

A summary of review progress achieved by each jurisdiction to the end of 1998, derived from jurisdictions' NCP annual reports, is provided in Table B5.1. Because some jurisdictions schedule their reviews on a financial year basis, others on a calendar year and there is occasionally incomplete reporting, the data in the table should be taken as indicative of progress only.

Table B5.1 Progress of reviews scheduled up to end-1998 by jurisdiction, at 31 March 1999

	Reviews scheduled[a]	Reviews completed and reform implemented	Reviews completed but reform still to be implemented	Reviews underway	Reviews scheduled but not yet commenced
Commonwealth	67	27	13	17	10
New South Wales	143	44	16	65	18
Victoria	121	57	19	20	25
Queensland	68	26	5	24	13
Western Australia	164	43	49[b]	47	25
South Australia	121	28	13	73	7
Tasmania	186	95	18	47	26
ACT	161	36	20	43	62
Northern Territory	85	17	9	55	4
Total (all jurisdictions)	1116	373	162	391	190

a Data on reviews scheduled do not include Acts where jurisdictions' preliminary reviews indicated there were no significant restrictions.

b The Western Australian Government has endorsed a response to 45 reviews but is yet to take legislative action to implement the approach endorsed.

Source: Jurisdictions' Annual Reports (1999)

Progress with review and reform programs by jurisdiction

All governments stated that their review and reform agendas are progressing, consistent with the CPA objective of removing unjustified restrictions on competition by December 2000. All up, governments have completed or commenced over 80 per cent of the reviews originally scheduled for completion by the end of 1998. Given the size and complexity of some of the larger reviews, this is a reasonable outcome.

Progress differs amongst jurisdictions, in part reflecting the different priorities at the time governments put their programs in place. Some governments, such as the ACT, scheduled the bulk of their program early on whereas others left most of their review program until later in the NCP period. Governments that scheduled their programs for early completion have tended to find it necessary to defer their programs, as the demands of ensuring rigorous examination of some highly complex matters became more apparent. In addition, because national reviews have not proceeded as anticipated, all governments have had to reschedule a range of matters for individual review. This reluctance to adopt national processes has increased the complexity of

the subsequent by-jurisdiction reviews because of the need to consider national consistency in regulatory arrangements.

As well as undertaking reviews, the CPA also obliges governments to implement the recommended changes by the year 2000, unless the responsible government can mount a robust net community benefit case to do otherwise. The Council has continually stressed the importance of meeting the year 2000 target if a jurisdiction is to be considered to have complied with its NCP obligations. On the indications to date, it is likely that some recommended reforms will not be in place by 2000. However, such delays would not infringe upon NCP obligations if they were shown to be in the public interest.

Significant reform outcomes have been achieved in a range of areas. Unjustified restrictions have been removed, for example, by repealing redundant legislation or streamlining licensing processes to ensure that community objectives are met while minimising imposts on business from unnecessary 'red tape'. Conversely, governments have sometimes retained restrictions on competition or introduced new ones. Such action is consistent with the objectives of NCP, where rigorous assessment of the restriction shows that the benefits it offers the community outweigh the costs.

This section presents a broad overview of each Government's progress against its legislation review and reform obligations. The matters have been identified following the Council's scrutiny of governments' NCP annual reports and/or questions raised with the Council by individuals and businesses that believe (unjustified) regulations are having an adverse effect on their livelihood.

Commonwealth

The Commonwealth scheduled 67 reviews to be completed by the time of the second tranche assessment. Of these, 40 have been completed, with the Government's response announced in 27 cases. Of the 27 scheduled reviews not yet completed, three are underway, a further three Acts are expected to be repealed without review and one review has been deferred on the basis that it will now be examined through a national process.

The Commonwealth has delayed reviews of five Acts, but has commenced four third tranche reviews early. There are 20 reviews that have been scheduled for completion in the period 1998-1999 and a further 10 for 1999-2000.

The Commonwealth has completed NCP reviews in several significant areas. These include:

- the Wallis review of the regulatory framework of Australia's financial system;
- review of legislation governing the operation of Australia Post;
- tariff reduction programs for both the automotive and the textiles, clothing and footwear industries;
- aspects of the health industry legislation restricting the market for private health insurance; and

- aspects of the Migration Act relating to student, business and visitor visas and registration of migration agents.

New South Wales

New South Wales had scheduled 143 reviews for completion by the second tranche assessment. The New South Wales Annual Report indicates that 60 reviews are now completed and 65 are underway. Of those reviews not yet completed, 17 are drafting final reports for Government consideration, two are now part of national review processes and three are to be conducted jointly with Victoria.

The Government has announced its response to 44 reviews, repealing 42 pieces of legislation. Five pieces of legislation are currently before the Parliament. Reform highlights follow.

- New South Wales' Licence Reduction Program reviewed 250 licences between August 1995 and February 1997. Of the 85 licences identified for repeal, 72 have already been repealed. Proclamation of the remaining 13 repeals have been made contingent on the outcomes of other review processes including NCP reviews. New South Wales also made changes to reduce 'red tape' and provide for more certain and consistent decisions on development proposals.

- In-principle agreement has been reached to remove the Rice Marketing Board's current vesting arrangements subject to the acceptance of Commonwealth single desk export arrangements.

- Changes in the *Environmental Planning and Assessment (Amendment) Act 1997* are intended to simplify procedures for obtaining approvals to projects such as construction of new buildings or commencement of businesses through a one stop shop process.

- Repeal of the *Bread Act 1969* has removed the licensing requirements for bread manufacturers and also the restrictions on standard bread sizes, baking times and delivery times.

New South Wales are addressing ahead-of-time several reviews scheduled to be completed in 1999-2000. Two reviews have been completed and have resulted in repeal of the related legislation and one other Act has also been repealed. One 1999-2000 review is currently underway and three others are being considered through a national process.

Victoria

Victoria originally scheduled 146 reviews for completion by the time of the second tranche assessment. Subsequently, preliminary reviews found that 22 Acts did not significantly restrict competition and did not warrant detailed review. Victoria removed a further two pieces of legislation, which provide exclusive licences for casinos, from its review timetable on the basis that these formed contractual arrangements with little scope for amendment. Victoria also removed the *Control of Weapons Act 1990* from its review timetable on the basis that it relates to public safety.

Of the remaining 121 reviews, 76 have been completed. There are 20 reviews currently underway, 13 of which are nearing completion. In addition, the Government has completed or commenced 23 third tranche reviews ahead of schedule. Of these, five pieces of legislation have been repealed and a further nine review reports are awaiting Government consideration. Victoria stated in its annual report that considerable progress has been made against its review schedule and that it is on track to complete its legislation review program by the December 2000 deadline.

Victoria has announced its response to 57 reviews, repealing 41 Acts and implementing reforms to a further 14 pieces of legislation. Some key reforms follow.

- Changes to the *Barley Marketing Act 1993* provide for the progressive opening of the market to competition. Restrictions on the domestic marketing of barley and the exporting of packaged barley will be removed completely by July 1999. Restrictions on the export of all other forms of barley will be removed after a transition period (to July 2001) to allow the Australian Barley Board (and its successor) to adjust to operating in an open, competitive market.

- Reform of the *Liquor Control Act 1987* has simplified licensing procedures and relaxed restrictions on the consumption of liquor on licensed premises. Victoria has retained some restrictions on packaged liquor licences. For example, it prevents an individual or single entity holding more than 8 per cent of the total number of packaged liquor licences, and it prevents outlets such as convenience stores, petrol stations and cinemas selling packaged liquor. Victoria's liquor licensing arrangements are discussed further in section B5.4.4.

- Reforms to the regulatory arrangements governing several health professions include the relaxation of advertising controls and the removal of restrictions to ownership of practices. The statutory registration of practitioners and the restrictions on the use of professional title are retained.

- The legislative preference towards State Trustees, under the *State Trustees (State Owned Company) Act 1994*, to administer several categories of estates and funds has been removed.

Queensland

Queensland had 68 reviews (of its entire program of 114 reviews) scheduled for completion for the second tranche assessment. Of these, 31 reviews have been completed and a further 24 are currently underway. Of those underway, six are nearing completion, one Act is expected to be repealed and three are to be addressed by national review. There are 13 reviews yet to be commenced.

After commencing its review program later than most other jurisdictions, Queensland had a relatively heavy program scheduled for 1998-99, with 52 reviews in this period. At the time of its annual report, eight of these reviews had been completed (seven pieces of legislation repealed) and a further 18 were underway. Nonetheless, the Government stated that it is confident it will complete its review and reform program by December 2000. It indicated in its annual report that several larger reviews were commenced at the beginning of 1998, ahead of schedule, to alleviate the overall review workload. The Government stated that it would continue to look for

opportunities to commence larger reviews earlier than scheduled and would devote additional resources towards reviewing legislation to ensure timely completion of its review program.

So far the Government has responded to the recommendations of 26 reviews and repealed 23 pieces of legislation. Reform highlights follow.

- Reforms to the *Chicken Meat Industry Committee Act 1976* provide for individual growers to negotiate directly with processors outside of legislative collective bargaining arrangements.

- The Brisbane Marketing Authority is proposed for corporatisation.

- Advertising controls have been reduced and commercial controls removed in regulations governing Health and Medical Practitioners (separate review for Pharmacy and Optometry pending).

Several reviews recommended retention of restrictions on competition in areas of agriculture, including dairy, barley and sugar. These are discussed in the following sections. The Casino Agreement Acts, which provide exclusive licences, were retained without reform as Queensland considered them to be contractual arrangements with the respective private enterprises and not able to be repealed without compensation.

Western Australia

Western Australia scheduled 166 pieces of legislation for review by the time of the second tranche including two Acts subsequently found to contain no competitive restrictions.

So far, recommendations from 92 reviews have been presented to the Government for consideration. At the time of Western Australia's annual report, the recommendations from 43 reviews had been implemented, with 15 Acts being repealed entirely and restrictions retained in 28 Acts. In addition, the Government had endorsed the recommendations from a further 45 reviews, and was drafting legislation for implementation by the year 2000.

Western Australia's review program has recommended several significant reforms. Some of the highlights of the program to date are set out below.

- Repeal of the *Bread Act 1982* has removed a number of onerous restrictions, including licensing requirements for bake-houses, restrictions on the time at which bread can be delivered and requirements for marking vehicles used for delivery.

- Removal of several restrictions, under the *Betting Control Act 1954*, enable bookmakers to compete with the Totalisator Agency Board on a more level footing.

- Exclusive licences to provide port services such as towage, piloting and stevedoring can be granted only by the responsible Minister who must consider whether public benefits from exclusivity exceed public costs.

- The review of the *Chicken Meat Industry Act 1977* and associated Regulations recommended that the legislation be amended to allow broiler growers to negotiate contracts with processors outside the existing compulsory collective contract system. The review found that a voluntary collective contract arrangement is in the public interest because it offers protection to broiler growers from the strong market position of the two large chicken meat processors in Western Australia.

- The review of the *Finance Brokers Control Act 1975* and associated Regulations has recommended that the Act be repealed on the grounds that a less restrictive code of conduct would be equally as effective in protecting consumers as the current arrangements and would reduce compliance costs for finance brokers. It was also noted that the Act duplicated provisions contained within the Commonwealth *Trade Practices Act 1974* and the *Fair Trading Act 1987*.

- The current system of mandatory licensing, under the *Painters Registration Act 1961*, has been found to be too restrictive. The review of the Act recommended that certification be supported by a system of negative licensing, allowing for the removal from the industry of persons who do not adhere to basic standards of commercial conduct. Western Australia stated that this would reduce business costs but still enable consumers to readily identify painters with particular skills.

Western Australia reported that it is taking steps to ensure that it completes its review and reform obligations by December 2000. The Government believes that, with the increasing experience of its reviewers, the efficiency of the State's review processes has been improved. The Cabinet has also recently approved a National Competition Policy Omnibus Bill to implement amendments and repeals resulting from reviews.

Some 20 reviews scheduled for the third tranche have been commenced ahead of schedule. Further, the need for many scheduled reviews is being obviated by the development of new legislation. For example, new legislation covering the health and medical professions will effectively remove the need for 30 reviews. The recent *Port Authorities Act 1999* (expected to be proclaimed in August 1999) and other Bills awaiting enactment, including the *Agricultural Industries Bill*, will repeal a further 24 pieces of legislation scheduled for review prior to December 2000.

South Australia

South Australia scheduled 121 reviews for completion by the time of the second tranche assessment. South Australia's tabulations in its annual report indicate that 46 reviews are complete, including five reviews that had been scheduled for 1999 or beyond.

The Government has announced its response to 27 reviews. In 21 cases, the Government has repealed legislation, or has identified legislation for repeal once it is no longer operational. Acts repealed to date include the *Bulk Handling of Grain Act 1955, Catchment Water Management Act 1995, Manufacturing Industries Protection Act 1937* and *The Carriers Act 1891*. Proclamation of the *Livestock Act 1997* will streamline regulations affecting market entry and conduct relating to the keeping of bees, cattle, pigs and deer by repealing six separate Acts. The Government is currently drafting new legislation following the review of the *Local Government Act 1934*.

Some 73 of the reviews scheduled for completion in the second tranche period are still underway. South Australia's report indicated that 22 of these are expected to be complete by mid-1999, with a further two expected to become national reviews.

Of the 13 reviews scheduled for completion in the second tranche period but not yet commenced, three are now to be examined through a national process. Review of the *Occupational Health, Safety and Welfare Act 1986* has been deferred so that it can be examined in conjunction with related legislation in 1999. Advice from South Australia is that the remaining 1998 reviews, which are primarily within the portfolio of Primary Industries, Natural Resources and Regional Development, are now to be reviewed in 1999.

South Australia has also brought forward some reviews, recognising that it has over 30 reviews scheduled for 2000. Its annual report indicated that 20 reviews scheduled for 1999 and beyond have commenced early.

The Government has retained restrictions in several pieces of legislation. Restrictions in shop trading arrangements in the *Shop Trading Hours Act 1977* and the partial deregulation of liquor licensing arrangements provided by the *Liquor Licensing Act 1997* are discussed in the sections B5.4.3 and B5.4.4, respectively.

Tasmania

Tasmania scheduled 202 reviews of legislation for completion by the time of the second tranche assessment. In 16 cases, preliminary reviews found that legislation did not contain significant restrictions and further review was unnecessary. Some 113 of the remaining 186 reviews are now completed.

Tasmania's annual report indicated that, of the 73 scheduled reviews not yet completed or still to commence, 14 are nearing completion, 12 are being conducted in conjunction with a national approach and 25 have been deferred pending completion of related reviews or the expected repeal of the legislation. Four reviews have been commenced ahead of schedule, and two other Acts have been added to the review schedule for the third tranche.

The Government has announced its response to 95 reviews, proposing to repeal 86 pieces of legislation including the following Acts.

- The *Apple and Pear Industry (Crop Insurance) Act 1982* is to be repealed as no evidence was found to suggest that legislation to require growers to take out crop insurance is needed for the industry to operate efficiently and effectively.

- Part III of the *Traffic Act 1925*, regulating the carriage of goods or passengers, was found to have controls that stifled innovation and increased costs to consumers. New legislation is to be developed in line with the national road transport reforms.

- The *Weights and Measures Act 1934* is to be repealed and replaced with nationally uniform legislation.

The Government has retained restrictions following consideration of review recommendations in nine cases. Restrictions retained following the review of the

Motor Accident (Liability and Compensation) Act 1993 are discussed in the following section.

Tasmania has had to reschedule for State-based review a large number of Acts that it had originally listed for national or multi-jurisdictional review. This has had the effect of increasing the demands on the State in the latter part of the program. However, Tasmania stated that its Regulation Review Unit is working with other Tasmanian Government agencies to facilitate completion of the remaining reviews by the year 2000.

ACT

The ACT had scheduled some 181 reviews to be completed by the second tranche assessment. However, in 20 cases, review was deemed unnecessary, the legislation having been repealed or found to have no significant restrictions on competition. Of the remaining 161 reviews, 56 have been completed and 43 reviews are currently underway. Three third tranche reviews have commenced ahead of schedule.

The Government has announced its response to 36 reviews, repealing 35 pieces of legislation. Significant decisions follow.

- Repeal of the *Trading Hours Act 1962*, which removes restrictions to Monday to Sunday trading hours, and retains only minimal restrictions on shop trading.

- Amendments to legislation, following review of racing codes, ensure persons are not excluded from market entry or from accessing racing infrastructure.

- Reforms to the *Milk Authority Act 1971*, to be phased in over 2 years, eliminate subsidies and remove exclusive geographic distribution franchises.[19]

Currently, some 62 reviews originally scheduled by the ACT for completion by the second tranche are yet to be commenced. While some of these are to be considered as part of national or joint-jurisdictional reviews, or are awaiting the outcome of other reviews, it appears that as many as 48 reviews have been rescheduled for completion by the end of 1999. A significant number of these are in the Health and Community Care portfolio, which has rescheduled 26 reviews, including nine that are incorporated into the review of health practitioner legislation about to commence. The Department of Urban Services has rescheduled another 9 reviews.

The appearance of slippage in the ACT program is a consequence of the Territory having originally scheduled all of its reviews for completion by 1998. The Council raised the matter of progress against legislation review commitments with the ACT Government and received an assurance that the ACT is on track to complete its review program by the year 2000.

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[19] Although the review and the Government's decisions raise concerns in relation to structural separation between commercial and regulatory functions under clause 3 and the requirement to retain legislation only where it is demonstrated to be in the public interest under clause 5. These issues are discussed in sections B4.2 and B5.4.1, respectively.

Northern Territory

The Northern Territory had scheduled 85 legislation reviews to be completed for the second tranche assessment. Some 26 reviews have been completed. Of these, nine are awaiting a Government response and five found no restrictions on competition.

Of the 59 reviews not yet complete, 12 are nearing completion and eight are in the final phase of planned 3 stage reviews (due for finalisation by 30 June 1999). Two of these are now part of national review processes and two Acts are expected to be repealed.

The Northern Territory has identified two reviews relating to the functions of the Territory Insurance Office (TIO) which it expects will be subject to further external review. Restrictions contained in mandatory insurance legislation, including legislation governing the role of the TIO, are discussed in the following section.

The Government has announced its response to 12 reviews, repealing 11 pieces of legislation. Reform highlights follow.

- Repeal of the *Grain Marketing Act* and the subsequent dissolution of the Grain Marketing Board will facilitate rationalisation in the Northern Territory grain industry.

- Reforms to the *Commercial Passenger (Road) Act* have removed the restrictions on the number of taxi licences.

- The *Building Societies Act and Regulations* has been repealed and building societies now registered under the *Financial Institutions (NT) Code* as part of a national scheme of legislation.

- Repeal of the *Stock (Artificial Breeding) Act and Regulations* has removed restrictions on insemination and siring.

The Government has also endorsed the review recommendations for partial reform of the *Financial Management Act*, which governs the investment of Government funds. The Government has agreed to broaden the types of financial institutions able to hold a Government account beyond banks to institutions with a suitable published credit rating.

Of the four reviews not yet commenced, the *Mining Act* has been deferred pending the outcome of Native Title amendments, while the others are to be included in national review processes.

Only two reviews were scheduled for the period of the third tranche in the Northern Territory's original review timetable. While the number of reviews still underway at the time of the second tranche suggests that the original scheduling may have been overly optimistic, the progress demonstrated to date by the Northern Territory indicates that it should have little difficulty completing its review program by the CPA target date.

B5.4 Legislation review processes and reform outcomes: matters directly relevant to the assessment of second tranche progress

As part of its scrutiny of jurisdictions' legislation review and reform activity for the second tranche assessment, the Council identified a number of matters relevant to determining whether governments' progress has been sufficient to meet the obligations set out in the CPA. Upon investigation, some of these matters raised questions about governments' compliance with NCP legislation review obligations, and so are directly relevant to the assessment of progress by States and Territories for purposes of competition payments. Those matters are discussed in this section.

The Council's investigations also found that, for some categories of regulation, governments' review and reform activity met second tranche NCP obligations or that, because the review and reform process has not been completed, the matter is more appropriately assessed in the third tranche. These matters are discussed in section B5.5.

B5.4.1 Regulation of the dairy industry

Background

Dairy farming is Australia's fourth largest rural industry, producing 6-9 million litres per annum with a gross production value of approximately $3 billion. Approximately 45 per cent of Australian milk production is exported, which represents 10 per cent of world milk trade. Raw milk is used as either "market milk" (that is, fresh drinking milk) or 'manufacturing milk', which is used in the production of milk powder, cheese and butter.

Historically, the market milk sector has been tightly regulated through state-based dairy corporations, while the more export-focused manufacturing sector is relatively lightly regulated. This has resulted in the market milk prices paid to producers being approximately twice that of manufacturing milk (the price of which approximates the world price).

State-based dairy industry regulation typically includes:

- vesting of milk in a statutory body;
- farmgate price setting for market milk;[20]
- supply management arrangements:
  - via market milk production quotas in New South Wales, Western Australia and South-East and Central Queensland;[21] and

[20] The average all-Australian price paid to producers for market milk is 52 cents per litre as compared to an average 24 cents per litre for manufacturing milk.

[21] In South-East Queensland the quotas are statutory mandated, while in Central Queensland they voluntary industry arrangements which have the same effect on the market.

- via market milk pooling in Victoria, North Queensland, South Australia and Tasmania;

· food and safety standards; and

· compulsorily funded industry services.

