13 New legislation that restricts competition

Clause 5(1) of the Competition Principles Agreement (CPA) — the guiding principle — obliges governments to ensure that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

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

Complying with CPA clause 5 involves the following three types of action by governments;

1. ensuring the existing stock of restrictive legislation meets the pro-competitive guiding principle — clause 5(3);
2. Requiring that all new legislation that restricts competition to be consistent with the guiding principle — CPA clause 5(5); and
3. Systematically reviewing legislation that restricts competition at least once every 10 years to ensure the guiding principle is met over time — clause 5(6).

By requiring new legislation that restricts competition to be consistent with the guiding principle, clause 5(5) completes the process of ensuring all (existing and new) legislation does not unnecessarily restrict competition.

All governments have some form of legislative *gatekeeping* arrangement to examine new and amended regulatory proposals. Under these arrangements, an impact assessment is triggered where new legislation is considered to have a nontrivial effect on competition. In most jurisdictions, other triggers also prompt a regulation impact assessment. The Commonwealth Government, for example, requires an impact assessment of all regulatory proposals, including proposals in the form of nondisallowable instruments, quasi-regulation (see box 13.1) and those resulting from international treaties that restrict competition or affect business.

Box 13.1: A glossary of legislative terms

Regulation includes any laws or other government 'rules' that influence the way in which people and businesses behave. Forms of 'regulation' include both primary legislation and subordinate legislation, either disallowable or nondisallowable. Quasi-regulation is also a relevant non-legislative category.

1. **Primary legislation** — Acts of Parliament
2. **Subordinate or delegated legislation**
   - **Disallowable instruments** — Regulations, statutory rules, By-laws, Orders, Ordinances, instruments or Determinations made by an executive government according to the powers bestowed by an authorising Act of Parliament. Delegated legislation must be tabled in Parliament and can be disallowed (vetoed) by a motion agreed to by members in any house of Parliament. Delegated legislation is closely scrutinised by a review committee of the Parliament (such as the Senate Standing Committee on Regulations and Ordinances at the Commonwealth level).
   - **Nondisallowable instruments** — instruments that are not subject to parliamentary disallowance. They may be made by boards, agencies, statutory authorities or departments, and are gazetted and/or tabled. One example is the Radiocommunications (Spectrum Licence Limits — 2 GHz Band) Direction No. 2 of 2000, which imposed restrictions on some potential bidders for radio frequency spectrum in the 2 gigahertz band.
3. **Quasi regulation** — those rules, instruments and standards to which government influences business to comply, but that do not form part of explicit regulation. Examples of quasi-regulation are industry codes of practice, guidance notes (such as a policy statement issued by the Australian Securities and Investments Commission concerning offers of securities made over the Internet), industry–government agreements and accreditation schemes.

Regulation impact statement (RIS) — also referred to as a regulatory impact statement, regulation impact assessment (RIA), competition impact analysis (CIA) and Public benefit test (PBT) — a document prepared by an agency responsible for a regulatory proposal. It is developed in consultation with affected parties and formalises and requires analysis of the impact of a regulation, including an assessment of risks, costs and benefits (quantitative and/or qualitative) and a consideration of possible alternatives (regulatory and nonregulatory). The process formalises good policy formulation and provides evidence to support recommendations for the most effective and efficient option for meeting the government's policy objectives.

Principles for effective gatekeeping

The National Competition Council considers the CPA clause 5(5) obligation to mean that governments should have in place legislation gatekeeping arrangements that are comprehensive and robust and thus maximise the opportunity for achieving high quality regulation. It informed all jurisdictions before this 2003 National Competition Policy (NCP) assessment that the following principles are necessary for effective gatekeeping arrangements.

- All legislation (Acts, enactments, Ordinances and Regulations) that contains nontrivial restrictions on competition should be subject to a formal regulatory impact assessment to determine the most effective and efficient approach to achieving the government's regulatory objective,

including alternatives to regulation. The impact analysis must consider competition impacts explicitly.

- There are mandatory guidelines for the conduct of regulation impact analysis, which all government departments, agencies, statutory authorities and boards that review or make regulations must follow.

- An independent body with relevant expertise:

  – advises agencies on when and how to conduct regulatory impact assessment;

  – is empowered to examine regulatory impact assessments and advise on the adequacy and/or quality of the analysis; and

  – monitors and reports annually on compliance with the regulation impact analysis requirements.