The Commonwealth also regulates aspects of the dairy industry through marketing agencies, the imposition of a tariff quota system on some imported cheeses and through Domestic Market Support (DMS) paid to manufacturing milk producers' exports. The DMS Scheme will sunset in July 2000.

Farmgate price and supply management arrangements have a large impact on the market. In 1996-97, the state-based market milk regulations delivered transfers to producers of almost $370 million, while the Commonwealth's DMS delivered almost $120 million to manufacturing milk producers. Table B5.2 shows the state-by-state break down of these aggregate assistance figures.

States traditionally also regulated the "post-farmgate" arrangements in the dairy industry. This refers to the relationships, including price and margins, throughout the processing, vending and retail chain. Following an agreement in the early 1990s, all governments except the ACT have removed their post-farmgate arrangements.

Table B5.2 Estimates of dairy industry assistance for 1996-97, by State

	Market Milk Assistance	Manufacturing Milk Assistance	Total Assistance
		($ million)	
New South Wales	128	1	129
Victoria	70	103	173
Queensland	97	2	99
Western Australia	34	1	35
South Australia	28	6	34
Tasmania	12	6	18
Total Assistance	369	119	488

Source: ABARE (1999) and ADC (1998).

The Significance of the Victorian Dairy Industry

Victoria is the largest milk producing State, accounting for more than 60 per cent of total Australian production. More than 90 per cent of Victoria's production is used in manufactured milk products, of which approximately 50 per cent is exported. The remaining amount (less than 10 per cent) is used as market milk for human consumption. Victoria is also the lowest cost producer of milk in Australia.

This compares with next largest producers, New South Wales and Queensland, which produce 13 per cent and 9 per cent of total Australian milk production, respectively. In both States, approximately 50 per cent of total milk produced is used as market milk.

The size and structure of the Victorian dairy industry has a significant influence on the rest of the Australian dairy industry. There is also a perception within the industry that, of all of the States, Victoria is the most likely to fully deregulate its dairy industry arrangements following its current review. If this occurs, it is likely to have ramifications for dairy regulation in other States, particularly on the Eastern Seaboard. Should Victoria deregulate, it would become increasingly difficult for other jurisdictions to sustain any remaining price and market restrictions, due to the competitiveness of Victorian producers, processors and manufacturers, the operation of the *Mutual Recognition Act* and the threat of inter-state trade.

Current status of review and reform program

All States have scheduled reviews of their dairy industry legislation under NCP. New South Wales, Queensland, Western Australia and the ACT have all completed their reviews.

New South Wales

The New South Wales review of the *Dairy Industry Act 1979* was completed in November 1997. The members of the Review Group – chaired by New South Wales Agriculture and comprising industry and government representatives – were unable to agree on whether farmgate prices and supply management arrangements for market milk should be deregulated.

The Review Group agreed that the market milk arrangements resulted in revenue transfers from consumers to producers, resource use efficiency costs and consequential impacts such as regional multipliers and income effects. But the Review Group could not agree on the net public benefit (cost) arising from the arrangements. Government representatives estimated the arrangements produced a net cost in the order of $86-$132 million per annum. Industry representatives estimated the arrangements produced a net benefit in the order of $95-110 million per annum – relying heavily on (disputed) large multiplier effects.

The Chairman and industry members concluded the benefits arising from the current arrangements exceed the costs and recommended that the current farmgate pricing and supply management arrangements be retained and reviewed again by July 2003.

The government members (other than the Chairman) recommended that farmgate price control and supply management in New South Wales for market milk be removed within 3-5 years if nationally co-ordinated reform was not achieved. They also recommended the New South Wales Government support an industry application to the Australian Competition and Consumer Commission for authorisation of collective arrangements as a transitional measure following the cessation of the current arrangements.

In May 1998, the New South Wales Government announced that it would extend the current farmgate arrangements for five years until the year 2003.

Queensland

The Queensland review of its *Dairy Industry Act 1993* was completed in July 1998. The Review Committee comprised industry and government representatives, supported by a producer and processor Working Group advising on supply management arrangements.

The Review Committee recommended farmgate price regulation be retained for five years to December 2003, but reviewed again before 1 January 2001. It also recommended the retention of supply management (quota) arrangements in South East Queensland, and their formal extension into Central and North Queensland for five years.

In accordance with Queensland guidelines, a public benefit test of the current arrangements was undertaken based on economic modelling by consultants. The estimates of economy-wide effects ranged from a loss of $28 million to a gain of $54 million.[22] The Review Committee concluded that farmgate deregulation would have little overall impact on the Queensland economy, but that the expected industry rationalisation resulting from deregulation would have large impacts in regional economies.

The Committee stated that it believed the reform of market milk arrangements is ultimately inevitable. However, it did not support an immediate move to deregulate as it considered "*the potential social, economic, environmental and regional impacts as unacceptable*" (Queensland Dairy Legislation Review Committee 1998, p. 4). In recognition of this, the Committee supported a national approach to industry rationalisation and a review of the Queensland arrangements prior to the year 2001 if necessitated by industry changes and market pressures.

The Queensland Cabinet endorsed the recommendations of the review, extending the coverage and duration of farmgate price and supply management arrangements until the year 2003.

Western Australia

The review of the Western Australian *Dairy Industry Act 1973* was completed in 1998. Agriculture Western Australia conducted the review, overseen by the Treasury. The review was supported by an industry working party consisting of representatives from the Western Australian Farmers Federation, the Dairy Industry Authority and the Dairy Program Partnership Group of Agriculture Western Australia.

The Review estimated that farmgate pricing results in a transfer from consumers to producers in the order of $26 million per annum. The collective value of market milk quotas which underpin the supply management arrangements in Western Australia, were estimated to have a discounted capitalised value of some $88 million.

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[22] Net present values in 1996-97 dollars over a ten year period.

The review recommended:

- the retention of farmgate prices for market milk – on the ground that it corrects an imbalance in market power which is accentuated in Western Australia by the lack of competition in processing and retailing;

- the continued vesting of all milk in the Dairy Industry Authority – on the grounds that it is a means for achieving regulation, provides a secure payment system and ensures that milk companies do not under-state the volumes used as market milk; and

- the continuation of the licensing powers of the Authority – to ensure that health and quality standards are maintained. (Western Australian Government 1999, p. 58).

The review also found that quotas, as a mechanism for ensuring year round supply of fresh milk, are unnecessary. However, it recommended that quotas be retained in a modified form so long as regulated farmgate pricing continues.

The Western Australian Cabinet endorsed the findings of the review.

ACT

There is only one dairy farmer in the ACT, and the Canberra Milk Authority purchases more than 95 per cent of the Territory's raw milk requirement from New South Wales and Victoria. Unlike all other jurisdictions, the ACT has not introduced post-farmgate reform.

The ACT reviewed its *Milk Authority Act 1971* during 1998. The review was conducted from within the ACT Government but independent of the Department of Urban Services, which has portfolio responsibility for the Act. The review recommended:

- the structural separation of the commercial and regulatory roles of the Milk Authority;[23]

- the extension of existing raw milk supply contracts until 30 June 2000;

- the retention of maximum retail price setting until mid-2000, but that price determinations be made by the IPARC;

- reform of processor and distributor margins on 31 December 1998 (when the then current TPA exemption expired);

- requiring the Milk Authority to continue to purchase raw milk from the only ACT dairy, Goldholm Dairy, so long as the Authority continues to acquire bulk raw milk;

[23] See section B4 for a discussion of the clause 4 issues.

- reform of licensing and zoning arrangements for the home vending sector; and
- the arrangements be notified as exempt from the TPA.

The Review argued that the ongoing price regulation was in the public interest due to the uncertainty associated with post-farmgate deregulation outcomes in New South Wales. Further, the Review observed that 'regulated states'[24] had the lowest retail prices by an average of 15 cents per litre. The Review estimated that this produced a public benefit for the ACT in the order of $5 million per annum. It also considered the regulation was necessary to countervail potential retail price impacts due to the market power of the major food retailers.

In support of the existing arrangements, the Review argued that the various ACT milk businesses were locally owned, they had invested large amounts of money in their businesses, they employed local people, and their profits stayed in Canberra. The review estimated that the industry contributed $30 million per annum to the local economy.

However, the Review suggested that existing arrangements should not be maintained in perpetuity in an environment which is subject to rapid change at all levels, and stated that the restrictions on competition could at best only be justified in the short term (ACT 1999, p. 15 and p. 25).

In recommending reform of the home vendor sector of the industry, the Review noted that the sector is confronting demand and financial difficulties despite being cross-subsidised by the retail sector by $850 000 per annum (or 2.5 cents per litre).

In mid-1998, prior to the Government responding to the review recommendations, National Foods entered the ACT retail milk market in competition with the incumbent operator using milk processed outside the ACT, thus effectively deregulating the ACT retail milk market. In its Annual Report, the ACT stated that:

> *Competition in the market has not impacted adversely on consumers, who are paying similar prices for retail milk. There is greater choice in products for consumers.* (ACT 1999 p. 8)

The ACT Government has endorsed the review recommendations. A Bill to give effect to the recommendations and to extend the exemption from the TPA was rejected by the ACT Legislative Assembly in late 1998. Consequently, the existing legislation lapsed on 1 January 1999, effectively deregulating dairy arrangements in the ACT. However, in March 1999, the Bill was passed by the ACT Assembly restoring (or re-regulating) the dairy arrangements.

[24] Being, New South Wales, Queensland and the ACT which, at the time of the review, still had post-farmgate regulation in place.

Other jurisdictions

The Victorian dairy industry review is underway. An independent consultant has been engaged to conduct the review. An Issues Paper was released in March 1999 seeking submissions to the review from interested parties. The reviewer is expected to report to the Victorian Government in July this year.

The South Australian review is also in progress. An independent reviewer has been engaged who has initiated a public consultation process. The reviewer is expected to report to Government in October 1999.

The review of Tasmanian dairy arrangements is in progress. The Review Group initiated its consultative processes with the release of an Issues Paper in the second half of 1998. In April 1999, the Tasmanian Government advised that the process was close to completion.

The Commonwealth review of its remaining dairy industry regulations was scheduled for 1998-99. However, the review has been delayed and is now expected to start in the second half of 1999.

These reviews will be considered in the Council's third tranche assessment.

National developments

The Australian Dairy Industry Council (ADIC) has proposed an Australia-wide dairy industry reform and adjustment package to the Commonwealth. The ADIC proposes the simultaneous repeal of all remaining State and Territory dairy regulation in mid-2000 and the payment of $1.25 billion to assist dairy producers to adjust to the open market. ADIC has proposed the imposition of a levy on all market milk to fund the package. The Commonwealth is considering its response.

All reviews to date have expressed support for a national approach to any reform.

The Council supports consideration of transitional arrangements and/or adjustment assistance as a complement to reform, particularly where an industry is traditionally highly regulated and important to regional economies (NCC 1999).

The Council agrees that a national approach to reform, incorporating appropriate adjustment arrangements, may be worthwhile. Recognising the continuing influence of domestic and international pressures that have driven productivity improvements over the past decade, the Council considers that any adjustment assistance package should include measures to encourage continued productivity improvement. Relevant considerations when considering an adjustment assistance package include the appropriate quantum and targeting of the assistance.

Assessment

Given the size and importance of the Australian dairy industry, the Council considers the review and, where appropriate, reform of restrictions on competition in the industry to be an important component of the NCP agenda. Accordingly, The New South Wales, Queensland, Western Australian and ACT dairy industry reviews are all relevant to the second tranche assessment.

The Council has various concerns about the reviews conducted to date. For example, the split along industry and government lines of recommendations from the New South Wales Review Group highlight the Council's concerns about the need for review panels, particularly in sensitive areas such as dairy, to be independent from industry. Industry should participate in reviews via submissions, and other consultative mechanisms, rather than direct representation on review panels. More generally, the Council is not satisfied that the reviews have clearly demonstrated a net community benefit in support of the retention of market milk arrangements.

Similarly, the Council is concerned about the robustness of the cost-benefit analysis undertaken in reviews. For example, many of the costs and benefits listed in the ACT review report appear to have been included directly from submissions without analysis of their merit. The Council's recognises that the ACT's analysis is predominantly qualitative: however, the review does not appear to weigh up the many costs and benefits listed and thereby provide an overall sense of where the balance of the public interest lies. Further, some of the identified 'benefits' presented in support of retaining marketing arrangements are doubtful – for example, that school children can see cows from a particular road.

However, in view of the proposed national dairy industry reform and adjustment package that is currently under consideration, and recognising the significance of the outcome of the Victorian review in determining the direction of reform Australia-wide, the Council consider the New South Wales, Queensland, Western Australia and ACT reviews through a supplementary assessment before July 2000.

A common difficulty encountered when considering legislative reform is balancing the concentrated nature of the benefits arising from restrictions with diffuse benefits, often spread across the economy, from reform. This is an issue facing governments when considering reform of dairy farming. However, it is not a reason to avoid reform.

For example, the Queensland Dairy Review Group determined that "*the overall impact on the economy is of less concern than the potentially important regional effects*" (Queensland Dairy Legislation Review Committee 1998, p. 163). This approach suggests that the review believed that the highly concentrated benefits to a few from the existing arrangements should be protected at the expense of the more diffuse costs to the majority. This approach is inconsistent with the principle underpinning the NCP legislation review, that arrangements should be reformed unless it can be shown that they deliver a net benefit to the community as a whole.

The Council takes this opportunity to make the following general comments relevant to reviewing the dairy industry under NCP.

Typically, four reasons are put forward by the dairy industry in support of market milk arrangements, specifically:

- ensuring year round milk supply at stable prices;
- countervailing the market power of dairy processors and retailers;

- support or provide protection for Australian producers against "corrupt" world markets; and

- supporting regional economies.

To varying degrees, each review presents these arguments and relies on them to support recommendations for the status quo.

Against this, the following points arising from these reviews should be noted.

- It is not clear why milk is significantly different from other basic foods, the price of which fluctuate throughout the year according to seasonal availability. It is likely that year round supply would be achieved in the absence of supply management arrangements, with higher prices paid to producers in lower production periods to ensure supply.

- It is not clear that there is undue concentration and/or abuse of market power by retailers. Any risk of this is reduced by large farmer co-operatives, that are a significant feature of the milk processing sector and that provide countervailing power to farmers. Further, if the retail sector is misusing a position of market power, there are remedies available under the TPA.

- it is true that world prices for dairy products are distorted by subsidies paid to producers (notably within the European Union). However, this has been the case for many years and is likely to be the case for some time further, recognising that assistance levels are gradually being reduced through world trade negotiations. Further, matching overseas assistance would impose significant costs on the Australia, not only through any direct payments to producers, but through domestic market distortions and a reduced incentive for the industry to innovate.

- While regional development is a legitimate and important policy objective of government, a tax on milk consumers to subsidise producers is a particularly blunt policy tool to achieve this objective (IC 1997, pp. 40-44).

Additionally, dairy has, and continues to, benefit from high levels of assistance compared to other Australian agricultural industries. No clear case has been presented in the reviews to date to demonstrate why the dairy industry is more deserving of this assistance.

All reviews have drawn attention to, and to various degrees relied upon, experiences of retail price rises between 10 and 20 cents per litre following post-farmgate deregulation, as evidence of the power of the retail sector and of little or no consumer benefit from further reform. These price increases are not surprising as:

- post-farmgate regulation held processor and retail margins below what are considered 'normal' commercial levels – partial deregulation has allowed them to adjust prices;

- the demand for fresh milk is relatively inelastic; and

- farmgate prices continue to be set by regulation: that is, the input cost to processors, and consequently retailers, remains fixed. Therefore, processor and retail margin adjustments have been accommodated at the retail level.

Each of the reviews expressed the view that deregulation is inevitable, with market arrangements becoming increasingly difficult to sustain due to domestic and external commercial pressures – the most immediate being the outcome of the Victorian review which is widely expected to recommend reform. Each review expressed concern that reform should be introduced in a manner sensitive to expected social and economic impacts on producers and rural communities.

Contrary to these sentiments, the reviews have largely recommended retention of existing market arrangements without incorporating transitional arrangements either in terms of staged reform implementation or structural assistance. The approach proposed by New South Wales and Queensland for their dairy industries, leaving existing arrangements in place for a further five years without a progressive introduction of transitional arrangements to open competition, has the potential to exacerbate any industry dislocation. Such an approach provides no impetus or incentive for the dairy industry to prepare for, and respond to, expected change.

B5.4.2 Domestic marketing arrangements for rice

Background

In 1995, the New South Wales Rice Review Group (the Review Group) recommended that the domestic rice marketing monopoly held by the New South Wales Rice Marketing Board (the Board) be deregulated, finding that this would deliver a net community benefit. The Review Group found a case for retaining the Board's export monopoly.

The Review Group proposed that domestic deregulation be implemented by allowing the Board's vesting power over the New South Wales rice crop to expire after 31 January 1999. However, contrary to this recommendation, the New South Wales Government retained the existing vesting arrangements until 31 January 2004, with a further review in the year 2002.

In its first tranche assessment in June 1997, the Council identified the decision by New South Wales not to reform its domestic rice marketing arrangements, consistent with the review finding, as a compliance failure under clause 5 of the CPA. The Council's decision did not extend to the single desk export monopoly. The Council agreed to reassess New South Wales' progress with implementing domestic deregulation prior to July 1998 following an undertaking by the New South Wales Government to work with the Council towards resolving the matter consistent with the recommendations of the 1995 Review.

Despite extensive discussions, the following twelve months saw no progress toward deregulating domestic rice market arrangements. As a result, in June 1998, the Council recommended that the Commonwealth Treasurer deduct $10 million from the 1998-99 component of the New South Wales first tranche NCP payments. The deduction was to apply from 31 January 1999, being the date for reform of domestic rice marketing recommended by the 1995 Review Group. The Council based its

penalty broadly on the costs that the Review Group estimated fall on the Australian community as a result of the current domestic arrangements.

Subsequently, the Commonwealth Treasurer established a working group to examine Commonwealth options for ensuring a single desk for rice export under Commonwealth jurisdiction, if necessary, while allowing for domestic market deregulation. The Working Group was chaired by the Commonwealth Department of Agriculture, Fisheries and Forestry Australia, with participation from the Council Secretariat, Commonwealth Treasury, the Ricegrowers' Association of Australia, the NSW Rice Marketing Board and the Ricegrowers' Co-operative Limited (RCL).

On 22 January 1999, the Working Group delivered its report to the Commonwealth Treasurer. The key features of its preferred model were:

- the establishment under Commonwealth jurisdiction of a Rice Export Authority (REA) to manage a Commonwealth export monopoly for rice;
- sole export rights to reside with the RCL for an initial 3-5 years;
- during this period the REA may approve third parties to export rice where such action would not diminish benefits arising from the single desk;
- the regular review of the single desk to ensure it delivers a net benefit to the community;
- the REA to report regularly to the Commonwealth Parliament on the use of the export monopoly; and
- the cost of managing the single desk to be recovered from exporters.

Developments

In April 1999, the Commonwealth Treasurer sought in-principle agreement from the New South Wales Premier to deregulate domestic rice marketing arrangements in line with the Working Group's preferred model. The Premier gave his in-principle agreement, thereby ensuring receipt by New South Wales of all first tranche competition payments.

The Premier put three qualifications on his State's continuing involvement in the rice marketing reform process. Specifically, that:

- *the proposed Commonwealth single desk arrangements are feasible and practical, and do not put the export premiums under any risk;*
- *account is taken of the industry argument on the need for a transitional period to the commencement of the arrangements, and on the length of the initial period for which the [RCL] would be given an exclusive export licence; and*
- *all other States are in agreement with the proposal.*

The Treasurer asked the Council for its views on the New South Wales' in-principle commitment. The Council stated that it was satisfied with the commitment but made several comments on the Premier's qualifications.

First, the feasibility and practicability of a single export desk was addressed in the New South Wales 1995 rice industry review which found that it was feasible. This position was endorsed by the RCL both at the time and subsequently. As to the security of export premiums, a single export desk under Commonwealth jurisdiction will be at least as secure as the current New South Wales rice export arrangements, given the Commonwealth's constitutional power to legislate with respect to exports.

Second, the rice industry should be put on notice that the transition period prior to the new arrangements begins immediately and concludes with the passage of Commonwealth and New South Wales legislation, which will establish the single desk and repeal the domestic market arrangements respectively. Genuine reform requires near-simultaneous legislative action by the Commonwealth and New South Wales Governments

The Council sees no reason to extend the transition period or delay the reform of New South Wales' domestic rice marketing arrangements as:

- it is now four years since the rice review recommended domestic market reform, and the review suggested the industry was then already well placed to meet the challenge of more competitive domestic arrangements;

- export premiums arising from New South Wales rice exports will be protected under the Commonwealth single desk and by the initial exclusive licence period;

- only the small proportion (approximately 15 per cent) of New South Wales rice production which is marketed on the domestic market will be affected by the reform of the New South Wales marketing arrangements; and

- the policy refinement, legislative drafting and legislative action required to achieve this will take several months.

Parties have agreed that the duration of the initial exclusive licence period to be conferred on the RCL will be between three and five years. This will be the subject of negotiations prior to the introduction of the Commonwealth arrangements.

Assessment

The Council is satisfied that the in-principle agreement by New South Wales to domestic rice market reform meets the second tranche NCP obligations.

However, the Council is concerned to ensure that the policy development and implementation of the Working Group's preferred model is not unduly delayed, particularly in light of the Premier's qualifications on his Government's continuing involvement.

The Council will continue to monitor developments to ensure progress remains on track and will consider the outcome in its third tranche assessment of progress. Notwithstanding this, if prior to the third tranche assessment, evidence emerges that

progress is unduly delayed, the Council will consider making a supplementary second tranche assessment and recommendation to the Commonwealth Treasurer on competition payments to New South Wales.

B5.4.3 Shop trading regulation

Background

Legislation controlling the trading hours of shops was common place across Australia ten years ago. Prohibitions on Sunday trading date back to pre-Norman England and the first restrictions on trading hours in Victoria were introduced in 1885. These restrictions were intended to achieve a number of objectives, including observance of the Sabbath, protection of shop employees and to minimise the risk of market dominance by larger retailers. The legislation normally allowed for exemptions for a range of premises based on size, location and product sold – mainly small local shops selling newspapers, milk and tobacco. The impact of such legislation was clearly anti-competitive, with significant adverse effects on consumer convenience and choice.

The position across the different jurisdictions now differs widely. A generally deregulated environment is already established in New South Wales, Victoria, ACT and Northern Territory. Significant restrictions are still in place in Queensland, Western Australia, South Australia and Tasmania.

Current status of review and reform program

All jurisdictions, except the Northern Territory, have reviewed or will review trading hours legislation over the period of NCP. The Northern Territory has no specific trading hours legislation and has minimal regulation of shop trading. Table B5.3 below sets out the current position in each jurisdiction.

Shopping regulation was reviewed in Victoria in 1996 and in the ACT in 1998. Trading hours and other shopping arrangements are now largely deregulated in both jurisdictions.

Trading hours in New South Wales are also largely deregulated. Residual controls are through the *Factories, Shops and Industries Act 1962*, which was scheduled for review from 1996-97. The Act regulates a range of matters, including hairdressers and occupational health, in addition to trading hours. A series of staged reviews of the Act have commenced, although the trading hours component is still to be examined.

Queensland's review of the *Trading (Allowable Hours) Act 1990* and the *Trading (Allowable Hours) Regulation 1994*, which was scheduled for early 1999, has been deferred until the determination of a relevant appeal in the Industrial Court against a decision on Sunday trading hours by the Industrial Relations Commission.

In Western Australia, the original timetable for the review of the *Retail Trading Hours Act and Regulations* was extended due to the substantial number of submissions received. Completion of the review is now due by the end of June 1999.

A Community Reference Group has been convened to consider issues presented by the review team.

The Tasmanian review of the *Shop Trading Hours Act 1984* is scheduled to commence later in 1999.

South Australia reviewed its *Shop Trading Hours Act 1977* in 1998. The SA Government announced new trading hours arrangements on 21 October 1998, to come into effect on 8 June 1999. While there has been some liberalisation, the new arrangements maintain significant restrictions in several areas.

The second tranche assessment, therefore, concentrates on the South Australian *Shop Trading Hours Act 1977* – Victoria and ACT have already implemented deregulated arrangements; Northern Territory has limited restrictions; and the review and reform performance of the other jurisdictions will be assessed in the third tranche of NCP.

Table B5.3 Progress with reviews of shop trading legislation by jurisdiction, at 30 June 1999

	Legislation	**Review Status**	**Current Restrictions**
New South Wales	*Factories, Shops and Industries Act 1962*	Review has not commenced	Minimal restrictions – Monday to Saturday trading hours not regulated but some restrictions on Sunday trading
Victoria	*Shop Trading Act 1987* and *Capital City (Shop Trading) Act 1992*	Review completed 1997	Minimal restrictions – Monday to Sunday trading hours not regulated
Queensland	*Trading (Allowable Hours) Act 1990 (and regulations)*	Review to commence in July 1999	Significant restrictions – Monday to Saturday trading hours regulated, and Sunday trading prohibited outside major towns where it is restricted
Western Australia	*Retail Trading Hours Act 1987 (and regulations)*	Review underway and due to report in June 1999	Significant restrictions – Monday to Saturday trading hours regulated, and Sunday trading prohibited outside tourism precincts where it is restricted

	Legislation	**Review Status**	**Current Restrictions**
South Australia	*Shop Trading Hours Act 1977*	Review completed 1998 and limited changes announced on 21 October 1998 with effect 8 June 1999	Significant restrictions remain – Monday to Saturday trading hours regulated, and Sunday trading prohibited outside Adelaide CBD where it is restricted – recent changes had limited impact

	Legislation	Review Status	Current Restrictions
Tasmania	*Shop Trading Hours Act 1984*	Review scheduled to commence later in 1999	Significant restrictions – Monday to Saturday trading hours regulated, and Sunday trading prohibited for shops employing more than 250 people
ACT	*Trading Hours Act 1962*	Trading Hours Act repealed in 1997 due to lack of community support for trading hours restrictions	Very minimal restrictions – Monday to Sunday trading hours not regulated
Northern Territory	No specific 'shop trading hours' legislation	No review scheduled	Very minimal restrictions – Monday to Sunday trading hours not regulated

Source: Jurisdictions' Annual Reports (1999)

Shop Trading Hours Act 1977 (South Australia)

South Australia reviewed its *Shop Trading Hours Act 1977* in 1998. This legislation imposed considerable restrictions on trading hours. Arising from the review, the South Australian Government announced new trading hours arrangements on 21 October 1998, which came into effect on 8 June 1999.

South Australia's legislation exempts certain shops from the controls on hours of trade. Exemption is based on size and type of shop. This second exemption category includes a variety of activities and products, such as antiques (other than coins or stamps), live fish, wood carvings, greeting cards, surgical appliances, fresh flowers, ice-cream, household pets, garden supplies, hairdressing, souvenirs, cigars, motor vehicles and boats. The only change to this list, following the review, was to extend the exemption to include the sale of caravans and trailers.

The South Australian Government's response to the review provides for:

- trading by non-exempt shops, in the city, to be allowed until 9 pm, Monday-Friday, but only until 7 pm, in the suburbs (except for Thursday when trading is allowed until 9 pm), although the extended hours do not apply to (exempt) traders of motor vehicles or boats;

- trading by non-exempt shops will be allowed on Easter Sunday in the city only from the year 2000; and

- trading on Sundays allowed in the suburbs on six Sundays a year – four before Christmas with the two others prescribed following consultation.

While the new legislation provides for some extension to allowable trading hours for shops that are not exempt from controls on hours of trade, the new arrangements still contain significant restrictions, including:

- controls on the hours during which shops may open;

- variation in allowed hours, based on the day of the week; and

- discrimination in controls between different shops dependent on location, size and products sold.

Assessment

As well as restrictions on trading hours, the discriminatory treatment of different retailers with little apparent justification is a concern for competition policy. There is no clear net benefit from restricting the right of a shop to sell coins or stamps on a Wednesday evening when its neighbour, which sells antiques, is allowed to trade. The exemption on small shops, whatever their sales, is clearly discriminatory to the detriment of larger businesses.

There may also be adverse consequences for consumers from unjustified restrictions on competition. For example, an evaluation of the impact of deregulated shopping hours in Victoria indicates that longer trading hours increases consumer welfare. The work found a net benefit to consumers, in terms of increased convenience nationally, valued at $1.2 billion or $65 per capita in 1995-96 prices (Brooker and King 1997).

The annual report from South Australia confirms that the trading hours review identified many of these issues.

> *The review found that the Shop Trading Hours Act 1977 and its regulations provide for a very complicated web of principles, licences, exemptions and exceptions…There is no consistent, coherent theme to the Act….The objectives of the Act are unclear.…Any residual necessity for the Act on industrial grounds is arguable given the existence of industrial tribunals and the award system…. The Act is discriminatory in its application.* (Government of South Australia 1999)

However, there appears to be a disparity between this analysis, which is reported from the NCP review, and the suite of measures that have been adopted by the Government. The annual report material provided by South Australia does not make clear the extent to which those measures followed or were in contradiction to the recommendations of the NCP review of the State's trading hours. South Australia's annual report also provides little, if any, public interest justification for the restrictions now in place, stating only that the changes to trading arrangements "*represent a workable solution to balancing the interests of large and small retailers, of city and suburban traders and employees, employers and consumers*" (Government of South Australia 1999, p. 17).

Despite a request by the Council, South Australia did not provide the Council with a copy of the trading hours review report or a detailed comparison of the review's recommendations and the Government's decisions. South Australia offered to brief the Council on the key findings on a confidential basis and indicated that it would report in full in the year 2000, consistent with its view that the obligation in the CPA is the review and removal of unjustified restrictions by the end of 2000.

The Council does not support the interpretation placed by South Australia on the CPA obligation. The agreement contains a clear commitment on governments to report

annually on their progress with reviewing and reforming legislation. The Council does not consider that a briefing on a confidential basis provides a sufficiently transparent approach to progress reporting.

Given the limited analysis of the net community benefit from the restrictions now in place provided by South Australia, the Council was not able to assess the adequacy of the review process, or the extent to which the recommendations were implemented. In particular, the Council cannot be certain that the South Australian Government has met the key tests in the CPA that existing restrictions on trading arrangements provide a net community benefit and that the restrictions are needed to achieve the objectives of the legislation. The Council will consider an annual deduction from South Australia's NCP payments if South Australia does not remove unjustified restrictions on shop trading arrangements by 31 December 2000 or demonstrate that the restrictions retained beyond 31 December 2000 provide a net community benefit.

B5.4.4 Liquor licensing

Background

The primary objective of liquor laws, across jurisdictions, is the minimisation of harm associated with the abuse of alcohol, and the consequential provision of adequate controls over its sale and consumption. Some jurisdictions' laws also have the objectives of promoting proper development of the liquor industry and diversity in response to consumer needs. These objectives are said to be in recognition of consumers' expectations about the availability of liquor and the commercial expectations of the various participants in the liquor retailing industry.

As a result, licensing laws in most States contain 'public interest' requirements that restrict competition among businesses in the supply of liquor. This covers both supplies for consumption 'on-site', as in a hotel or restaurant, and 'off-site' as from a bottle-shop. The restrictions may include, for example, the requirement to be licensed, controls on the type of premises which can supply liquor, limitations on trading hours and a need for the licence holder to demonstrate that they are a suitable person. There are also a range of site controls, including the segregation of liquor sales from other activities and prohibition on access by minors.

Traditionally, the consumption of liquor has been based around hotels, both for on-site consumption and, as in some jurisdictions, for off-licence sales. The past ten years have seen a general movement to a more liberal, deregulated marketplace, in line with the growth in the number and range of venues for eating and gaming. For example, in Victoria, the number of premises licensed for consumption of liquor on the premises (mainly restaurants) rose from 731 in 1987-88 to 2 340 in 1995-96.

For off-licence sales of packaged liquor, the main restriction is on the type of businesses that can be licensed. Victoria, Queensland, South Australia and Tasmania all prohibit the sale of liquor by convenience stores. In New South Wales, Western Australia and the Northern Territory, licence applications for convenience stores are at the discretion of licensing agencies, but are rarely permitted. The ACT allows the sale of packaged liquor by convenience stores, except where such stores also sell petrol.

This prohibition on the sale of liquor from petrol stations is also in place in Victoria, Queensland, South Australia and Tasmania. Only the Northern Territory allows petrol stations to sell packaged liquor, most commonly from combined road-house/ restaurant/petrol stations in remote areas. Licensing of petrol stations in New South Wales and Western Australia is at the discretion of licensing agencies, although approval appears to be rarely granted.

In Victoria, there is an additional restriction that a single person or corporation may not hold more than 8 per cent of the total number of packaged liquor (off-premises) licences (the 8 per cent limit).

Current status of reviews of liquor licensing

All States and Territory Governments are reviewing their licensing laws over the period of NCP. However, to date, only South Australia and Victoria have completed reviews and implemented reforms.

In Victoria, the Government adopted a progressive, broad-based reform program. This has simplified licensing arrangements so alleviating compliance burdens, removed the 'needs' criterion and restored broader planning controls to local government. However, Victoria also retained some of the previous restrictions, including the prohibition on sales of packaged liquor by convenience stores and the 8 per cent limit for packaged liquor licences (although the 8 per cent limit was removed for licensed premises).

In South Australia, the outcome of the review and reform process was partial deregulation, with some of the existing restrictions retained. However, the review also recommended a further review after three or four years, once evidence is available on the effects of the reforms and of the experience of deregulation in other jurisdictions.

The Northern Territory intends to pass new licensing legislation later in 1999, as part of a broader review of licensing including liquor and gaming. The Western Australian Parliament is currently considering a Bill to limit the number of licences that could be held by an individual or business. As new legislation, both proposals will need to meet the provisions of clause 5(5) of the CPA. The Northern Territory confirmed its intention to conduct an NCP review prior to developing its legislation.

The current status of licensing reviews is set out in Table B5.4 below. Victoria and South Australia are relevant jurisdictions for the second tranche assessment as both have conducted reviews and implemented reforms. All other jurisdictions will be assessed as part of the third tranche, because of the timing of their review and reform programs. Thus, the Council's primary focus in this assessment is on:

- Victoria's *Liquor Control Reform Act 1998*, which retains certain controls in the earlier *Liquor Control Act 1987*, especially where the review recommended deregulation; and

- South Australia's *Liquor Licensing Act 1997*, which retained restrictions in the earlier *Liquor Licensing Act 1985*.

Table B5.4 Progress with reviews of liquor licensing arrangements by jurisdiction, at 30 June 1999

	Review and Reform Status
New South Wales	Review underway and scheduled for completion in late 1999
Victoria	Review completed 1998 and changes implemented 1998 and 1999
Queensland	Review underway and scheduled for completion in July 1999
Western Australia	Review underway and scheduled for completion in June 1999 (Private Member's Amendment Bill also currently under consideration)
South Australia	Review completed 1996 and changes implemented in 1997
Tasmania	Review scheduled to commence in the second half of 1999
ACT	Review underway and scheduled for completion mid 1999
Northern Territory	Review underway and scheduled for completion in September 1999; new legislation on licensing of liquor controls and gaming to follow

Source: Jurisdictions' Annual Reports (1999)

Liquor Control Act 1987 and Liquor Control Reform Act 1998 (Victoria)

Victoria's Review of the *Liquor Control Act 1987* commenced in September 1997. The review followed a semi-public process, involving an Issues Paper, Discussion Paper and a final Review Report provided to the Government in April 1998. The review panel received 47 submissions, met with 20 interested parties and commissioned an independent analysis of the effects of the restrictions on competition in the liquor industry.

The Review recommended significant pro-competitive reform of Victoria's liquor laws, particularly in regard to licensed premises. Victoria has now implemented substantial pro-competitive reform, including simplification of the licensing arrangements, abolition of the needs criterion, and relaxation of the controls on the presence of non-drinking minors on licensed premises under adult supervision. These changes were implemented through the *Liquor Control Reform Act 1998*. As a consequence, liquor retailing in Victoria is now less restricted than in any other jurisdiction.

However, Victoria also retained certain restrictions on licensing in the *Liquor Control Reform Act 1998*. For example, it retained the restriction on the number of packaged-liquor licences that can be held by the same or related persons (to 8 per cent of the total available licences), contrary to the Review recommendation for its removal. Victoria also retained the restriction on sales through outlets such as convenience stores, cinemas and petrol stations in line with the Review recommendation. Victoria's basis for retaining this restriction was concern about problems that may occur from potentially easier access to liquor for minors and proximity of liquor to drivers.

Analysis of competition issues

The two relevant matters for the assessment of Victoria's performance against the NCP legislation review and reform principles are Victoria's decisions to:

- retain the 8 per cent limit; and
- retain the restriction on sales through outlets such as convenience stores and petrol stations.

Victoria's arguments

Victoria argued in its annual report that the 8 per cent limit is consistent with the objective of minimising underage drinking. Victoria indicated that it would also have the effect of protecting smaller retail bottle-shops, particularly in the regions, from competitive pressures and would also guard against market dominance reducing competition. Victoria's annual report stated that "it is not unreasonable to expect that in an entirely unregulated market a duopoly may emerge."

Victoria retained the ban on licensing certain premises (such as convenience stores in metropolitan Melbourne and provincial cities, milk bars, petrol stations and drive in cinemas). The Government indicated that the potential for alcohol abuse by young drinkers was the basis for its concerns about the licensing of convenience stores (generally seen as premises of not more than 240 square metres selling food and other convenience products, being different from small supermarkets). Victoria's annual report also stated that it is agreed by the Victoria Police and alcohol and drug agencies that access to packaged liquor through supermarkets is a significant contributor to the problem of underage drinking in public places.

Furthermore, the Government is concerned about the proximity of liquor to drivers. It considers that licensing petrol stations would have implications for drink driving because, unlike purchases from drive-in bottle shops where the intention to purchase alcohol is clear, the availability of packaged alcohol at petrol stations may encourage impulse purchases.

The Government therefore stated that it is not in the community interest for premises such as drive-in cinemas, petrol stations and convenience stores to be licensed.

Victoria's NCP review

Victoria's NCP Review had assessed these issues and recommended abolition of the 8 per cent limit. In support of this recommendation, the Review concluded that:

- the 8 per cent limit is not necessary to achieve diversity in retailing;
- liquor retailing overall is likely to be more competitive in Victoria in the absence of the rule;
- no other State or Territory has an explicit restriction on the number of liquor licences that may be held by a person or corporation;

- the Victoria Police acknowledged that the two major supermarket chains are 'responsible sellers of liquor';

- several wholesale buying-groups supply multiple licensed retail outlets at a level well in excess of the 8 per cent limit; and

- an increase in the general availability of liquor, brought about by the removing the 8 per cent limit, would be unlikely to have a significant impact on total consumption.

The report commented that issues concerning threats of monopoly are better dealt with through the *Trade Practices Act* than through industry specific legislation.

The Council's considerations: the 8 per cent limit

There is no doubt that, as the Victorian Government argues, underage drinking is a significant issue for the community. However, there is little conclusive evidence provided to support the view that restricting the number of off-licences held by one organisation to 8 per cent of the total, which affects in practice only the two major supermarket chains, will achieve the objective of reducing alcohol abuse by underage drinkers.

The data on juvenile prosecutions in Victoria relating to alcohol abuse, referred to in the Government's annual report, do not provide any evidence on location of offence or the source of the liquor consumed. They do not necessarily support that contention that supermarkets are a major contributor to juvenile alcohol abuse.

The Victoria Police argued that the potential for binge drinking provides a case for closer supervision of alcohol sales by off-licence venues relative to licensed premises, given that binge drinking cannot occur lawfully on licensed premises (Victoria Police 1998, p. 5). The Council fully accepts this argument. However, any link between alcohol sales by supermarkets and underage drinking and binge drinking appears to have little, if any, relevance to the 8 per cent rule. Consideration of the evidence before the Review suggests that the 8 per cent rule does not achieve the objective of minimising underage consumption for the following reasons.

- Only the two large supermarket chains, Liquorland and Safeway, are affected by the 8 per cent rule. The rule does not apply in practice to smaller chains and independent liquor stores (because they do not have sufficient market share) or to buying groups, some of which hold in excess of 8 per cent of licences. Neither does it apply to hotels, having been removed for General Licences on the ground that it has no effect in practice.

- Both the large chains are acknowledged to be responsible sellers of alcohol. For example, Victoria's Review stated that Liquorland and Safeway "are acknowledged by the Victoria Police as being amongst the overwhelming majority of packaged liquor licensees who are responsible sellers of alcohol." (*Liquor Control Act 1987* Review 1998, p. 76)

- The Review found that an increase in the general availability of liquor, brought about by the removing the 8 per cent rule, would be unlikely to have a significant

impact on total consumption. It cited, among other things, evidence from New Zealand, where aggregate alcohol consumption levels have steadily declined (by nearly 18 per cent over 10 years) despite an increase in the number of liquor licences from 6 247 in 1988 to 11 048 in 1996 (*Liquor Control Act 1987* Review 1998, p. 120).

- The logical interpretation of comments that availability of liquor through various off-licence outlets is a contributory factor to underage drinking would suggest that the key public policy objective ought to be to limit the total number of off-licences (in contrast to the generally deregulatory action taken by the Victorian Government). However, retaining the 8 per cent limit on off-licences does not limit the total number of outlets, at most it limits the number which can be owned by one organisation.

- Removing the 8 per cent rule may even help to minimise problems due to underage consumption, given the large supermarket chains' established records for responsible selling of alcohol, if it results in liquor stores operated by the large chains replacing smaller independent sellers, as controls on sales would be tightened.

Thus, it appears that the primary objective for the retention of the 8 per cent limit is to shield existing holders of packaged-liquor licences from competitive pressures that would arise if the two major supermarket retailers were allowed to expand. This is emphasised by the then Minister's statement in May 1983, when the rule first became law. The Minister commented that the limit was a safeguard "*… to prevent domination of the liquor industry in the long term by hotel chains and supermarket chains.*" Victoria's 1998 Review confirms that:

> *the price of packaged liquor in the industry with the 8% rule would be higher relative to the price of packaged liquor without the 8% rule.*

Available evidence casts doubt on whether removal of the limit would lead to unacceptable retail concentration as alleged by Victoria. In New South Wales, where there are no restrictions on the number of licences which can be held, the two supermarket chains between them hold only 22.6 per cent of all packaged liquor licences, in comparison with 15.5 per cent in Victoria where the limit applies. Moreover, holders of General Licences such as hotels sell considerable volumes of packaged liquor. Thus, the percentage of packaged liquor licences held by the two supermarket chains overstates their relative share of the total packaged liquor market. In any case, as recognised by Victoria's Review, the TPA is a better mechanism for dealing with any unacceptable concentration in packaged liquor retailing.