Governments' gatekeeping arrangements

This section assesses governments' new legislation gatekeeping arrangements against the CPA clause 5(5) obligation and considers whether the arrangements meet best practice principles for effective gatekeeping. Table 13.2 summarises and compares jurisdictions' approaches to gatekeeping.

The Commonwealth

The Commonwealth Government made an administrative decision that, subject to limited exceptions, a regulation impact statement (RIS) must be prepared for all new and amended regulation with the potential to restrict competition or impose costs or confer benefits on business.[1] This requirement, endorsed by Cabinet, is set out in the Commonwealth Government endorsed publication *A guide to regulation (second edition)*.

As stated in *A guide to regulation*, the Commonwealth Government's RIS requirements apply to all forms of regulation from primary legislation through to quasi-regulation (see box 13.1) and treaties. All Commonwealth departments and agencies — including statutory authorities and boards that

[1] Preparation of a RIS is not mandatory in a limited number of cases, such as where regulation is of a minor or machinery nature and does not substantially alter existing arrangements, where it is required in the interests of national security or where it reflects a specific election commitment and there is no scope to consider alternative ways of meeting that commitment.

are responsible for making, reviewing and reforming regulations — must adhere to the requirements. The guide specifically outlines requirements under the CPA to ensure departments and agencies comply with Commonwealth obligations under clause 5(5) of the CPA.

The RIS prepared for each regulatory proposal, which triggers the requirements, must clearly identify the problem(s) and relevant policy objectives, and assess the costs and benefits of alternative means of fulfilling the objectives. Where possible, quantitative measures, such as financial and economic costs and benefits, should be identified and compared in support of the assessment of the costs and benefits of regulatory alternatives. The guidelines make clear, however, that the analysis in a RIS should not be restricted to tangible or monetary items. Where applicable, the analysis should also include possible changes in environmental amenity, health and safety outcomes, and other nonmonetary outcomes. The guide also notes that early adoption of the RIS process during policy development and consultation is part of best practice regulation making.

Transparency is an important feature of the Commonwealth Government's gatekeeping process. RISs should be prepared to a standard suitable for publication in parliamentary explanatory material. A RIS for new primary legislation and subordinate legislation (including amendments) must be included in the explanatory memorandum (for primary legislation) and explanatory statement (for tabled subordinate legislation). RISs for treaties must also be tabled in Parliament. There is no mandatory requirement to publish a RIS for nondisallowable subordinate legislation or for new or amended quasi-regulation. Departments and agencies are encouraged, however, to make their RISs available to affected groups and individuals, and to publish them on the Internet.

The Office of Regulation Review oversees the process. It advises Commonwealth departments and agencies on whether a RIS should be prepared. It also is responsible for examining and advising on the adequacy of analysis contained in all RISs prepared, at both the decision-making and transparency stages (for example, when the legislation and accompanying RIS are tabled in Parliament). The office provides guidance and training on the RIS requirements to departments and agencies.

The Office of Regulation Review reports on compliance with the RIS requirements in the annual publication *Regulation and its review* (published by the Productivity Commission). In assessing and reporting on compliance, the office aims to promote the Government's desire to improve the regulatory decision making process by requiring a gradual rise in the standard of analysis required for a RIS to be assessed as 'adequate'. In *Regulation and its Review 2001-02* (PC 2002d), the Office of Regulation Review found that compliance with the RIS requirements had improved on previous years, but tended to be lower for regulatory proposals of a more significant nature, partly because RISs prepared for significant proposals are often undertaken in compressed time frames. This finding suggested that some departments and agencies may be treating the RIS process as an 'add on' task, after a course of action has already been agreed (PC 2002d, p. XVII). Box 13.2

provides examples of where the Commonwealth gatekeeping mechanism contributed to best practice outcomes, and other instances where best practice was not achieved.

Box 13.2: A best practice approach with room for improvement

An effective gatekeeping mechanism can contribute to improved outcomes, but it will not always guarantee this. Below are examples of where the Commonwealth's gatekeeping mechanism helped to identify anticompetitive regulation that is not consistent with the guiding principle and other instances where best practice regulation review and reform was not achieved.