As also recognised by the Review, removal of the 8 per cent rule is likely to lead to a reduction in prices, as cost savings from greater competition are passed onto consumers. The Council considers that the potential increase in competitive pressure could be significant as evidenced by Liquorland's recent application to increase the

number of its licences for packaged liquor by 69, from 89 to 158.[25] Apart from reduced prices, there are also intangible benefits which could also be expected to flow from abolition of the 8 per cent limit including, for example, greater availability of outlets, a broader range of products and improvements in customer service.

Conclusion and recommendation

The Council acknowledges that there have been substantial reforms to liquor licensing arrangements in Victoria, and that arrangements in general are now less restricted than in other jurisdictions. However, the Council is not convinced that the Government has demonstrated a sufficient public benefit case to support retention of the 8 per cent rule, particularly given the Review recommendation advocating removal of the restriction. Evidence provided by Victoria, while addressing relevant NCP public interest factors, does little to support an argument that the rule is necessary to limit underage drinking or that there is a net community benefit in shielding existing holders of packaged liquor licences from greater competition.

The Council concludes that, for Victoria to be considered as complying with its NCP obligations, the Government will need to remove the 8 per cent limit from its liquor licensing legislation in line with the recommendation of its Review. Given that the Review provides no specific date for removal, the Council considers the provisions of the CPA, which require the removal of unjustified restrictions by the end of the year 2000, should apply. The Council will consider an annual deduction from Victoria's NCP payments if Victoria does not remove the 8 per cent rule by 31 December 2000.

The Council's considerations: liquor sales by convenience stores and other venues:

Victoria's Review recommended that the prohibition on licensing cinemas, petrol stations, milk bars, convenience stores and mixed businesses remain. It was unable to identify a reasonable alternative non-regulatory means of achieving the "adequate controls" objective of the legislation that the prohibition seeks to address.

The evidence to support retention of the prohibition is not clear cut. For example, the Review found the primary objection to licensing convenience stores and other businesses to be that they are places frequently visited by families and, in particular, unaccompanied minors, but stated that no evidence was presented to suggest that well-run convenience stores are more likely to sell alcohol to minors than are other licensees. The Review also considered that licensing petrol stations may send the wrong message to the community concerning drink driving, but was not fully convinced that licensing petrol stations, subject to appropriate conditions, would in fact lead to a significant increase in drink driving (*Liquor Control Act 1987* Review 1998, pp. 70-74). The Victorian Government stressed that social objectives – especially reducing drug abuse by youth and reducing drink driving – support its decision to retain the licensing prohibition on convenience stores and other venues.

[25] Liquorland applied for the additional licences on the basis that its share at the time its application was made was less than 8 per cent, in line with what appears to be the approach taken until recently by the Liquor Licensing Commission.

While the evidence may be equivocal, the Council does not believe that the Review's recommendations, or the Victorian Government's policy response, is unreasonable. As this was a bona fide review, the Council accepts the balance of the arguments regarding the overall benefits to the community from retaining some restrictions on the premises that can supply packaged liquor. The Council considers that Victoria has complied with its NCP obligations in retaining the restriction on liquor licensing in respect of premises such as cinemas, petrol stations, convenience stores and milk bars.

Liquor Licensing Act 1985 (South Australia)

Following an NCP Review in 1996, South Australia removed several restrictions on the sale of alcohol. For example, the licensing authority no longer may take account of the impact of a new licensee on existing licence holders. These changes were incorporated in the new *Liquor Licensing Act 1997*, which came into operation on 1 October 1997.

However, consistent with the Review recommendations, the new Act also retained a number of restrictions, including:

- restrictions on the types of outlets that can retail liquor, that is, only hotels and retail liquor stores devoted entirely to selling alcohol are able to sell packaged liquor; and

- a 'proof-of-need' requirement for hotels and bottle shops – applicants for licences must demonstrate that the licence is necessary to meet the needs of consumers in the locality.

The justification for these restrictions, given by the Review, is that they are necessary to prevent a proliferation of liquor outlets. Indeed, in considering the recommendations of the Review, the South Australian Government stated that it saw retention of the needs test as an appropriate balance of the competing demands of all the community.

Nonetheless, the Government noted that the Review qualified its recommendations by proposing a further examination of liquor licensing arrangements in three to four years. In accordance with this, the Government proposes to review the desirability of retaining the 'proof-of-need' criterion at the end of the year 2000 or early 2001, although this would not be a full review of the 1997 legislation.

Assessment

The Council is not convinced that restricting licences for the sale of packaged liquor to hotels and bottle shops, for example, preventing establishments such as supermarkets from selling packaged liquor, is necessarily the best way to minimise harm from misuse of alcohol. As shown by Victoria's review, many operators other than hotels and liquor stores selling alcohol only, are likely to be capable of managing the sale of packaged alcohol in a way which meets community objectives about its use. Similarly, the 'proof-of-need' criterion inevitably impacts on the commercial interests of existing and potential licensees, restricting competition and reducing convenience for consumers especially in relation to packaged liquor sales.

However, the net public benefit of allowing liquor sales by outlets such as convenience stores and petrol stations is not clearly established. As discussed in the section above relating to Victoria's liquor licensing changes, evidence from the police and alcohol and drugs agencies suggests that preventing outlets such as convenience stores and petrol stations from selling alcohol may be in the community interest. On the other hand, the Victorian review found little evidence of harm arising in the ACT, where supermarkets can sell packaged liquor. Overall, the Council's view is that the evidence may support the approach being taken by both South Australia and Victoria, following their reviews, in retaining restrictions on these types of outlets.

The case in favour of 'proof-of-need' as a licensing criterion is less clear. South Australia's Review opted for retention with further review when the community impacts of less regulated approaches in other jurisdictions are clearer. Victoria has already removed the requirement to prove need following the finding by its Review that removal would primarily change the pattern of sales, reflecting customer demand and convenience, rather than impact significantly on alcohol consumption and problems from misuse.

In assessing NCP compliance, it is relevant to take into account that the South Australian Government has agreed to reconsider the case for retaining the needs criterion in late 2000 or early 2001. This is within four years of the date that the current Act became operational and thus is broadly in line with the timeframe recommended by South Australia's NCP Review for reconsideration of restrictions. In these circumstances, the Council assesses South Australia as meeting its second tranche NCP obligations on liquor licensing. The Council will take into account progress towards establishing the further review of the 'proof-of-need' criterion achieved by South Australia in its third tranche assessment.

B5.4.5 Third party motor vehicle insurance

Background

Each jurisdiction operates its own legislated compulsory scheme to cover costs associated with personal injuries resulting from motor vehicle accidents.

The regulatory environment governing delivery of compulsory third party (CTP) insurance varies significantly across jurisdictions. In two states, New South Wales and Queensland, private sector providers compete to provide CTP cover. In the other jurisdictions CTP insurance is provided by monopolies. In all but the ACT these are government-owned statutory monopolies. The ACT legislation provides for any qualified insurer to seek ministerial approval to provide CTP services. However, in practice, a single company provides cover.

Premium setting in all jurisdictions is subject to some form of regulation or oversight. In New South Wales, insurers propose the premium they intend to charge and file the premium with the Motor Accidents Authority (MAA). The MAA can reject the premium if it considers it excessive or inadequate to fully fund liabilities or if the premium does not comply with certain conditions. The Motor Accidents Insurance Commission in Queensland recommends premiums to the Government following actuarial advice and submissions from insurers. In all other jurisdictions, except Tasmania, the monopoly provider recommends premiums to the Government for

approval. In Tasmania, the Government Prices Oversight Commission (GPOC) recommends maximum premiums to the Government, following a review process involving public consultation.

Legislation also determines the nature of the product – that is, the terms of cover, the basis for determining compensation and eligibility for compensation. Supplementary activities often associated with CTP, such as accident prevention schemes, are either performed by the monopoly or, where there is competitive delivery, by an independent oversight authority, with funding from all CTP insurance providers.

Current status of reviews of CTP legislation

All governments, except the ACT, have scheduled relevant legislation for review. The ACT is not reviewing its legislation, on the grounds that it already provides for competitive delivery of CTP services.

Reviews have been completed in New South Wales, Victoria, Tasmania and the Northern Territory. In Western Australia, the review was close to finalisation at the end of June 1999. The Northern Territory is proposing an additional review to extend the coverage and independence of the earlier process. Therefore, at this stage, only New South Wales, Victoria and Tasmania are subject to assessment under the second tranche for CTP. Table B5.5 below outlines the current position.

New South Wales has recently announced a suite of new measures to amend aspects of its current legislation. The headline announcement is for a $100 reduction in the cost of green slips. This will be funded largely by reducing the costs of the scheme through greater controls over legal and medical costs. Claimants will have to refer disputes over medical issues to a single panel and general disputes to a Claims Assessment and Resolution Service. In addition premiums will be more risk related.

The actions being taken by New South Wales are consistent with its second tranche NCP obligations on this matter, given the existing deregulated arrangements and the recently introduced changes, which should simplify claims processing. The second tranche assessment, therefore, concentrates on the Victorian Transport Accident Compensation Legislation, the Tasmanian *Motor Accidents (Liabilities & Compensation) Act 1973* and the Northern Territory's *Motor Accidents (Compensation) Act* and *Territory Insurance Office Act*.

Transport Accident Compensation Legislation (Victoria)

Victoria's Review of its transport accident compensation legislation identified three main restrictions on competition:

- the scheme is compulsory for all registered vehicles;
- the Transport Accident Commission (TAC) has a statutory monopoly over the provision and administration of no–fault transport accident compensation in Victoria; and
- premiums are set by regulation.

The Review found there is a net community benefit from the compulsory nature of the scheme, although it did not investigate whether there is a viable alternative. It recommended no change to this aspect of the scheme.

Table B5.5 Progress with reviews of compulsory third party insurance legislation by jurisdiction, at 30 June 1999

	Legislation	Review and Reform Status
New South Wales	*Motor Accidents Act 1988 & Motor Vehicles (Third Party Insurance) Act 1942*	Review completed in 1998. Recent announcement provides for $100 reduction in premiums, risk based premiums and claims resolution mechanisms.
Victoria	*Transport Accident Compensation Legislation*	Review of Transport Accident Compensation legislation by Department of Treasury and Finance in 1997-98. Review found a found net benefit from compulsory scheme but significant costs associated with monopoly provision. The review recommended removal of statutory price setting provisions, introduction of risk reflective premiums and the separation of commercial, regulatory and other non-commercial functions. The Government announced in October 1998 that it would retain the main features of the existing scheme.
Queensland	*Motor Accident Insurance Act 1994*	A major review has commenced, including NCP issues.
Western Australia	*Motor Vehicle (Third Party Insurance) Act 1943* and regulations	Review is expected to be completed in June 1999. Completion date deferred from July 1998 to enable additional consultation and to address issues raised by NCC.
South Australia	*Motor Accidents Commission Act*	Review underway.
Tasmania	*Motor Accidents (Liabilities & Compensation) Act 1973*	Review completed October 1997. Recommended that the Motor Accidents Insurance Board should continue to operate as a monopoly provider and that the power of the Board to enter arrangements with other insurers be replaced with a power only to reinsure. Recommendations accepted by the Tasmanian Government in December 1998.
ACT		No review scheduled as legislation provides for competitive arrangements.
Northern Territory	*Motor Accidents (Compensation) Act & Territory Insurance Office Act.*	Internal review completed by Territory Insurance Office. The Northern Territory is finalising the terms for a wider external review.

Source: Jurisdictions' Annual Reports (1999)

The Review concluded that, on balance, there are significant costs associated with the monopoly. These costs include reduced incentive for suppliers to innovate and improve performance, or to reduce costs and prices, and constraints on consumer sovereignty. The Review recommended that statutory price setting be discontinued and risk reflective premiums be introduced, and that the TAC's commercial activities be separated from its regulatory and non-commercial functions.

The Government did not accept the majority of the Review's recommendations. The Government believes that a competitive model with compulsory coverage, lifetime care and community ratings would involve substantial on-going regulatory costs. Furthermore, while it agreed that the TAC premiums do not reflect risk (and therefore offer little incentive for those at risk to modify their driving behaviour), it was not persuaded that a strictly risk-reflective premium structure is required by the objectives of the scheme.

The Government stated that it did not release the review for public comment prior to making its decision, as it had already reviewed the scheme in its first term in office (1992 to 1996), although it acknowledged that the earlier review did not consider NCP matters.

Assessment

The Council questions whether Victoria has fully met its NCP obligations in relation to traffic accident compensation arrangements. The Council's concern arises from the disparity between the recommendations of Victoria's Review and the program implemented by the Government. Victoria's annual NCP report does not provide convincing evidence to rebut the Review's recommendations and justify the disparity.

The Council considers that Victoria should review its current position regarding arrangements for the delivery of CTP insurance. In view of this, and emerging questions about CTP review processes and outcomes in other jurisdictions, the Council considers the best way forward would be by way of a national review of CTP, conducted by an independent body with recognised expertise.

Victoria has indicated that it is willing to co-operate with a review by the Productivity Commission, possibly commissioned by the Council, of the different regimes provision of CTP for motor vehicles in Australia. This review would examine the approaches to, and performance of, regulation of transport accident insurance in the States and Territories, and provide recommendations on the appropriate level of competition in the provision of these services. The review might also consider any national issues which State and Territory reviews have not, or could not, address.

Victoria's agreement to such a review constitutes satisfactory compliance with its second tranche NCP obligations on this matter.

Motor Accidents (Liabilities and Compensation) Act 1973 (Tasmania)

A review of the *Motor Accidents (Liabilities and Compensation) Act 1973* was undertaken during 1997. The Review focussed on the statutory monopoly and the power of the Motor Accidents Insurance Board (MAIB) to enter arrangements with other insurers. A three-person team, including the Executive Officer of the MAIB, conducted the review.

The Review found that the statutory monopoly was justified and recommended its retention, noting that:

- premiums would be higher under a competitive model, because of additional costs faced by new entrants, and the need to fund an industry regulator and a scheme to cater for uninsured or unidentified vehicles;
- comparisons of cost of claims processed by MAIB and by New South Wales insurers did not support suggestions that competition would reduce premiums;
- while higher premiums might be acceptable if there is product innovation, the product in this case is defined by statute preventing innovation; and
- the size of the Tasmanian market precludes more than two providers, leading to potential oligopoly.

The Tasmanian Government accepted the review recommendations in December 1998.

Assessment

The Council considers that the close links between the Review Group and the MAIB, the provider of CTP in Tasmania, cast doubt on the weight of the Review Group's argument to support retention of the MAIB monopoly.

The Council raised the matter of the lack of independence of the Review Group with Tasmania during the assessment process. Tasmania argued that, at the time the Review was established, the Council's views of the importance of independent panels had not been expressed publicly. Tasmania also considered its review process had strong compensatory elements. For example, the Government indicated there had been considerable public consultation, including with industry participants. Thus, Tasmania argued that it met the provisions of the CPA on this matter.

While acknowledging that the Council's views on the importance of independent processes were not made available until after the establishment of Tasmania's Review, the Council considers that the matter of independence is relevant in this case. The Council understands, for example, that the MAIB, which was represented on the Review Group, made a submission prior to the commencement of the Review, which argued that the current arrangement should not be changed. Similarly, the Council understands that the Tasmanian Law Society, to which the barrister/solicitor on the Review Group has a close connection, provided a paper to the review arguing that there is no basis for any change to current arrangements.

In the light of the process adopted for this review, the Council believes that the finding that premiums would be higher under a competitive model warrants further examination. For example, premiums in a competitive market might in fact be much lower than estimated by the Review Group for several reasons.

- New entrant costs might, in practice, be quite low, as private insurers are likely to enter the CTP market on the basis of their existing infrastructure and advertising arrangements. That is, many potential participants would face a marginal cost of entry rather than full start-up costs.

- It is true that in New South Wales and Queensland, where there is competitive provision of CTP services, an industry regulator oversees pricing, monitors scheme arrangements and acts as conduit to the Government. However, these would not be entirely new functions or costs for Tasmania in the event of change. Government resources are already devoted to determination of premiums (including price regulation by the Government Prices Oversight Commission), prudential oversight, management of the MAIB, and payment of Commonwealth and State taxes and charges. To suggest that significantly higher costs would be associated with an industry regulator would imply that these functions are currently not being undertaken in Tasmania.

- In competitive markets in other jurisdictions, claims made in respect of uninsured or unidentified vehicles are allocated across all insurers according to market share. This is unlikely to impact greatly on premiums.

- Premiums can be readily collected and distributed through the motor vehicle registration system. For example, in Queensland, the registration system collects the insurance premiums and remits to the relevant insurer. This is a relatively simple computer-based operation.

- Evidence from Queensland and New South Wales suggests that the small market size and potential oligopoly argument raised by the Tasmanian Review Group is also doubtful. In both New South Wales and Queensland, there are operators with smaller market share than the Tasmanian market. In any case, problems relating to oligopolistic pricing may be better addressed through scheme design/regulation than by requiring monopoly supply.

- There is evidence from relevant bodies such as the Insurance Council of Australia which casts doubt on the administration cost comparisons for the six major CTP jurisdictions in Australia used by Tasmania's Review Group to support its claims about likely premiums under a competitive arrangement.

Given the questions about the independence of the review process and the recommendations of the Review Group, the Council does not consider that Tasmania's review and reform action relating to CTP arrangements for motor vehicles sufficiently addresses the State's NCP obligations. In line with the recommendation regarding the position in Victoria, the Council considers that an appropriate way forward would be through a national review by the PC of arrangements for CTP for motor vehicles.

The Tasmanian Government has indicated support for an independent review by the PC of national CTP arrangements but stated that it will not necessarily be bound by the outcome of such a review. On the basis of the Government's support for further consideration, the Council assesses Tasmania as complying with its second tranche NCP obligations on this matter.

Motor Accidents (Compensation) Act and Territory Insurance Office Act (Northern Territory)

The *Motor Accidents (Compensation) Act* establishes a no-fault third party compensation scheme, prescribes rates of benefit and abolishes certain common law rights. The *Territory Insurance Office Act* establishes the Territory Insurance Office (TIO) to provide certain insurance, financial and related services. The Act confers a monopoly on the TIO as provider of motor vehicle accident CTP insurance. The TIO also acts as the insurer of Territory assets and liabilities.

The Northern Territory has undertaken an internal review (involving the TIO) of legislation governing the operation of the TIO. The recommendations of this review, and the Northern Territory Government's decision in response, have not been reported in detail. However, following criticisms by the insurance industry of similar reviews in other jurisdictions, the Northern Territory Government agreed to reconsider its position. The Government has now decided to hold a further review, which will have a more extensive brief, covering a range of activities for which the TIO is responsible and involving an appropriately independent process. The Territory is also considering the possible coordination of this exercise and any national review of CTP as proposed above.

The Council considers that the program for further review of the role of the TIO proposed by the Northern Territory Government complies with second tranche obligations.

B5.4.6 Workers' compensation arrangements

Background

Workers' compensation insurance is a compulsory arrangement, whereby employers purchase insurance policies from authorised insurers on behalf of employees. In each State/Territory, a public monopoly provider administers the workers' compensation scheme.

There are significant restrictions on competition where the entire process is provided through a single state-based monopoly supplier covering all aspects of the scheme.

Current status of reviews of workers' compensation legislation

Legislation review and reform performance for the second tranche of NCP is relevant only for New South Wales and Victoria. In all other jurisdictions, workers' compensation legislation is scheduled for review during the period of the third tranche. Table B5.6 below summarises review status across all jurisdictions.

In New South Wales, a major inquiry into the workers' compensation system was launched in April 1997, prompted by an accumulating deficit in the workers

compensation scheme. The report of that inquiry, by Richard Grellman, was issued in September 1997. This led to the passing of the *Workplace Injury Management and Workers Compensation Act 1998* and the cognate *Workers Compensation Legislation Amendment Act 1998*, the majority of which came into effect in August and September 1998.

As a result, as from October 1999, the workers' compensation system in New South Wales will be privately underwritten. There will be a Rating Bureau, which will develop a methodology for the setting of premiums and a process for review of that methodology by WorkCover. The premium payable by employers is to be set on the basis that fully funds claim liabilities. There is provision to keep the average premium rate of 2.8 per cent for a period of up to 12 months after private underwriting is introduced. WorkCover will, therefore, license insurance companies to offer services and run schemes that are compliant with minimum criteria. Processes will be in place to limit the costs of disputes through formal mediation reviews and medical panels.

In Victoria, a review by the Department of Treasury and Finance recommended that the Victorian WorkCover Authority (VWA) monopoly should cease and a competitive scheme be introduced. The Review did not outline a proposal for a competitive scheme. However, the Victorian Government decided to retain monopoly delivery through the VWA.

Table B5.6 Progress with reviews of workers' compensation legislation by jurisdiction, at 30 June 1999

	Review and Reform Status
New South Wales	Review completed. Review recommended that a private sector, competitive scheme be introduced. Government has adopted this approach in legislation that is currently being implemented.
Victoria	Review by Department of Treasury and Finance recommended that the Victorian WorkCover Authority monopoly should cease and a competitive scheme be introduced. The review did not outline a proposal for a competitive scheme. The Victorian Government decided to retain monopoly delivery through the VWA.
Queensland	Review of the *Workcover (Queensland) Act 1996* scheduled for 2000.
Western Australia	Review of *Worker's Compensation and Rehabilitation Act 1983* expected to be completed in June 1999.
South Australia	Review of *Workers Rehabilitation and Compensation Act 1986* is scheduled for 1999.
Tasmania	Joint Select Committee review of the *Workers' Rehabilitation and Compensation Act 1988* reported in May 1998. Government considering response.
ACT	Review of the *Workers Compensation Act 1951* and the *Workers Compensation Fund Supplementation Act 1980* currently underway.

	Review and Reform Status
Northern Territory	Review of the *Work Health Act* and the Occupational Health and Safety Regulations is underway.

Source: Jurisdictions' Annual Reports (1999)

Assessment

New South Wales

The Council considers that review and reform action taken by New South Wales complies with CPA obligations, as it provides for competitive, market choice of insurer for employers, within a compulsory statutory framework.

Victoria

The Department of Treasury and Finance Review of Victoria's workers' compensation arrangements made eight recommendations, including the primary recommendation that the Victorian WorkCover Authority (VWA) cease to provide insurance and that all underwriting risks be borne by private insurers. The Review also recommended introduction of decentralised competitive premium setting and that insurers be subject to independent regulation and prudential requirements.

The Victorian Government rejected most of the Review's recommendations, including the primary recommendation for private delivery of workers' compensation insurance through a competitive model. Victoria referred to the substantial benefits which have flowed from reforms to workplace accident arrangements in the existing Workcover scheme, and to the success of integrated schemes overseas, to support its case. Victoria stated that these benefits include low and stable premiums and a greater ability to capture the benefits of investment in accident prevention and long term rehabilitation.

Victoria also believes that, in a competitive market, the objective of affordable universal coverage could not be achieved without significant regulation to enforce and subsidise universal coverage, either directly or through an insurer of last resort. The Government argued that investor pressure on private insurers means they are less able to manage the benefit structure, which focuses on long term rehabilitation and return to work and as a result has a significantly increased liability tail (due to restrictions on common law actions). The Government considered that heavy-handed regulation, involving potentially high compliance costs, would be necessary to deliver the objectives of its workers' compensation legislation through a system of competing private insurers.

Victoria did acknowledge the benefits associated with premiums that are more risk reflective. It noted there may be (limited) means of ensuring premiums are more reflective of risk and stated that it intended to introduce greater flexibility to enable insurers to compete on administrative costs. However, the Government's acceptance of this recommendation was tempered by concerns about premium volatility.

The recommendation by Victoria's Review supporting a competitive approach to the delivery of worker's compensation, and the recent pro-competitive developments in New South Wales, raise a question for the Council as to whether Victoria's decision to retain the VWA monopoly fully addresses NCP obligations. Given the disparity in the two States' approaches, and that all other jurisdictions will confront similar questions, the Council considers the best way forward would be through a national review conducted by an independent body with recognised expertise.

As it has for its CTP arrangements, Victoria indicated that it is willing to co-operate with a review by the PC, possibly commissioned by the Council, of the different regimes for regulating workers' compensation. Victoria's agreement to such a review constitutes satisfactory compliance with its second tranche NCP obligations on this matter.

B5.4.7 Professional indemnity insurance for legal practitioners

Background

Professional indemnity (PI) insurance is compulsory for all solicitors throughout Australia, because of the perceived risks to consumers of legal services of allowing lawyers to practice without insurance. This insurance provides a means of funding claims from clients of solicitors who allege loss as a result of negligence in how their legal affairs are handled. Losses from fraud or mismanagement of funds held on behalf of clients are normally dealt with through separate (fidelity) arrangements.

Historically, compulsory PI insurance for solicitors has been delivered by a monopoly provider, either through:

- a single Master Plan negotiated with a commercial insurer, which provides a policy under which all solicitors are covered; or
- an independent mutual fund, with a levy on all solicitors within the relevant region.

Both approaches are recognised to have strengths and weaknesses for the profession itself and neither is without risk. For example, Master Plans have demonstrated dramatic increases in their premmie, whilst mutual funds can find themselves without the resources required to cover outstanding claims, as happened in the United Kingdom in 1997.

More recently, some jurisdictions are allowing individual lawyers to choose their own insurer on the open market – normally with the proviso that the policy has to meet certain minimum criteria. This is the approach adopted for the insurance of barristers in New South Wales and lawyers more generally in New Zealand. Although PI insurance is not compulsory for lawyers practising in New Zealand, around 95 per cent of lawyers do hold such cover.

State and Territory reviews of professional indemnity insurance legislation

Apart from the ACT, which has deregulated its market to allow two approved insurers, all other jurisdictions require legal practitioners to take out PI insurance through a single provider of professional indemnity insurance cover.[26]

New South Wales has completed an NCP review of its *Legal Profession Act 1987*. This review included an assessment of PI insurance arrangements for solicitors and recommended deregulation, subject to certain constraints. The report was tabled in the New South Wales Parliament in November 1998 but is still to be formally considered by Cabinet.

Victoria has taken a number of actions on PI insurance. Following an NCP-based review in 1996, Victoria legislated to allow lawyers a choice, after a transition period, as to whether to insure with the Legal Practitioners Liability Committee (LPLC) or through other commercial insurers. Subsequently, however, following a review undertaken by the Legal Practice Board (LPB), Victoria reversed this decision and amended its legislation to confirm the existing statutory monopoly.

Apart from the ACT, which has completed its review and partially deregulated its market, the Council's primary focus for this assessment is on Victoria's *Legal Practice (Amendment) Act 1998*, which retains the statutory monopoly. Because of the timing of their review and reform activity, all other jurisdictions will be assessed as part of the third tranche. Table B5.7 summarises the status of jurisdictions' reviews at 30 June 1999.

Table B5.7 Progress with legislation providing for professional indemnity insurance for legal practitioners by jurisdiction, at 30 June 1999

	Review and Reform Status
New South Wales	Review completed. Report tabled in Parliament in November 1998. It is unlikely that Cabinet will consider the report before the end of June 1999.
Victoria	Review, following NCP principles, recommended the introduction of competitive arrangements. The *Legal Practice Act 1996* provided for competitive arrangements for legal indemnity insurance, with a sunset date, for the previous monopoly, of 1 January 1999. A further review by the Legal Practice Board (June 1998) recommended that the monopoly continue and that the reforms in the *Legal Practice Act 1996* not proceed. The Government passed the *Legal Practice (Amendment) Act 1998* that continues the monopoly.
Queensland	Review of the *Queensland Law Society Act 1952* and the *Queensland Law Society (Indemnity) Rule 1987* is pending.
Western Australia	Review of *Legal Practitioners Act 1893* and Rules rescheduled to March 2000.

[26] PI insurance for barristers in New South Wales is open to the market.

	Review and Reform Status
South Australia	Review of the *Legal Practitioners Act 1981* is currently underway.
Tasmania	Review of the *Legal Profession Act 1993* is to commence later in 1999.
ACT	Review completed. The ACT has a partially deregulated market with two insurers approved.
Northern Territory	*Legal Practitioners Act* to be reviewed as part of development of a national market for legal services. However, PI issues will be reviewed separately by the end of 2000.

Source: Jurisdictions' Annual Reports (1999)

Victoria's Legal Practice Act 1996 and Legal Practice (Amendment) Act 1998

Victoria's *Legal Practice Act 1996* provided for, among other things, competitive delivery of legal PI insurance by allowing legal practitioners the right to insure either with the Legal Practitioners Liability Committee (LPLC) or another insurer of their choice. The LPB would set the minimum conditions for all insurance policies. Under the Act, the monopoly was to sunset on 1 January 1999. In the interim, the LPLC was to continue as the monopoly provider of PI cover and the LPB was to review its future operation.

The LPB's report to the Victorian Government, in June 1998, disagreed with this position and recommended that the LPLC's statutory monopoly on supply of compulsory PI insurance continue, and that the reforms envisaged under the *Legal Practice Act 1996* not proceed. As a result of this advice, Victoria passed the *Legal Practice (Amendment) Act 1998* to confirm and extend the statutory monopoly indefinitely.

Analysis of Competition Issues

The NCP tests for assessing such restrictions under clause 5 of the CPA cover two elements:

- that the benefits of the restrictions to the community as a whole outweigh the costs (the net benefit test); and

- that the objectives of the legislation can only be achieved by restricting competition (the alternative means test).

The LPB's Review found that the monopoly provides a net benefit to the community. It noted reports from external consultants to the LPB, which advised that:

- premiums under a statutory monopoly would be cheaper than those under a commercial arrangement, in the long term;

- the monopoly could provide greater premium stability than the commercial market, over the long term; and

- a monopoly fund would cover elements of the legal services market, such as smaller operators, retired solicitors who are insolvent, deceased practitioners, disbanded partnerships or disgraced solicitors who are struck off, which the commercial market would not cover.

As required under the CPA, the LPB Review also considered alternative means for achieving the objectives of the legislation. It considered that the objectives are to ensure protection for all consumers of legal services, to ensure consumer access to economic and convenient services including sole practitioners, and to ensure that competition within the legal services market is not reduced by the inability of a practitioner to obtain insurance coverage. The review found all alternatives to the monopoly to be deficient and concluded that an open market would not achieve the objectives of the legislation.

There is considerable evidence that supports an alternative approach to that recommended by the LPB Review. For example, in relation to the net benefit associated with restrictions on competition in this area, the New South Wales' NCP Review of the State's *Legal Profession Act 1987* took the following evidence.

- Willis Corroon Professional Services Limited indicated that its experience, as the agent of insurers entering the market in the ACT, was that competition led to broader cover, cheaper premiums and a higher level of service.

- PI insurance for barristers in New South Wales is open to the market. The Bar Association of New South Wales indicated that the threat to clients posed by an insurer ceasing to operate was more apparent than real. The Bar Association also stated that, to its knowledge, no barrister had been refused cover as a bad risk and believed that any such barrister would probably obtain cover, albeit at a higher premium.

- The ACCC argued that the insurance market is large enough to accommodate any practitioner and that in any case, the threat of losing insurance would provide an incentive to solicitors to provide better customer service. Similarly, the New South Wales Council on Social Service considered that it is in the best interests of the profession and the public for the market to be deregulated.

The New South Wales NCP Review concluded that:

> *The provision of a choice of insurers for solicitors would be likely to engender competition in the market for PI insurance, reducing the costs of legal practice.*

It recommended that:

> *deregulation of the market for professional indemnity insurance for solicitors should take place, subject to appropriate protection for clients being addressed, through minimum standards for policies, run-off and indemnity.* (New South Wales Attorney General's Department 1998)

Available evidence in other jurisdictions also raises doubt about the conclusion reached by the LPB. The ACT has partially deregulated its arrangements and there are now two approved insurers. Within Victoria itself, there is a competitive market delivering top-up indemnity insurance above the compulsory minimum. Under the fully competitive arrangements in New Zealand, premiums for sole practitioners and new entrants are set on the basis that they are good risks (until experience shows otherwise). Run-off cover is purchased on a diminishing scale from 100 per cent of fees to 50 per cent, diminishing at 15 per cent a year. There are minimum criteria for insurance that were developed following a review in 1993, which have been adopted as a voluntary industry standard.

Similarly, the available evidence suggests that potential (competitive) alternatives to the statutory monopoly are available, including:

- an open market for legal PI insurance as exists in New Zealand and Ireland (where a mutual fund also operates), potentially supplemented by external minimum standards;

- a single insurer selected for a defined period through a competitive tender process;

- a regime whereby practitioners can limit liability where they have sufficient assets to meet compensation at a required level; and

- a risk weighting scheme whereby insurers are required to accept all proposals, with a limit set on the maximum and minimum premia, such as the model for CTP insurance in New South Wales.

Moreover, the market-based approach appears to have general support within the profession. For example:

- in New Zealand, where lawyers rejected a proposal in 1993 to move from the competitive model to a master policy scheme;[27] and

- in the United Kingdom, where a recent ballot of the Law Society indicated a large majority of solicitors in favour of the right to choose their insurer on the open market (Law Society of England and Wales 1999). The outcome of this ballot contrasts with the recent decision of the United Kingdom Law Society to retain the statutory monopoly fund.

One important consideration in assessing the net benefit of the different arrangements for the delivery of PI insurance is the potential cost to the community of high risk behaviour, given that the statutory scheme is ultimately underwritten by its members. The ballot of solicitors in the United Kingdom was taken following the failure of its Mutual Fund in 1997, due to "*the very substantial shortfall between the contributions so far collected and the likely costs of claims.*" The United Kingdom Law Society blamed the failure on the situation where "*the comfort factor is too great – leading a small number of firms to fail to adopt proper risk management systems, relying on the*

[27] Personal Communication, Austin Forbes QC, Christchurch, New Zealand, President of the New Zealand Law Society 1994.

rest of the profession to bail them out" (Law Society of England and Wales 1998, para. 1.5).

Premium setting which is more reflective of risk than the current arrangement would reduce the potential financial demand on the community. Indeed, the LPLC has adopted more risk-related premiums since 1996. It also fully employs opportunities for re-insurance in order to spread that risk. Studies have identified further options to address this issue, including the establishment of an assigned risk pool funded by the market, which would enable higher risk lawyers to obtain cover although at a higher premium. The Insurance Council of Australia has indicated to the Council that, in anticipation of the introduction of competition, several insurers are preparing schemes that do not envisage premium increases, except for firms with poor claims histories.

Finally, the concept of the legal profession as a single distinct discipline, which ought to share risk solely within itself, is becoming less relevant with the growth of multi-service consultancy companies providing a coordinated suite of business services covering law, accounting, finance, economics, management and strategic development etc. The legal element within any consultancy advice is unlikely to readily distinguishable, and it is not always clear that legal issues are necessarily more complex or risky than those relating to, say, financial or strategic advice.

Assessment

There is evidence to suggest that the argument contained in the LPB Review and in Victoria's annual report may not fully address the legislation review competition tests within the CPA. The experience in other countries and conclusions reached by other Australian reviews tends to suggest that competitive delivery presents a workable alternative to the monopoly and that there are likely to be benefits from introducing competition. Indeed, Victoria's own earlier NCP Review, which led to the *Legal Practice Act 1996,* supported a more competitive arrangement.

The decision to retain the monopoly was taken on the basis of recommendations by the LPB, a body with representation from a number of bodies including lawyers. While making no comment on objectivity in this case, the Council notes that the earlier pro-competitive reforms encompassed within Victoria's *Legal Practice Act 1996* followed a review process which was to a large extent independent of (but working in consultation with) legal industry representatives. The equivalent New South Wales Review which supported competitive delivery, although undertaken by the Attorney General's Department, appears to have considered submissions from a much wider range of stakeholders than did the LPB.

Victoria has now committed to revisit its policy approach to the delivery of PI insurance for solicitors. The Victorian Government has advised the Council that it will conduct a further independent review to test whether a change to existing restrictions would be appropriate. The Council acknowledges that determining the best way of delivering PI insurance involves some complexities, and considers that Victoria's undertaking to conduct a further review is the most appropriate way to proceed.

B5.4.8 Australian Postal Corporation Act

Background

On 19 May 1997, arising from its NCP legislation review commitments, the Commonwealth Government requested the National Competition Council to review the *Australian Postal Corporation Act 1989*.

The Act restricts competition in several ways. The main restrictions arise from those sections of the Act that reserve certain postal services to Australia Post. With a few exceptions, only Australia Post can carry a letter for less than $1.80 if it weighs less than 250g. In addition, only Australia Post can deliver international mail in Australia.

The Act also requires Australia Post to provide reasonable access to postal services for all Australians − a universal service obligation (USO). In addition, it stipulates that Australia Post must provide a letter service at a uniform rate across the whole country; so whether a letter is sent from Bourke to Mount Isa or around the corner in a capital city, the cost to the sender is the same.

Council recommendations

The essential elements of the Council's package for the reform of postal services in Australia included:

- retention of the obligation on Australia Post to provide an Australia-wide letter service, with unprofitable parts of the USO subjected to community service obligation (CSO) funding from a mix of sources;
- that household letter services remain reserved to Australia Post, with a mandated uniform rate of postage;
- open competition in business letter services, with Australia Post free to discount against a maximum charge set at the same level as the uniform rate for household letters;
- open competition in all international mail services;
- the application of general pro-competitive regulation plus limited special arrangements to restrict monopolistic behaviour by Australia Post in the transition to fully competitive business letter services and to ensure access on reasonable terms to Australia Post's CSO-funded services and post office boxes;
- licensing of all letter service providers to maintain minimum standards and ensure that Australia Post's competitors do not free-ride on its obligation to provide comprehensive services;
- accounting separation for Australia Post's retail operations, reserved services and CSO–funded services;
- services standards for the universal service obligation be established in the legislation that will be monitored and enforced by the Australian Communications

Authority, and a service charter be used to explain these minimum standards to customers; and

- an effective competitive neutrality complaints mechanism.

The Council considered that opening up the market for business mail would generate significant competition. Indications of this potential competition came from both competitors and postal service users. On the other hand, it was not obvious where or how such competition would arise for household mail. Because the information necessary to judge the impact of extending the package to the household sector was not available, the Council considered it best to deregulate business mail and to assess the need for further reform later.

The Council noted the strong community support for the two social obligations of Australia Post, namely the universal service and the uniform rate. The Council recommended that these obligations be strengthened through guarantees to the community on minimum performance standards. The package of recommendations put forward by the Council would enable these two obligations to be met, while encouraging competition in markets where it is most likely to arise and be of greatest benefit.

Commonwealth Government's response

On 16 July 1998, the Government announced its response to the Council's review.

The Government's reforms are to apply from 1 July 2000. The key features are:

- Australia Posts' monopoly on domestic mail will be reduced from 250g and four times the standard letter rate to 50g and one times the standard letter rate;
- an access regime;
- incoming international mail to be open to competition;
- a further review in 2002-03 to assess the effects of these changes and the need for further reform; and
- a Service Charter, approved by the Government, to be underpinned by regulations which require Australia Post to meet specified performance standards, including delivery times and a minimum number of postal outlets.

Australia Post will continue to fund its CSOs from cross-subsidies and the uniform rate will remain at 45 cents until at least 2003.

Bulk mail customers will benefit from:

- a reduction in the volume threshold;
- aggregation, which will allow smaller volume mailings to be combined to generate volumes sufficient to attract larger discounts;
- the development of a performance monitoring system for bulk mail; and

- Australia Post and its major customers will develop a Code of Practice to improve the commercial relationship.

In addition, arrangements are to be made to assure competitors that Australia Post is not cross-subsidising from its protected monopoly services to its services that are in competitive markets.

Analysis of response

The reduction in the monopoly threshold will still retain the uniform rate. The Government believes the reduced threshold will provide sufficient protection for Australia Post to continue to cross subsidise its loss making services and so continue to provide a universal service. There may be enforcement problems in having the standard letter rate monopoly protected at 45 cents. There will be an incentive to bundle mailing services with postage (so that, while the cost of the bundled mail service is more than 45 cents, the effective 'cost' of the postage element is less than 45 cents) and so undermine the postal monopoly. While the reduction in the monopoly will encourage competition, by itself it will offer less incentive than the Council's recommendations.

Instead of opening up business mail to competitors, the Government has chosen to direct Australia Post to make the bulk mail system more accessible, to improve relations with its largest customers and to put in place an access regime. It has also removed larger letters from the Australia Post monopoly.

The greatest scope for increased competition will arise from an effective access regime. The Government is still to release the details of the regime it proposes and so it is not yet possible to estimate its effect. After the previous Australia Post review (IC 1992), the Government instituted an interconnection scheme for bulk mail which was meant to offer more choice for bulk mailers and allow them to access the Australia Post network at various stages. The scheme has not been a success. It is therefore important to know the detail of the proposed regime in order to assess the effect on competition.

Both the Government's reforms and the Council's recommendations call for the opening of inwards international mail to competition. Because the Government has chosen a more regulated response, it will need to put in place arrangements to protect the Australia Post monopoly on domestic mail to address the potential for domestic mail to be posted overseas for delivery in Australia, bypassing Australia Post.

The Government recognises the need for further review, when an assessment of the new reforms would be undertaken. This is in line with the Council's recommendations.

The Government put in place regulations on performance of Australia Post in May 1998. Australia Post's performance is audited against these and a report tabled in Parliament. Australia Post is then required to submit a plan for overcoming any shortfalls in performance. While this is not as strict an arrangement as that envisaged by the Council, the effect may be similar, as Australia Post is keen to protect its reputation.

The Government's reforms are in many ways similar or the same as the Council's recommendations. However, there is a difference in approach to one major issue − how to inject more competition into the postal services industry. The success of the Government's approach will depend on the effectiveness of the access regime. Until there is more detail available about the access regime, it is not possible to fully assess its likely effects. To date, the Commonwealth has not elaborated on the July 1998 press release that sketched-out its postal reforms.

Assessment

The Council considers that the package proposed by the Commonwealth can fulfil its NCP obligations for legislation review. However, crucial to this is the nature and form of the access regime. Previous attempts to allow access to Australia Post's network have not been successful. Subject to the Government implementing an effective access regime, the Council considers the Commonwealth to have fulfilled its NCP obligations with respect to Australia Post.