Customs (Prohibited Imports) Amendment Regulations 1999

Implementation of these regulations would have prevented second-hand diesel engines designed for use in road vehicles from being imported unless the engines complied with the current Australian motor vehicle emission standards. The Regulations did not impose this condition on the sale of locally sourced second-hand diesel engines. The Department of Transport and Regional Services worked cooperatively with the Office of Regulation Review to improve the analysis in the RIS that accompanied the regulatory proposal to ensure that issues were discussed in a transparent manner. At the end of the process the office advised that the quality of the analysis was good, but assessed that the RIS was not adequate because it could not satisfy the CPA requirements. The Government introduced the Regulations to Parliament, but the proposed Regulations were disallowed in both the House of Representatives and the Senate. As a result, the Government indicated its intention to introduce more appropriate Regulations, which meet the environmental objectives of the regulation but reduce the unintended impacts on industry.

Third Community Pharmacy Agreement — pharmacy remuneration

The pharmacy remuneration provisions in the *Third Community Pharmacy Agreement* that were implemented through the National Health Amendment Bill (No. 1) 2000 did not follow best practice RIS requirements. The Department of Health and Aged Care prepared a RIS, but the Office of Regulation Review assessed that the RIS for tabling was not of an adequate standard as the remuneration provisions were not made fully transparent. At the decision-making stage the RIS was assessed as meeting the adequacy requirements.

The Interactive Gambling (Moratorium) Bill 2000

The National Office of Information Economy was responsible for preparing a RIS for the Interactive Gambling (Moratorium) Bill 2000. The Bill provided for a moratorium on interactive gambling to slow the expansion of the industry while the Government considers a long-term regulatory response to problem interactive gambling. The merit of the Bill depends on the benefits of limiting the number of problem gamblers outweighing possible damage to the development of the Internet industry in Australia.

The Office of Regulation Review noted that the RIS discussed the social benefits of the moratorium, but that the analysis did not demonstrate that the Government's objectives could be met only by restricting competition or that there was a net benefit to the community from restricting competition as required by the CPA. The office also found that consultation on options was limited. Consequently, it assessed the analysis in the RIS as not meeting the adequacy criteria at the decision-making and tabling stages. The Government implemented this legislation in 2000.

Sources: Jackson and Tapley 2000; PC 2000b, 2001a.

The Commonwealth Government implements hundreds of pieces of legislation (over 1900 pieces of legislation for example were implemented in 2001-02). Typically, only a small number of the regulatory proposals contained in the legislation require preparation of a RIS. Between 1999-2000 and 2002-03, around 140–207 regulatory proposals each year triggered the requirement to

prepare a RIS at the decision-making stage (table 13.1). Compliance with the requirements by Commonwealth departments and agencies — in terms of preparing a RIS judged by the Office of Regulation Review to be of an adequate standard — was generally high at around 81–88 per cent a year over the period 1999-2000 to 2002-03.

Table 13.1 indicates that typically only a few regulatory proposals triggered the RIS requirements because of a potential for the policy proposal to restrict competition. Over the period 1999-2000 to 2002-03, some 7–22 regulatory proposals with the potential to restrict competition required preparation of a RIS. However, with the exception of 2002-03, compliance, in terms of adequacy, with the RIS requirements for proposals with the potential to restrict competition tended to be lower than the overall compliance rate. This compliance rate partly reflects the fact that a higher proportion of the RISs required were not prepared at the decision-making stage.

Table 13.1: RIS compliance for Commonwealth regulatory proposals at the decision-making stage

	Regulatory proposals that triggered the RIS requirements			
	All proposals[a]		*Proposals that restrict competition*[b]	
Year	*Total required (no. prepared)*	*Adequate %*	*Total required (no. prepared)*	*Adequate %*
1999-00	207 (181)	169 82%	15 (9)	8 53%
2000-01	160 (137)	132 83%	7 (6)	2 29%
2001-02	147 (132)	130 88%	12 (9)	8 67%
2002-03	139 (120)	113 81%	22 (19)	18 82%

[a] Subject to limited exceptions, a RIS must be prepared for all new and amended regulations with the potential to restrict competition or impose costs or confer benefits on business. [b] Regulatory proposals that trigger the RIS requirement due to the potential to restrict competition.

Source: Compiled from data supplied by the Productivity Commission.

In 2002, the Office of Regulation Review (PC 2001a) put forward four proposals for improving regulatory outcomes. These included:

1. An adequate early warning system of pending regulatory changes is needed. The Government decided in 1998 that each department and agency would publish annual regulatory plans.

2. Embedding the RIS process into policy development processes helps to ensure the RIS analysis is done relatively early and that the process adds value.