B5.5 Other review and reform matters investigated as part of the second tranche

This section deals with a range of legislation review and reform activity that falls into one of four categories. Specifically:

- review and reform activity which satisfies a government's second tranche legislation review commitments; or
- reviews and/or reforms which demonstrate evidence of progress achieved through NCP processes; or
- matters which have arisen during the second tranche assessment but will be assessed in the third tranche assessment; or
- issues which are on-going from the Council's first assessment of the Commonwealth Government's progress.

B5.5.1 Agricultural statutory marketing arrangements

Agricultural statutory marketing arrangements (SMAs) are prima facie anti-competitive. Typically, they incorporate a centralised marketing board with powers to compulsorily acquire or vest an entire crop, set quality grades and prices, and act as the single seller of the acquired product on either or both the domestic and export markets. They are anti-competitive because they impose legislative restrictions on producers to sell their product to the marketing body and on customers to buy the product from the marketing body.

All governments are reviewing legislation governing SMAs over the period of NCP. Legislation relating to the dairy industry and to the domestic marketing of rice in New South Wales raise matters directly relevant to the Council's assessment of progress for second tranche competition payments and was discussed in section B5.4.2. This section discusses review and reform activity relating to regulations in other agricultural industries, where a government's review and reform activity either

complies in full with second tranche obligations or will be assessed under the third tranche.

Barley marketing arrangements (Victoria, South Australia and Queensland)

Background

The barley industry is dominated for many years by statutory "single-desk" authorities. Each significant barley-growing State[28] has had its own marketing authority with an exclusive right to acquire barley (and often other coarse grains) and to sell it on the domestic and international markets.

Developments

The review and, in some instances, reform of the statutory barley marketing arrangements in relevant States is well progressed.

Queensland reviewed its *Grain Industry (Restructuring) Act 1993* in mid-1997. The Review Panel comprised government and industry representatives, including from Grainco, the SMA under review. In practice, the domestic market monopoly arrangement is no longer operating in Queensland, as recommended by the Review, with legislation to codify the changed arrangements before the Queensland Parliament (the *Primary Industries Legislation Amendment Bill 1999*). However, the Government has retained the export marketing monopoly until at least June 2002, albeit subject to earlier review if there is a change either to arrangements in other States or to the policy of the Japan Food Agency (JFA).

In 1997, Victoria and South Australia jointly reviewed their respective *Barley Marketing Act 1993*. The two Governments accepted the review recommendations to remove the domestic marketing monopoly and to retain the export marketing monopoly only for the "shortest possible transition period". Both States have now passed legislation to complete domestic market deregulation by 30 June 1999 and export market deregulation by 30 June 2001. The Australian Barley Board (ABB) has been transferred to grower ownership.

New South Wales' review of its *Grain Marketing Act 1991* commenced in April 1998 and is near completion. As well as the marketing of barley, this Act regulates the marketing of other coarse grains and oilseeds, and establishes the New South Wales Grains Board. Western Australia is also reviewing its *Grain Marketing Act 1975*. These reviews will be considered in the Council's third tranche assessment.

The relevant jurisdictions for the second tranche assessment are Victoria, South Australia and Queensland.

Assessment

Victoria and South Australia's joint review of their respective legislation set a benchmark for the conduct of independent and rigorous reviews of agricultural

[28] New South Wales, Victoria, Queensland, Western Australia and South Australia.

marketing arrangements. Both Governments have implemented the recommended reforms following consultation with industry through the Implementation Working Group. The automatic right of traders, other than the ABB, to export bagged and containerised barley during this period will assist them to prepare for an open market. By June 2001, the Council expects that all parties will be well placed to compete on the open market.

The Council has, on several occasions, stated its view that it is important, for purposes of ensuring appropriate independence and objectivity of review processes, that industry representatives are not included on review panels; rather, that industry participate through submission to a review. The Council is particularly concerned where a body under review is represented on the review panel as was the case in the Queensland grains review. Having said that, the Council welcomes the move to deregulate domestic marketing arrangements in Queensland.

Since the completion of the review, the conditions it prescribed for reviewing the export monopoly earlier than the year 2002 appear to have been satisfied. That is:

- the JFA indicated in April 1999 that it is gradually lifting its control over barley imports into Japan, which has allowed Australian and other exporters to earn a premium in that market; and

- the export marketing reforms in Victoria and South Australia substantially erode the risk that, if the statutory monopoly in Queensland was removed, the JFA would switch its purchases to other States.

Further, the domestic market structure is changing. The two largest barley producers, Victoria and South Australia, are progressively opening their markets over the next two years to full competition.

The Council, therefore, encourages Queensland to initiate a review of the export monopoly as soon as practicable. The Council will revisit the issue of Queensland barley arrangements in its third tranche assessment.

Sugar (Queensland)

Background

The *Queensland Sugar Industry Act 1991* establishes a statutory authority, the Queensland Sugar Corporation (QSC), as the single desk marketer of raw sugar to domestic and export customers. The Corporation compulsorily acquires all raw sugar produced in Queensland; pools returns to growers from raw sugar sales; and sets quality standards. The legislation also regulates cane production and milling through establishing local boards with powers to assign rights to grow cane and rights to mill capacity.

In September 1995, the then Queensland Government commissioned a review of this legislation and the industry. The Sugar Industry Review Working Party (SIRWP) reported in July 1996. It recommended:

- retention of the single desk subject to export price parity for domestic sales;

- changes to local cane supply and milling arrangements to permit individual growers to opt-out of collective agreements upon their expiry, and to transfer cane supply to other mills;

- removal of the tariff on raw sugar imports; and

- a ten year moratorium on further review of the marketing arrangements.

The Queensland and Commonwealth Governments endorsed the recommendations.

In its first tranche assessment, the Council indicated that it was not convinced about the evidence for continuation of the domestic monopoly. The Council proposed the Queensland Government reconsider the marketing arrangements for sugar before ten years expires should changes in market conditions suggest that the arrangements are no longer in the community interest. The Queensland Government agreed to this approach.

Developments

As of July 1997, the tariff was removed and the QSC shifted from import to export price parity for domestic raw sugar sales. With the removal of the tariff, and substantial falls in world prices, the domestic price for raw sugar has fallen by more than $200 per tonne.

Over this period, the Queensland Government has determined the detail of the other reforms in consultation with the industry, and is preparing legislation for introduction in the Winter 1999 Parliamentary session. The Council is aware of one key change from the agreed reform package – the legislation will now prevent growers from transferring cane supply unless their existing mill will not meet grower demand for expanded capacity. According to Queensland, this change is intended to avoid threats to mill viability from transfers of existing cane supply.

Assessment

The Council recognises the progress that Queensland has made with introducing sugar industry reform since its first assessment in 1997. Evidence suggests domestic consumers of sugar are benefiting from price reductions resulting from the abolition of the tariff on imports and the QSC's shift to export parity pricing for domestic sales.

The Council notes the slippage in timeframe to implement the remainder of the agreed reform package. However, the Council recognises the complexities involved with the task, the considerable amount of development and consultation undertaken over the past two years, and that legislation to give effect to the reforms is imminent.

Overall, the Council is satisfied that Queensland has met its second tranche obligations in relation to sugar industry reform.

Having said that, the Council raises the following matters which it will consider in its third tranche assessment.

The Council is not convinced that the export parity pricing rule for domestic raw sugar sales is delivering the full net benefit which domestic deregulation would bring.

While domestic raw sugar purchasers have certainly gained from the substantial falls in world prices, by including the "Far East" regional premium in the pricing rule, domestic prices are likely to be held above a level sustainable under open domestic competition. The single desk and associated price pooling arrangements are also likely to lower incentives for efficiency and innovation in the supply chain between growers and domestic users.

More importantly, available evidence casts doubt on the sustainability of the principal benefit identified by the SIRWP of the single desk arrangement – maximisation of the "Far East" regional premium. The SIRWP found that the single desk was able to manage its sales into Asian markets so as to increase its returns to growers – this arose from the strong growth in market demand and the relatively high shipping costs faced by Australia's out-of-region competitors. Since then market conditions have changed dramatically. According to the Australian Sugar Milling Council, demand has fallen in Asia and Russia following their respective financial crises, while supply from Western Europe, India, China and Brazil has expanded. Aided by a currency devaluation, and reduced shipping costs, Brazilian sugar exports to the Middle East and Asian markets have shown particularly strong growth, where competition is now intense. These changes in market conditions mean the single desk exporter is unlikely to sustain a premium over what competitive Australian exporters would earn.

Asian demand for raw sugar should, of course, strengthen again as these economies recover. Nevertheless, without a return to earlier supply conditions, which seems unlikely, a single desk premium is unlikely to be sustainable.

Given these recent developments, the Council considers there is now a prima facie case that the single desk marketing arrangements may no longer be in the community interest. It would, therefore, be appropriate for the Queensland Government to revisit the regulatory arrangements for the sugar industry prior to the third tranche assessment. This would ensure that, should the arrangements no longer be justified, the cost to the community could be minimised and the Government could amend the proposed legislation as appropriate. It may also highlight pro-competitive options for improving returns to the industry that could be more important than ever given the clearly difficult times ahead.

The decision to prevent growers from transferring existing cane supply between mills represents an important departure from the recommended reform package. This will protect mills from competition and, therefore, from pressure to improve productivity, even while returns to the industry are falling. However, the Council recognises the issues associated with milling industry reform, and that transitional arrangements may be desirable.

The Council is working with the Queensland Government to find the best way forward for the sugar industry and the wider community. Progress in both areas – the single desk and the constraints on growers – will be considered as part of the Council's third tranche assessment.

Poultry meat (Queensland, New South Wales, Victoria, South Australia, Western Australia)

Background

All jurisdictions with significant poultry meat industries regulate commercial relations between poultry growers and processors. The legislation generally establishes an industry committee of grower and processor representatives to approve grower entry and to negotiate standard contract terms (including fees) for the supply of poultry to processors. The intention is to increase the bargaining power of growers, through collective arrangements, to countervail that of processors.

Developments

The Governments of South Australia, Western Australia and Queensland have each agreed to remove regulated entry barriers and to retain some degree of collective bargaining subject to allowing individual growers the right to "opt out" – that is, to separately negotiate a supply agreement with a processor. Their approaches to achieving this have differed.

South Australia reviewed its *Poultry Meat Industry Act 1969* in 1994. The review found that the industry no longer required specific legislation to provide security for chicken growers. The Government subsequently introduced a Bill to repeal the legislation that was passed by the Lower House. Passage through the Upper House was adjourned pending authorisation by the ACCC of collective negotiation arrangements between each processor and their respective growers. Authorisation for five years has now been granted, and the repeal Bill is awaiting space in the legislative program.

Queensland completed a review of its *Chicken Meat Industry Committee Act 1976* in 1997 and, in December 1998, the Government agreed to implement the recommendations. Amendments currently before the Queensland Parliament reduce the Industry Committee's role to a facilitative one - convening representative groups of growers to negotiate with each processor, and referring disputes to mediation or arbitration. The Committee will be specifically barred from making recommendations or providing information on growing fees.

Western Australia reviewed its *Chicken Meat Industry Act 1977* in 1996. As noted above it recommended removal of entry regulations and permitting growers to opt out of collective negotiations. It also recommended retention, subject to review in another five years, of the Industry Committee's power to set a fee for supply contracts between growers and processors. The Government endorsed these recommendations and intends to amend the Act by the year 2000.

New South Wales and Victoria have reviews of their respective legislation underway. These will be addressed in the third tranche assessment.

Assessment

Subject to the passage of legislation, the decisions by South Australia, Queensland and Western Australia accord with the outcomes of their respective reviews which seem to have been sufficiently open and objective. South Australia's approach is of

particular note as it illustrates how general competition law can, in some circumstances, render specific legislation unnecessary.

While retaining industry specific legislation, the approaches taken by Queensland and Western Australia are likely to have a largely similar impact as South Australia's. However, Western Australia could usefully look at drafting its amendments to provide for collective negotiations on a processor basis, rather than on an industry-wide basis. The Council is satisfied that, once each Government makes its respective legislative changes, they will have met their CPA clause 5 commitments in this area.

Wheat (Commonwealth)

Background

During 1997 and 1998, the Commonwealth introduced new legislation to facilitate the transfer to growers of the Australian Wheat Board (AWB, now AWB Ltd) and to delegate the existing wheat export monopoly to the privatised entity via the statutory successor to the AWB, the Wheat Export Authority (WEA). The legislation is discussed in section B4.2.

The Commonwealth has confirmed that its NCP review of the *Wheat Marketing Act 1989*, scheduled for 1999-2000, will examine all aspects of the legislation underpinning wheat marketing arrangements, including the WEA and the export monopoly, in accordance with NCP principles.

The privatisation of the AWB, and similar moves in respect of several State-based grain marketers and handlers, have stimulated considerable debate about the future structure of the Australian grains industry. It is generally accepted that there will be, over time, some rationalisation among former statutory grain marketers and handlers. The commercial and investment decisions made over the next couple of years by growers, handlers, marketers and investors will have important long term consequences for them individually and for the industry as a whole. The Council is also aware of concerns that the export monopoly may advantage AWB Ltd's position in domestic marketing and handling markets and, hence, disadvantage other players in these markets.

The credibility of the review and any reform recommendations will rest on the bona fides of the review process. In particular, the Council will be looking for:

- the terms of reference to include all material NCP questions;
- the reviewer to be well qualified in regulatory review and independent of industry and other affected interests;
- the process and the material NCP questions to be well publicised, with ample opportunity for public participation;
- the review to be released and summarised in a form that will assist public understanding; and
- recommendations of the review to be implemented in a timely manner.

Turning to the outcome of the review, if it recommends retention of the wheat export monopoly, it will need to demonstrate that the monopoly provides a net benefit to Australia. Essentially, this means showing that AWB Ltd is able to exert market power in the international wheat market such that it can sustain a price premium for Australian wheat which exceeds any losses (for example, reduced innovation and efficiency) consequent on its monopoly. Should the review find the monopoly is not beneficial for Australia, the Commonwealth will need to consider how to open wheat exporting to competition.

This review, and any subsequent reform, will be a matter for the third tranche assessment.

B5.5.2 Pharmacy regulation

Background

Retail pharmacy is a highly regulated sector of the economy with both Commonwealth and State regulations governing practitioners and the practice of pharmacy.

The core elements of state-based regulation of pharmacists and pharmacy practice are largely the same across jurisdictions. State regulations typically include:

- registration of pharmacists;
- pharmacy ownership limited to registered pharmacists;
- limits on the number of pharmacies a pharmacist can own;
- premises standards and site regulations;
- advertising restrictions on the promotion of pharmaceuticals; and
- drugs and poisons scheduling.

Typically, State regulations have been justified on the basis of maintaining professional ethics and standards, controlling access to drugs, encouraging responsible use of pharmaceuticals and ensuring community access to services.

The Commonwealth also regulates the pharmacy sector. Under the Pharmaceutical Benefits Scheme (PBS), the Commonwealth subsidises a wide range of pharmaceuticals to consumers. The PBS is aimed at improving community access to, and constraining the cost of, PBS drugs. In this context, the Community Pharmacy Agreement between the Commonwealth and the Pharmacy Guild of Australia determines:

- dispensing fees for PBS drugs; and

· limits the number and location of pharmacies approved to dispense PBS drugs.[29]

The current five year agreement expires on 30 June 2000.

Pharmacy practice in Australia is also subject to therapeutic goods legislation. The classification of drugs is determined by the Australian Health Ministers' Advisory Council (AHMAC), which includes the Health Minister from each jurisdiction. The Commonwealth is responsible for the registration of drugs through the *Therapeutic Goods Act 1989*. States and Territories are responsible for the scheduling of drugs for the purposes of retail distribution. The state-based schedules, underpinned by legislation, are based on schedules determined by the National Drugs and Poisons Committee of AHMAC.

Developments

All States and Territories identified their pharmacy regulations as restricting competition in their 1996 legislation review schedules.

In May 1998, all governments agreed to a national review examining State and Territory legislation relating to pharmacy ownership and the registration of pharmacists, together with Commonwealth legislation relating to the regulation of the location of pharmacy premises approved under the PBS.[30] The Commonwealth is co-ordinating the establishment of this review, which is expected to commence in mid-1999. As a result, a number of state-based pharmacy reviews have been deferred until the national process is concluded.

The Commonwealth, State and Territory governments have also commissioned a review to examine legislation and regulation pertaining to drugs, poisons and controlled substances. The scope of this review will extend beyond the human use of drugs, to include issues relating to drugs for veterinary use, agricultural chemicals and household chemicals. The Commonwealth is currently consulting with the States and Territories on the terms of reference for this review.

Stage 1 of the Queensland health practitioner review (see Section B5.5.3) examined the regulatory framework relating to pharmacists in that State. It recommended the retention of registration of pharmacists and the reservation of the practice of "*professional dispensing of medicines, mixtures, compounds and drugs*". The review recommended that ownership of pharmacy practices continue to be restricted to registered pharmacists, but that pharmacists be allowed to incorporate their businesses. As Queensland is participating in the national pharmacy review, its pharmacists registration and pharmacy ownership regulation will be revisited.

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29 Refer section 90, *National Health Act 1953* (Clth) and Determination No PB 21 of 1996 made under section 99L(1) of that Act.

30 Noting that in the case of Queensland and Tasmania the national review will not cover the registration of pharmacists as this has already been addressed in state-based pharmacy reviews.

Assessment

The Council considers that the national approach to the review of pharmacy regulation and the review of the related drugs and controlled substances regulation provides an opportunity for a considered and co-ordinated approach to determining the most appropriate regulatory environment for retail pharmacy.

Given the proposed review schedule, the Council will consider the outcomes of the national reviews and reviews of the residual state-based regulation in the third tranche assessment. In particular, the Council will look for the national review of pharmacy arrangements to consider whether the restrictions imposed on pharmacy ownership generate a net community benefit.

B5.5.3 Professions regulation

Many professions have traditionally been shielded from competitive pressure through specific legislation and/or self-regulatory arrangements. NCP has changed this significantly, first, through extension of the *Trade Practices Act 1974* to the professions under the Conduct Code Agreement, and second, through the review of legislation which regulates the professions.

Professions regulation typically affects the market structure for professional services - for example, through reservation of professional title, registration and ownership restrictions and the market conduct of practitioners – for example, through fee limits/scales, advertising restrictions and professional and ethical standards.

In the main, States are responsible for the regulation of the professions. Consequently, each State and Territory has scheduled a wide range of professions legislation for review under the NCP. The Table 5.8 provides a summary of government's professions reviews and reforms to date.

Table B5.8 Summary of professions related reviews

	Profession	**Review status**	**Reform status**
National reviews	· Mutual recognition	Recommendations with governments	Not applicable (n/a)
	· Travel Agents	Commenced	
	· Architects · Pharmacists (registration & ownership regs)	To commence in 1999	
NSW	· Legal practitioners · Medical practitioners	Completed	Recommendations with government
	· Chiropractors · Dentists · Nurses · Optical dispensers · Optometrists · Physiotherapists · Property, stock & business agents	Commenced	n/a

	Profession	Review status	Reform status
	· Psychologists · Surveyors · Valuers · Veterinary surgeons		
	· Podiatrists	To commence in 1999	n/a
	· Dental technicians	Review under consideration	n/a
Vic	· Chiropractors · Chiropodists · Finance brokers · Legal practitioners · Optometrists · Osteopaths · Physiotherapists · Veterinary surgeons	Completed	In general −retention of registration −reservation of professional title −retention of some advertising restrictions −removal of some ownership restrictions −professional fee reform −some specific reservation of practice e.g., eye testing with dispensing of glasses −opening up of some professional services e.g., extending limited prescribing rights to orthoptists under referral −introduction of negative licensing for finance brokers
	· Dentists · Psychologists	Completed	Reform pending along similar lines as above
	· Surveyors	Completed	Recommendations with government
	· Medical practitioners · Nurses · Estate agents	Commenced	n/a
Qld	· Health and Medical Practitioner registration: – Chiropractors – Osteopaths – Dentists – Dental technicians & prosthetists – Medical practitioners – Occupational therapists – Optometrists – Pharmacists – Podiatrists – Psychologists – Speech pathologists	Stage 1: review completed Stage 2 : in progress, application of principles to specific legislation	Stage 1 proposed minimalist regulatory framework based on a risk assessment to be applied to specific Acts in Stage 2 (see following discussion)
	· Legal practice incl. non-lawyer conveyancing	Commenced	On 30 June 1999 the Queensland Government announced significant reforms to its legal profession, including: - a Legal Practice Authority to handling complaints; - a disciplinary board to hear conduct charges; - Supreme Court committees to set admission rules and approve cost scales; - allowing non-lawyer property conveyancing; - allowing lawyers to join multi-disciplinary

	Profession	Review status	Reform status
			practices.; and - a cap on payouts for damages caused by unscrupulous lawyers.
	· Auctioneers & Agents	Proposed legislation being revised and subject to public benefit test in 1999	n/a
WA	· Surveyors	Completed	Retain entry restriction but defined so as to remove Board discretion; equal consumer representation on Board; and reduce minimum supervised field training for trainees
	· Finance brokers	Completed	Act to be repealed & replaced with a code of conduct under *Fair Trading Act* and reliance on the TPA (Clth)
	· Health practitioner legislation: – Chiropractors – Dentists – Dental prosthetists – Medical practitioners – Nurses – Occupational therapists – Optical dispensers – Optometrists – Osteopaths – Physiotherapists – Podiatrists – Psychologists	Commenced	Acts to be repealed & replaced with new legislation consistent with CPA. Adopting similar approach as Qld (see following discussion)
	· Architects	Commenced but see national reviews	n/a
	· Legal Practice	Due to commence in March 2000	n/a
SA	· Health practitioner legislation: – Chiropodists – Chiropractors – Dentists – Medical practitioners – Nurses – Occupational therapists – Optometrists – Physiotherapists – Psychologists	Completed	Recommendations with government
	· Architects	Commenced	See national review
	· Legal practice · Surveyors · Teachers · Veterinary surgeons	Commenced	n/a

	Profession	Review status	Reform status
Tas	· Chiropractors	Completed	New Act retains registration requirement
	· Physiotherapists · Nurses · Psychologists · Radiologists · Podiatrists	Commenced	Will build on program of Act replacement; framework based on *Optometrists Registration Act 1994* which: – retained reservation of professional title; - retained a requirement for professional indemnity insurance; and - removed advertising restrictions
	· Auctioneers & estate agents · Surveyors	Commenced	n/a
	· Non-lawyer conveyancers	Will be subject of new legislation	n/a
	· Legal practitioner · Veterinary Surgeons	To commence in 1999	n/a
	· Dentists · Medical practitioners · Optometrists	Deferred until 1999 to utilise Committee on Regulatory Reform 1999 guidelines	Will build on program of Act replacement; framework based on *Optometrists Registration Act 1994* which: – retained reservation of professional title; – retained a requirement for professional indemnity; and insurance. - removed advertising restrictions.
	· Hairdressers	Yet to commence	n/a
ACT	· Surveyors	Commenced	n/a
	· Legal practitioners incl. non-lawyer conveyancing	To commence in 1999	n/a
NT	· Architects	Completed	Government deferred response given national review
	· Nurses	Commenced	Act to be repealed & replaced. New Act, which retains registration and Board, will be reviewed
	· Veterinary surgeons · Surveyors · Health practitioners: – Aboriginal health workers – Chiropractors – Dentist – Dental therapists & hygienists – Medical practitioners – Occupational therapists – Optometrists – Osteopaths – Physiotherapists	Commenced	n/a

	Profession	Review status	Reform status
	– Psychologists – Radiographers · Legal practitioners	To be advised	n/a

Source: Jurisdictions' Annual Reports (1999)

Health Practitioner Legislation

Health practitioner legislation represents a large proportion of the professions legislation scheduled for review by States.

Queensland has completed the first stage of a major review of health and medical practitioner registration acts and associated regulations covering 13 professions.[31] The review presented a systematic approach to regulation based on risk assessments. It recommended the retention of registration/licensing provisions and the reservation of several professional titles (for example, physiotherapist, medical practitioner, doctor and surgeon). The review also recommended the winding back of commercial controls[32] and significant lessening of advertising restrictions. The second stage of the process is now underway and involves developing new practitioner legislation reflecting the principles and recommendations arising from Stage 1.

The Council considers this to be a thorough approach to review and reform. Stage 1 provided an objective consideration of the need to regulate health practitioners and their practice and the most appropriate manner in which to regulate. The resultant minimalist risk management approach is being applied across the health professions in Stage 2. Applying a framework reduces the risk of regulatory anomalies arising between often related professions while allowing issues specific to a particular profession to be taken into account.

Western Australia and South Australia are adopting a similar approach to reviewing professions regulation.

Victoria's review of the physiotherapists regulation maintained the restriction on the use of the title "physiotherapist" and advertising restrictions requiring fair and accurate advertising and the power for the Physiotherapy Board to investigate advertising as necessary. No restrictions on professional practice or practice ownership were retained.

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31 Chiropractors, osteopaths, dentists, dental technicians, dental prosthetists, doctors, occupational therapists, optometrists, pharmacists, physiotherapists, podiatrists, physiologists and speech pathologists.

32 Noting that ownership restrictions for pharmacy and optometry will be the subject of separate reviews in 1999.

Legal Practice

Legal practice remains a highly areas of professional practice. There continues to be many restrictions on entry to the profession and to practice. These restrictions are primarily contained in each State's *Legal Practice/Practitioners Act* while others arise from professional and ethical standards determined within the profession.

Typically, restrictions on legal practice include: restriction on entry to the profession; professional or legal practice training for graduates; ownership restrictions prohibiting incorporation of practices; restrictions on advertising; the setting of legal fees; the reservation of practice in certain areas to legal practitioners (for example, property conveyancing); and Legal Practice Boards which have disciplinary powers over practitioners.

Under NCP, each State is reviewing its legal practice legislation, while standards and/or policies set by a profession are subject to scrutiny against Part IV of the TPA by the ACCC. Victoria completed a review in 1996 that led to a range of reforms being implemented including: the removal of the distinction between solicitors and barristers; direct access by clients to barristers; the introduction of non-lawyer property conveyancing; incorporation of legal practices; removal of binding fee scales; and the abolition of compulsory membership of professional associations.

The Victorian review recommended the retention of professional licensing of lawyers based on a defined minimum level of qualification. The review determined that the benefits arising from the restriction exceeded the costs. The review argued that the restriction avoided the costs otherwise imposed on the community of allowing unqualified people to perform specialised work requiring legal knowledge and skill – for example, costs to business associated with inefficient handling of procedures, and litigation costs arising from non-lawyer professional failures. The review also recommended the retention of the Solicitors' Guarantee Fund or Fidelity Fund (see Section B5.4.7). This is a statutory fund administered by the Legal Practice Board to provide automatic reimbursement of client monies which have been misappropriated from solicitors' trust accounts. The rationale behind this was that the private insurance market would not provide a comprehensive and cost effective coverage with no limits on claims.

New South Wales completed its review of the *Legal Profession Act 1987* in December 1998 and the recommendations are currently before the Government for response. Reviews of legal practice are underway in Queensland and South Australia. The Tasmanian and ACT reviews are due to commence later in 1999. The Western Australian review is scheduled for March 2000 while the timing of the Northern Territory review will be advised.

In all jurisdictions, solicitors are required to hold legal professional indemnity insurance. In most cases this is only available through a monopoly provider. As discussed in Section B5.4.7, these arrangements are also the focus of NCP review.

An apparent regulatory anomaly in legal practice is the continuing prohibition on non-lawyer conveyancers in Tasmania and the ACT. Over the past two decades all other states have removed the legal practitioner monopoly over property conveyancing. Indeed, non-lawyer conveyancers have existed in South Australia for

140 years. With the appropriate professional accreditation of non-lawyer conveyancers, the benefits to consumers are clear. The liberalisation of conveyancing in New South Wales in 1992 resulted in a 17 per cent reduction in costs (or some $86 million per annum) for New South Wales consumers (NCC 1998a).

On 30 June 1999, the Queensland Government announced a wide-ranging package of reforms for the legal practice in that state. The package includes:

- the establishment of a new independent Legal Practice Authority to handle complaints about lawyers;
- a disciplinary board to hear conduct charges against lawyers;
- Supreme Court committees to set admission rules and approve cost scales;
- the introduction of non-lawyer property conveyancing, allowing lawyers to join multi-disciplinary practices with other professionals; and
- the capping of payouts for damages arising from unscrupulous behaviour by lawyers to $60 000.

Assessment

The Council views the application of NCP principles to professions regulation as a key reform area. The Council recognises that certain aspects of professions regulation may well be justified, particularly given the information problems facing consumers in some circumstances. However, in assessing professions reviews the Council is keen to ensure that, where restrictions are retained, they are clearly supported by a net public benefit.

The Council recognises that the Law Council of Australia is working with governments to reform a number of features of the profession. The Council considers that Victoria has met its CPA commitments in relation to its legal practice review and reform, with one exception, professional indemnity insurance (see Section B5.4.7).

The Council will maintain a close interest in the outcomes of the remaining State's legal practice reviews in the context of the third tranche assessment, particularly the issue of non-lawyer conveyancing in Tasmania and the ACT.

National professions related reviews

Governments are conducting national reviews of regulation relating to the licensing of travel agents and the mutual recognition regime (see following discussion). The Commonwealth and States are currently establishing national reviews of architects regulation and the registration and ownership of pharmacists (see Section B5.5.2) which are due to commence in the second half of 1999.

Professional associations have raised concerns about the lack of national reviews of professions legislation to date. They argue that the predominantly state-based approach to legislation review:

- duplicates effort for both reviewers and the professions with the conduct of multiple reviews across jurisdictions;

- does not adequately focus on the national dimension of the market for professional services; and

- could result in different regulatory outcomes across jurisdictions for the same profession, thereby potentially undermining gains made this decade toward a national professional services market in the context of the development of the mutual recognition regime.

The Council sees considerable benefit in adopting a national approach to the review of professions regulation. However, support for, and participation in, such processes is a decision for each government. The CPA provides for, but does not require, joint-jurisdictional and national reviews. Similarly, there is no requirement that the outcomes of reviews of professions legislation be uniform across jurisdictions. Further, the Council is not aware of any evidence to suggest that the NCP reviews are undermining the effectiveness of, and benefits for professionals associated with, the mutual recognition regime.

Fewer national processes have been undertaken than might have been expected. In view of this, governments have established alternative means of ensuring that a national focus is brought to state-based reviews through the oversight of the COAG Committee on Regulatory Reform (CRR). This has included the development of guidelines for the review of professions regulation (CRR 1998). The mutual recognition regime itself continues to act as a standardising influence on professional registration regulation. The influence of mutual recognition and its recent review are discussed in the following section.

Mutual recognition

The nation-wide introduction of mutual recognition laws in 1993 has been a significant driver of reform in the area of professions regulation.

The aim of mutual recognition is to remove regulatory barriers to the free movement of goods and labour between Australian States and Territories. This is achieved by jurisdictions recognising each other's regulation with respect to goods and registered occupations. The principles of mutual recognition now extend to New Zealand under the Trans-Tasman Mutual Recognition Agreement.

For registered professions, such as architects, surveyors, chiropractors, nurses, legal practitioners, and real estate agents, variations in regulation between jurisdictions had created barriers to entry, providing protection from competition for practitioners within a jurisdiction. The recognition of professional registration across state borders has helped to facilitate a national market for professional services.

Mutual recognition relates solely to registration or entry requirements. It mitigates regulatory differences by ensuring that if a professional satisfies the registration criteria in their home state, that registration is recognised elsewhere in Australia. Mutual recognition does not, and was not intended to, address differences in

regulation relating to the conduct or delivery of professional services between jurisdictions.

Mutual recognition is given effect through Commonwealth, State and Territory legislation. COAG established a working group to conduct a national review of mutual recognition arrangements. Queensland was lead jurisdiction for the review with the Commonwealth, New South Wales, and Western Australia represented on the Working Group. The review was completed in mid-1998 following public consultations.

The Queensland Annual Report states that "*the review essentially found that the legislation is working properly and is generally consistent with national competition policy, and that no major change is in order*" (Queensland Government 1999, p. 6). The CRR will prepare a detailed response to the review recommendations for consideration by COAG.

Travel agents

All Australian travel agents (other than those in the Northern Territory) are licensed under a national scheme of state/territory legislation. This requires each travel agent to be licensed in each state/territory where they operate and to be contributing members of the national Travel Compensation Fund. The aim of licensing is to protect consumers from losses by restricting entry to agents who have satisfied certain probity, educational and financial hurdles. The aim of the Fund is to provide compensation for losses suffered by consumers due to agent fraud or dishonesty.

The Ministerial Council on Consumer Affairs commissioned a national review of the legislative scheme, co-ordinated by the Western Australia Ministry of Fair Trading. The review is underway and, following an initial round of consultations with relevant peak bodies and regulatory agencies, the reviewer released an issues paper in June 1998 and invited written submissions. A final report will be delivered to the Ministerial Council this December.

B5.5.4 Employee choice in public sector superannuation

Background

In most jurisdictions, public sector superannuation schemes have been provided by statutory public monopolies. These legislative arrangements are significant restrictions on competition. By constraining which fund the employer's guaranteed charge is paid into, they prevent access by alternative providers to a significant component of the market.

Several jurisdictions are now addressing this legislative restriction through reforms that give public sector employees choice over which fund their employer payments are paid into.

A related issue raised with the Council by a private sector organisation active in superannuation administration is the alleged anti-competitive nature of legislation that protects government superannuation scheme administrators from competition.

Scheme administration can be subjected to competitive tendering (although this is not a requirement under NCP). This exposes the incumbent administration to the challenge of the market on cost and service criteria. Parallel tests can be made for other elements of the scheme, such as funds management. Indeed, requirements for market testing have been built into legislation in a number of jurisdictions.

Although the operation of public sector superannuation funds is underpinned by legislation, both South Australia and Tasmania do not believe that NCP legislation review obligations are relevant. Both jurisdictions consider that the operation of their respective funds relates more to the manner in which the Government, as an employer, chooses to conduct its internal affairs.

Current status of reviews of superannuation provision

Following an approach from the Council, New South Wales, Queensland and Western Australia either confirmed that the relevant legislation is already in their review program or that they will consider it for review. The three jurisdictions propose to consider both the question of allowing choice of funds and the matter of contestability for funds administration.

The Commonwealth had legislation before the Parliament to give current employees, both in the private and public sectors, choice in their superannuation provider. The legislation was scheduled to take effect as from 1 July 2000 but delays in consideration recently led to debate on the Bill being deferred. The Commonwealth's legislation was intended to restructure arrangements for public sector superannuation by creating a single co-ordinated Board of Trustees for the two main public sector schemes, the Commonwealth Superannuation Scheme (CSS) and Public Sector Scheme (PSS). It also provided for market testing of scheme administration after a three year transition period. The legislation is now not expected to take effect until July 2001, at the earliest.

Australian Government Employees Superannuation Trust, the default fund for temporary and casual federal government employees, has always had its administration provided by the private sector.

New South Wales has recently passed legislation to corporatise its Superannuation Administration Authority, with effect from 1 July 1999. This process includes provision for competitive challenge for the administration of the scheme, after a mandated fixed term for the incumbent provider. First State Super, the largest of the public funds, allows members both choice of fund provider and of investment strategy.

The Northern Territory reviewed its Northern Territory Government and Public Authorities Superannuation Scheme (NTGPASS) in 1998. NTGPASS is to be closed from 1 July 1999 and all new employees will be free to choose any complying superannuation fund.

In the ACT, prior to this year, all government employees were covered by Commonwealth superannuation arrangements. As far as existing employees are concerned, the ACT is continuing to track developments by the Commonwealth. That is, ACT members of CSS or PSS will be given choice over their fund provider at the

same time as all other members of those funds, subject to the legislative timetable as set out above. However, both the CSS and the PSS are now closed and all new ACT employees, after 1 July 1999, will be offered unlimited choice of complying funds or will be allocated to a default fund, which was chosen following a formal tender exercise.

Victoria and Tasmania are not reviewing their relevant legislation, noting that, in each case, it already enables the relevant board to engage a third party and that this is a commercial decision for the board independent of government. However, neither the Victorian Superannuation Board nor Tasmania's Retirement Benefits Fund (RBF) Board (which are the current providers of superannuation administration services in their jurisdictions) has as yet invoked the option to engage a third party. Nonetheless, both Governments provided a commitment to introducing choice in superannuation arrangements, and Victoria has provided for market testing of its closed fund within two years.

In South Australia, the *Superannuation (Benefit Scheme) Act 1992* and the *Southern State Superannuation Act 1994* tie South Australian Government employees to the Southern State Superannuation (SSS) Fund for any employer contributions. South Australia conducted a preliminary examination of the *Southern State Superannuation Act 1994* using the same methodology as CPA clause 5. This examination concluded that restrictions in the Act were trivial.

The current review status of legislation relating to the provision of public sector superannuation is summarised in Table B5.9 below.

Table B5.9 Progress with reviews of legislation governing provision of public sector superannuation funds by jurisdiction, at 30 June 1999

	Legislation	**Review and Reform Status**
Commonwealth	*a) Superannuation Act 1976* *b) Superannuation Act 1990*	Legislation before the Senate would have removed the administrative monopoly created by a) & b) and allowed contestability of funds administration in due course.
	c) Defence Force Retirement and Death Benefits Act 1948	Amendments for c) & d) would have mirrored the civilian Bills.
	d) Military Superannuation and Benefits Act 1991 *e) Parliamentary Contributory Superannuation Act 1948*	The Commonwealth stated that review of the Department of Finance and Administration of e) is not cost effective as administration costs are trivial ($200 000 pa) and there are efficiencies in co-locating administration and policy functions.
	f) Judges' Pension Act 1968	Act f) does not set aside funds, there are no employer or employee contributions to manage and therefore no funds administrator which may be exposed to competition.

	Legislation	Review and Reform Status
New South Wales	*Superannuation Administration Act 1996*	Legislation to corporatise the Superannuation Administration Authority enacted, with provision for market testing of administration. Government considering whether the Act should be subject to legislation review. Largest public sector super providers allow for choice.
Victoria	*Public Sector Superannuation (Administration) Act 1993*	Public sector employees have choice in their funds manager. Victoria considers the Act does not restrict competition as it allows the VSB to enter into agreements with any person to carry out its functions. Victoria has restructured administration of public sector superannuation to introduce contestability.
Queensland	*Superannuation (Government and Other Employees) Act 1988*	Superannuation arrangements are the subject of an on-going general review. This will address the matter of a statutory monopoly funds manager. Residual NCP matters to be reviewed, commencing in 1999.
Western Australia	*Government Employees Superannuation Act 1987*	Review expected to be completed by June 2000, but consideration being given to earlier scheduling.
South Australia	*Southern State Superannuation Act 1994*	South Australia has decided not to conduct a full review of the Act (clause 5 of the CPA) on the basis that a preliminary examination applying the same methodology as clause 5 showed that restrictions in the Act are trivial.
Tasmania	Retirement Benefits Act 1993	Tasmania considers the Act does not restrict competition as it allows the RBF Board to enter into agreements with any person in connection with the administration of the Act. Tasmania is to provide employees with a choice of funds, as from early 2000. Government to ensure RBF is competitively neutral.
ACT	*See Commonwealth*	Existing employees will be provided with choice. New employees will have free choice of funds provider.
Northern Territory	*Superannuation Act 1986*	Act establishes the NT Government and Public Authorities Superannuation Scheme (NTGPASS). Scheme reviewed in 1998. NTGPASS to be closed from 1 July 1999 and all new employees will be free to choose any complying super fund.

Source: Jurisdiction's Annual Reports (1999)

Analysis of competition issues

The Commonwealth had broadly pro-competitive proposals before the Senate to provide both for choice of fund and competition over administration. However, the legislation has now been deferred. The Council will monitor the Commonwealth's progress with this legislation as part of its third tranche assessment.

Victoria declined to review its previous legislation, as it claimed the Act already allowed for choice on administration. In addition, most Victorian Government Departments allow freedom of choice as to super fund provider for employer guaranteed payments.

Recent Victorian legislation, the *Government Superannuation Act 1999*, introduced additional pro-competitive aspects. This Act, which takes effect from 1 July 1999, separates the arrangements for the closed, defined-benefits fund, the State Superannuation Fund (SSF), from the continuing accumulation fund, the Victorian Superannuation Fund (VSF). The SSF will be subject to new trustees, the Government Superannuation Office (GSO). Section 6 of the Act places a duty on the GSO to market-test the administration of the SSF within two years. VicSuper Pty Ltd will be the new trustee of the VSF and prudential supervision will be transferred to the Commonwealth as from 1 July 1999. Any future decision as to the management of the fund will be taken on strictly commercial grounds and are outside the State Government's ambit.

Tasmania has decided to provide choice to contributors to super funds. This has been implemented through the *Public Sector Superannuation Reform Act 1999*, which will shortly give all employees choice as to a complying superannuation scheme.

The ACT proposes to mirror Commonwealth changes for existing employees and provide choice for new employees.

The Northern Territory has reviewed its arrangements, and will permit new employees to choose from complying superannuation schemes.

South Australia

The current position in South Australia provides for neither:

- right of choice for employees as to the superannuation funds provider for the employer's superannuation guarantee charge; nor

- competitive challenge to the administration of the government monopoly provider.

In South Australia, the Government's employer contributions, prescribed by the Superannuation Guarantee legislation, have traditionally been paid into one of two schemes, the State Superannuation Benefits Scheme (SSBS) or the Southern State Superannuation Scheme (the Triple S Scheme). Unlike the SSS, the SSBS had not allowed employee contributions. These two schemes were merged on 1 July 1998.

The *Superannuation (Benefit Scheme) Act 1992* and the *Southern State Superannuation Act 1994* mandate payments into these schemes. These Acts tie South Australian Government employees to the Southern State Superannuation Fund,

managed by the Superannuation Funds Management Corporation of South Australia (Funds SA). Employees are prevented from nominating another fund manager for any employer contributions, whether these represent the superannuation guarantee charge required by Commonwealth legislation or are part of State Government remuneration.

South Australia does not accept that its legislation contains any non-trivial restrictions on competition and provided the results of an examination by the Crown Solicitor to support its view. The Crown Solicitor's main arguments are set out below.

- The design and implementation of State Government employee benefits are a matter solely for the State Government. There is no obligation to outsource government functions. Therefore any challenge on competition grounds is limited to the Commonwealth required superannuation benefits.

- South Australia retains the option of outsourcing any aspect of the scheme, including its administration and has followed this course for its funds management role.

- The fees charged for administration of the fund are very low in comparison with others in the market. Funds SA has therefore retained administration in-house.

- The level of 'economic activity' associated with scheme administration is irrelevant in terms of the South Australian economy and therefore is trivial in relation to anti-competitive concerns.

- The South Australian Government uses the statutory fund, required under Commonwealth superannuation legislation, as a vehicle to provide a range of additional benefits to its employees, including death and disability benefits. There are considerable economies of scale and scope from this co-ordinated arrangement. The current arrangement therefore meets the net benefit test.

- Any alternative arrangements would involve considerable transaction costs and dis-benefits for the State and employees.

- In any case, State Government employees have the right to make payments to any private sector superannuation scheme.

It is not clear that the South Australian legislation contains only trivial restrictions on competition. The sums involved from employer contributions are significant and, arguably, represent a non-trivial impact. The Triple S Scheme itself had employer contributions of $11.85 million in 1997-98, whilst the parallel SSBS had employer contributions of $99.27 million. Between them the two schemes provide for an annual contribution in excess of $100 million, representing payments for 150 000 public servants. As such, the management of the funds represents significant economic activity and a market opportunity for other superannuation fund providers were it not that the current legislation restricts entry by potential competitors.

The Council is also not persuaded by the other arguments presented for retention of the monopoly provision, noting the developments in other jurisdictions where public sector employees have been given choice as to their funds manager.

Finally, on the question of market-testing funds administration, the Council notes both New South Wales and Victoria have introduced legislation that will explicitly require market testing of their funds administration after a specified period.

For the reasons above, the Council considers that the South Australian legislation may have more than a trivial effect on competition. Accordingly, the Council proposes to continue to work with South Australia on this matter in the period leading to the third tranche assessment. The Council's objective is to clarify the magnitude of restrictions on competition in the legislation and to ascertain that, by the end of the year 2000, any non-trivial restrictions provide a net community benefit.

B5.5.5 Gaming regulation

Background

Governments are reviewing legislative restrictions affecting gambling activity throughout the period of the NCP legislation review program. Consistent with the CPA, they are to review and, where appropriate, reform existing restrictions on competition and ensure that new restrictions are in the public interest.

In the first assessment in June 1997, the Council found that some governments were not proposing to schedule legislation supporting monopoly casino licences for review and/or had not provided a public interest case in support of recently enacted legislation providing monopolies in areas of gambling activity. Given that such arrangements restrict competition, the Council considered that they should form part of the NCP review program. The Council asked governments to add monopoly licensing legislation for gambling activities to their review schedules.

In June 1998, the Council looked at progress in this area as part of a supplementary NCP assessment. It took into account reviews of casino licensing arrangements by Queensland and South Australia and of the TAB monopoly by New South Wales. These reviews highlighted the complexities and sensitivities associated with the social and economic impacts of gambling and wagering.

Competition issues

Restrictions on competition and market behaviour are common in gambling legislation. Typically, these include restrictions on:

- who can participate in the provision of the gambling activity, such as through probity checks;
- the accessibility of gambling operations – for example, caps on the number of gaming machines;
- the kinds of gambling activities which may take place at a particular venue – for example, gaming machines are not permitted at the Canberra Casino, but are restricted to clubs, hotels and taverns in the ACT. Further, there is a cap on the number (and in the case of hotels and taverns on the kind of) machine at each venue;
- the kinds of horse races which can be staged;

- the involvement of third parties – for example, there are some restrictions in some jurisdictions on leasing and/or ownership of gaming machines in licensed venues; and

- gambling operators by use of licences, particularly exclusive licences – for example, exclusive licences have been granted to some TABs and casinos.

Many of the restrictions in gambling legislation reflect a desire to address actual or perceived social problems, for example, by limiting access to gambling opportunities. Licensing restrictions on operators are, in part, a response to the community's desire to minimise the probability that these activities might be involved with criminal elements (for example, as money laundering operations).

Nonetheless, restrictions often also have economic consequences. These consequences affect participants in gambling activities in a variety of ways, including:

- exclusive licensing, which by its nature, excludes other operators;

- consumers may be unable to purchase services as they would wish;

- effort can be directed into circumventing restrictions, as the Canberra Casino has done by opening a club in order to circumvent gaming machines being limited essentially to clubs;

- restrictions on involvement by third parties may alter the financing options available to some venue operators; and

- how restrictions are implemented – for example, the capping of the number of gaming machines in a jurisdiction should also take into account the best way of allocating the number of machines available.

Assessment

Given the complex social and economic issues raised, the Council decided that gambling regulation would be better examined outside the NCP assessment process. Noting that the Commonwealth had proposed a national inquiry by the PC into the social and economic impacts of gambling, the Council decided that it should wait for the outcome of that inquiry before considering governments' competition policy performance on compliance. The PC is due to report to the Federal Treasurer in November 1999.

While there have been some gambling regulation issues which could have been considered prior to the PC report, the Council considers that, rather than adopt a piecemeal approach to NCP assessment, there is greater value in a comprehensive assessment of all gambling legislation as part of the third tranche assessment.

Other gambling regulation matters

In December 1997, the New South Wales Government passed legislation which, amongst other things, granted the New South Wales TAB exclusive licences to operate on and off course totalisator wagering, linked jackpots and the Centralised Monitoring System (CMS). As required under clause 2(1) of the Code of Conduct,

the New South Wales Government notified the ACCC and the Treasury that the legislation enacted provisions which relied on an exemption to competition law under section 51 of the *Trade Practices Act*. At the request of the Council, the New South Wales Government commissioned the Centre for International Economics (CIE) to undertake a net public benefit analysis of the exemptions. However, as has been noted before, all gambling legislation will be assessed by the Council in the light of the PC report. The CIE report will be considered at that time.

In May 1998, the New South Wales Government enacted further legislation granting the TAB an exclusive licence that required a section 51 exemption. This exclusive licence, known as an investment licence, will allow the TAB to purchase approved gaming devices and supply them to hotels, to finance the acquisition of devices by hoteliers and to share in the profits of a device supplied or financed by the TAB.

In notifying the ACCC and the Treasury (29 May 1998) of the section 51 exemption, the NSW Government noted that it is:

> *..of the view that the benefits to the community from the legislative exemption outweigh the costs, and that the objectives achieved by restricting competition by means of the legislative exemption can only be achieved by means of the legislative exemption.*

No further information has been provided. The granting of this licence raises clause 5(5) issues. A more detailed net benefit analysis will be necessary to satisfy the third tranche assessment.

B5.5.6 Taxis (all jurisdictions other than the Commonwealth)

Background

The taxi industry in Australia has been heavily regulated for many years. Key elements are:

- limits on licence (plate) numbers;
- regulation of taxi fares; and
- conduct (safety and quality) rules.

Owing to their scarcity in many areas, taxi licences have accrued a substantial market value. Licensees who obtained their licences some years ago have received substantial capital gains. However, this has been to the cost of taxi users as licensees seek a return on their investment ultimately via fares higher than they would be without limits on licence numbers.

The 1994 Industry Commission inquiry found that better access to taxi licences would have significant community benefits. It also acknowledged, as the Council does, that change will not be easy, because of the effects of deregulation on licensee wealth and differences in the circumstances of current licensees. Regulatory risk to wealth is a fact of life for all businesses and investors and, hence, it is factored into asset values

and required returns. On the other hand, in respect of taxi licences, the values may also have had factored in an expectation of compensation or other measures to ameliorate the wealth impact should deregulation occur.

So far the Northern Territory has made the most progress in reviewing taxi licensing. Amendments to the *Commercial Passenger (Road) Act*, passed late last year, removed limits on the number of taxi licences from 1 January 1999. The Government has compensated existing licensees for the loss of value of their licence (which traded at up to $230 000 in Darwin). It is recovering this cost by charging operators an annual fee, ranging from $4 500 in Tennant Creek to $16 000 in Darwin, for the new licences. According to the Government, the number of taxis in Darwin has risen by 10 per cent just three months after deregulation and two new taxi networks have started operation.

The Northern Territory still has in place maximum fare restrictions that it intends to review in July 2000. The Government also introduced a new restriction on competition – minimum taxi network sizes[33] – as an interim measure this year with the aim of ensuring that networks are of a sufficient size to meet customer response time expectations. In response to Council concern about the justification for this new restriction, the Government has undertaken to treat it as an interim measure only and to start a competition policy review of it within a month.

Reviews are currently underway in Queensland, New South Wales, Victoria, South Australia and Western Australia. Tasmania and the ACT have yet to commence their respective reviews.

Assessment

The Council welcomes the progress made by the Northern Territory Government so far in removing several restrictions on competition in its taxi licensing regime. This has satisfied the Government's second tranche obligations in this area. The Council looks forward to the Government building on this very creditable progress by reviewing the restrictions on minimum taxi network size and fare maximums.

The Council highlights the compensation provided by the Government to licensees as illustrating one way in which barriers to reform in the community interest can be handled in a manner which is sensitive to sometimes concentrated wealth impacts of reform.

With all other jurisdictions still to complete their respective reviews, it is clear that taxi licensing will be a significant third tranche assessment issue. The Council will be looking to ensure that each jurisdiction does not allow the difficult issue of licence value impacts to colour their evaluations of the net community benefit of reform, but that it is dealt with as an adjustment matter.

[33] The minimums are: Darwin – 20 standard taxis or 5 executive taxis; and Alice Springs – 10 standard taxis or 5 executive taxis.

B5.5.7 Animal Welfare Act 1992 and Food Act 1992 (ACT)

Background

In September 1997, the ACT Legislative Assembly passed amendments to the *Animal Welfare Act 1992* and the *Food Act 1992.* These amendments were intended to prohibit the sale in the ACT of eggs produced under the battery cage system, and to provide for labelling of eggs which are produced under the battery cage system. Clearly, there is an overlap in the effect of these two legislative amendments.

For the legislation to achieve its objective of prohibiting the sale of battery eggs in the ACT, it required that battery eggs be exempt from the *Mutual Recognition Act 1992*. Exemption from the *Mutual Recognition Act* requires the unanimous agreement of all other jurisdictions. Given that it introduced new restrictions, the legislation also triggered ACT Government responsibilities under clause 5(5) of the CPA: in essence, to show that the restrictions provided a net public benefit and were necessary to achieving the objective of the legislation.

Productivity Commission findings

In line with its obligations, the ACT Government commissioned the PC to undertake a public inquiry on whether it would be in the public interest for the ACT to:

- ban the sale of eggs from battery hens in the ACT;
- ban the production of eggs from battery hens in the ACT; and
- introduce a labelling requirement to indicate the conditions under which the hens produced their eggs.

The PC found that a ban on battery egg production in the ACT would improve hen welfare. It noted that the costs, which it estimated to be no more than $940 000 annually, would be borne by ACT consumers and it would be for the ACT to decide if the benefits, in terms of improved hen welfare, exceeded the estimated costs of such a ban.

ACT Government response

The ACT Government accepted the PC's recommendations and moved to ban the sale and production of all battery eggs in the ACT. However, the ACT failed to gain unanimous support from the other jurisdictions for its legislation. Consequently, the legislation has no effect.

The labelling rules require the ACT producer to disclose how their eggs are produced. The ACT Government argued that this is consistent with competition policy because it means that consumers are in a position to make better informed decisions about their egg purchases. However, egg producers outside the ACT would not be subject to the additional labelling requirements for eggs they offer for sale within the ACT.

Assessment

The Council considers that the ACT has met its CPA obligations with respect to the *Animal Welfare Act 1992* and relevant provisions of the *Food Act 1992*.

B5.5.8 Resource development agreement legislation (Western Australia)

Background

At the first tranche assessment in June 1997, Western Australia had 84 Agreement Acts in place, including 64 resource development Agreement Acts. Only three Agreement Acts were scheduled for review. Other jurisdictions had similar, although fewer, Acts, and in most instances had listed these for review. Western Australia indicated it intended to repeal all non-operative and non-resources development Agreement Acts.

The Council sought and obtained a commitment from Western Australia to examine a small sample of its resource development Agreement Acts to determine the extent of competitive restrictions and to determine arrangements for reviewing other agreement legislation if significant restrictions on competition were found in the Acts reviewed. The sample Acts were agreed with the Council.

The review found that the three Agreement Acts impose few restrictions on competition. It also noted that the benefits flowing from the Acts are often not at the expense of taxpayers or other industries and are an 'efficiency bonus' for the developer arising from greater certainty and risk reduction.

The review identified several clauses which it recommended be removed, including those which impose small levels of cost that are not offset by benefits. It concluded that removal of these restrictions would confer only a small public benefit and that it would only be in the public interest to amend the agreements if this were done by mutual consent. For new agreements, the review suggested these clauses be excluded.

Western Australian Government response

The Western Australian Government stated that it endorses the findings of the review report. The Government also said that as the three Acts reviewed are representative of other resource development Agreement Acts, it does not consider it necessary to review remaining Agreement legislation.

Western Australia has undertaken to consider removal of restrictions imposing a net community cost at the time each Agreement Act is reviewed or varied. It will also ensure there is increased focus on the community impacts of new State Agreement Acts and will exclude provisions which do not confer a net community benefit through the State's new legislation gate-keeping process.

Assessment

The Council considers that Western Australia's approach meets the State's obligations under the CPA.

B5.5.9 Digital television (Commonwealth)

Background

The *Television Broadcasting Services (Digital Conversion) Act* and *the Datacasting Charge (Imposition) Act*, assented to in July 1998, establish the framework for the conversion of free-to-air (FTA) television broadcasters to digital broadcasting and the basis for charging for access to the broadcasting spectrum for datacasting.[34]

Under the legislation, the Commonwealth will provide to each incumbent FTA broadcaster an additional 7 megahertz (MHz) of spectrum, for no additional charge, on condition that they (inter alia):

- commence digital transmissions by 1 January 2001 (later for regional broadcasters);
- transmit a minimum level of high definition programming (HDTV);[35]
- simulcast their programs on the existing analogue channels for at least eight years; and
- return a 7 MHz channel to the Government at the end of the simulcast period.

In addition, spectrum not required by the FTA broadcasters will be made available for datacasting on a competitive basis, and FTA broadcasters will be charged if they use their channels for datacasting purposes.

This legislation restricts competition in various ways, significantly by:

- extending the prohibition against new commercial television broadcasters until at least 31 December 2006, giving incumbent broadcasters protected access to Australian consumers and a head start in introducing the new technology; and
- prohibiting commercial FTA broadcasters from providing multiple and/or subscription programs on their digital channel, and requiring a minimum level of HDTV transmission.

The Commonwealth addressed its CPA clause 5(5) responsibilities through the preparation and release of a Regulation Impact Statement (RIS). Having examined three options, the RIS concluded that the restrictions are necessary to achieve the Government's objectives of: minimising disruption to consumers; maximising the use of existing transmission infrastructure; introducing digital television in Australia not significantly behind the rest of the world; and maximising viewer choice and diversity of product. It also noted that many of the regulations, including these restrictions, will be reviewed during the introduction and transition periods.

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[34] Datacasting is yet to be precisely defined but is generally understood to mean an Internet-style data service.

[35] HDTV provides a cinema-like viewing experience – a higher quality and widescreen picture with surround sound.

On 4 March 1999, the Commonwealth Treasurer asked the PC to examine regulatory arrangements for Australia's broadcasting services, including this legislation. This Inquiry will, amongst other things, apply the Commonwealth's analytical requirements under CPA clause 5(1). A draft report will be released for comment by October this year and a final report provided to the Treasurer by 5 March 2000.

Assessment

Current regulation of broadcasting in Australia reflects a legacy of restrictions on competition that aim to pursue multiple and sometimes conflicting policy objectives. The 1998 legislation attempts to facilitate technological change without disturbing this legacy and the associated balance of vested interests. However, the result has been, in the Council's view, that the restrictions extended or introduced by the legislation are not well targeted to achieve the Government's stated objectives.

The prohibitions on new commercial television broadcasters, and restrictions on the use of digital channels, are not obviously necessary to achieve the objectives of minimising disruption to consumers or maximising the use of existing infrastructure, and will directly frustrate the objective of maximising viewer choice and product diversity.

The linkage of the restrictions to the objective of introducing digital television on a timetable not significantly behind the rest of the world is not clear. The Commonwealth has argued that prohibiting entrants will avoid undermining the available advertising revenue base, and thus commercial viability, of incumbent broadcasters during the expensive conversion to digital. Typically, however, competition and the threat of entry is a powerful spur for the adoption of new technology. It might be that other factors, such as the long-standing ownership controls, constrain investment in digital broadcasting technology by incumbents and potential entrants alike. The Commonwealth has not presented sufficient evidence to determine whether this is the case and, if so, how long Australians might otherwise have had to wait before digital transmissions commenced.

Furthermore, the prohibition on multiple and/or subscription programs on the digital channels will both deny consumers important product choices, thus reducing the benefits of investing in digital reception equipment, and harm the economics of conversion for incumbent broadcasters. HDTV, which has been mandated by the Government, may well be of less net benefit to consumers – HDTV requires the consumer to invest in considerably more expensive reception equipment than is required to enjoy multiple and/or subscription digital programs.

The Council's view is that the RIS may have reached a different conclusion had it examined options better directed at achieving the Government's stated objectives, and had it given the impact of each on the community as a whole more weight. However, the legacy of restrictive regulation with its associated balance of vested interests means that incremental change is difficult and could have unintended and harmful long term consequences. The Council, therefore, welcomes the PC inquiry as an opportunity to consider, with a clean slate, what might be the minimum and most well targeted regulation necessary for this industry, in light of the forces of technological and global change. The Council will consider in its third tranche assessment the outcome of the inquiry and the Commonwealth's subsequent decisions.

B5.5.10 Commonwealth Government matters continuing from the first tranche assessment

National Health Act 1953 (Part 6 and Schedule 1) and the Health Insurance Act 1973 (Part 3) - Community Rating

In 1996, the Commonwealth referred to the (then) Industry Commission (IC) an inquiry into private health insurance. This inquiry included a review of the *National Health Act 1953 (Part 6 and Schedule 1)* and the *Health Insurance Act 1973 (Part 3)*. It reported in February 1997.

In its first tranche assessment, the Council found that the Commonwealth had not met its CPA obligations in this case. This was because the terms of reference for the inquiry specifically prevented examination of the Commonwealth's policy of retaining Medicare, bulk billing and community rating. The IC reported that community rating, which prevents registered funds from discriminating in relation to a contributor or a contributor's dependants, is perhaps the main regulatory influence on product and price competition amongst funds.

The Commonwealth noted in its second annual report that the *Health Legislation Amendment Act (No. 2) 1998* addressed a number of issues raised by the inquiry. The report did not otherwise respond to the Council's first tranche finding that the Commonwealth had failed to meet its CPA commitments.

In its 1999 Budget, the Commonwealth announced "Lifetime Health Cover", an initiative to promote private health insurance, under which insurance premiums paid by individuals will reflect the age at which they first join. As noted by the Commonwealth, it "*allows health funds to offer lower premium rates to people entering insurance early in their lives and higher premiums for people joining later*" (Commonwealth Department of Health and Aged Care, 1999). Notwithstanding this initiative, community rating will continue to underpin regulation of health insurance products and pricing.

Human Services and Health Legislation Amendment Act (No. 2) 1995, Health Insurance Amendment Act (No. 2) 1996 – Medicare provider numbers

The Commonwealth introduced new legislation, the *Human Services and Health Legislation Amendment Act (No. 2) 1995* and the *Health Insurance Amendment Act (No. 2) 1996*. This legislation has the effect of limiting the Medicare provider numbers available annually to new doctors, therefore, restricting entry to private medical practice. According to the Commonwealth its objective is, inter alia, to restrain increasing Medicare costs induced by an increasing supply of general practitioners.

The Council found in its first tranche assessment that the Commonwealth had failed to provide a substantive public benefit justification in support of the new restriction and appeared not to have examined alternative (non-restrictive) means of achieving the objectives of this legislation.

The Commonwealth's second annual report notes that this legislation contains review mechanisms. Specifically:

- section 19AA inserted in the *Health Insurance Act 1973* sunsets on 1 January 2002 – this section denies Medicare benefits in respect of medical services provided by/on behalf of practitioners who commenced practice on or after 1 November unless the practitioner meets certain criteria; and

- section 3GC inserted in the same Act establishes a Medical Training Review Panel, to compile and publish information on medical training and employment opportunities, whose reports are laid before Parliament by the Minister.

In the Council's view, these mechanisms do not discharge the Commonwealth's CPA obligation to have evidence that the legislation is consistent with the guiding legislative principle.

Health Insurance Act 1973 (Part IIA) – pathology licensing

Part IIA of the *Health Insurance Act 1973* has the effect of limiting the number of pathology outlets that can provide services eligible for Medicare benefits. In the first tranche assessment, the Council outlined its view that this piece of legislation, which was not then on the Commonwealth's review program, warranted review. Subsequently, the Minister for Health and Family Services agreed to examine competition matters associated with this piece of legislation under the review program.

The Commonwealth's second report to the Council confirms that this piece of legislation has been added to the Commonwealth's program for review in 1998-99.

Quarantine Act 1908

The Council's first tranche assessment noted that the Nairn Review of the *Quarantine Act 1908* did not address the fundamental questions expected of an NCP review. The assessment also noted that the Commonwealth had agreed to identify those elements of the Act which restrict competition and were not examined by the Nairn Review and test them for compliance with the CPA.

The Commonwealth's second report notes that the Department of Agriculture, Fisheries and Forestry will commence this review in 1999.