3. Encouraging greater commitment to the RIS process by, for example, encouraging departments and agencies to publish their compliance record in their annual reports.

4. Concentrating analytical resources committed to the RIS process where they can be most effective by, for example, permitting agencies that had demonstrated a commitment to the Government's RIS process to use a self-assessment approach for proposals having relatively minor significance. (The ORR would continue to monitor/audit and report on compliance.)

In addition, the Government introduced into Parliament the Legislative Instruments Bill 2003,[2] which was read for a second time on 26 June 2003. This Bill establishes a comprehensive regime for the registration, tabling and scrutiny of Commonwealth legislative instruments (laws that are made under a power delegated by Parliament). It introduces, for example, sunset provisions (for automatic repeal of a legislative instrument after 10 years) and new consultation processes that require, subject to limited exceptions, the explanatory statement for each legislative instrument to include a consultation statement. Many provisions contained in the Bill share features with provisions in subordinate legislation Acts operating in other jurisdictions (see the summary in later sections of this chapter). Promotion of consultation within the Bill complements elements of the existing RIS process for legislative instruments.

The Council considers that the Commonwealth Government's gatekeeping arrangements comply with NCP obligations and meet all best practice principles for effective gatekeeping. The Council also supports the Office of Regulation Review's initiatives to improve regulatory outcomes, including the streamlining of administrative processes where this approach would benefit the community. It would, however, be concerned about a significant shift to self-assessment if it would substantially diminish the role of the Office of Regulation Review.

New South Wales

New South Wales uses both legislative and administrative provisions to implement its legislative gatekeeping arrangements. The provisions require all proposals — legislation, regulation and quasi-regulation — to include impact analysis. Moreover, subordinate legislation is subject to regular review requirements.

When Government agencies submit Cabinet minutes that propose a new regulatory control (including primary and subordinate legislation), they must demonstrate that the New South Wales best practice approach — as outlined in *From red tape to results — government regulation: a guide to best practice*

[2] Previous versions of the Bill were introduced to Parliament in 1994, 1996 and 1998.

(Regulation Review Unit 1995) — has been applied in assessing the regulatory impact of the proposal. *From red tape to results* encourages the integration of the RIS process and a consideration of best practice regulation at an early stage; it also specifies what best practice means. While the guide does not explicitly note the CPA guiding principle, it explains that best practice regulatory systems do not restrict competition (see the summary in box 13.2). The guide also notes that RISs must identify alternative options by which stated objectives can be achieved, assess the costs and benefits (including on resource allocation) of the proposed regulation and identify options with the greatest net benefit or least net cost to the community.

Box 13.3: New South Wales guide to best practice for regulatory systems

From red tape to results outlines and describes New South Wales requirements for achieving best practice regulatory systems. It states that the RIS process aims to reduce unnecessary regulation and red tape and identify whether a proposed regulation is the most efficient and effective way of achieving the stated objective. It also states that departments and agencies will be considered to be best practice regulators where their regulatory systems:

- have clear objectives and focus only on fixing identified problems;
- regulate ends not means;
- maximise benefits and minimise costs;
- are integrated with other regulatory systems so the public is presented with requirements that 'make sense' across the Government as a whole;
- minimise the number of Government agencies involved;
- promote certainty (so the assessment of applications for approvals, permits, licences and so on is based on clearly stated criteria and the time that it will take is indicated publicly);
- are simple for users to understand;
- are simple to administer;
- are easy to enforce;
- have a high voluntary compliance rate;
- are subject to regular review;
- do not restrict competition; and
- use commercial incentives rather than command-and-control rules.

Source: Regulation Review Unit 1995.

Under the *Subordinate Legislation Act 1989*, New South Wales government agencies must prepare RISs for proposed principal statutory rules[3] before the rules can be made. Guidance for meeting the requirements of the Subordinate Legislation Act is provided in the *Manual for preparation of legislation* (Parliamentary Counsel's Office 2000) and the guidelines in schedule 1 of the Act. The manual explains that the responsible Minister must certify whether the RIS complies with the provisions of the Subordinate Legislation Act

[3] The Subordinate Legislation Act defines a principal statutory rule to mean a statutory rule that contains provisions apart from direct amendments, repeals and provisions that deal with its citation and commencement.

relating to the proposed statutory rule. Subject to conditions, Ministers may postpone the requirement to prepare a RIS for up to four months.

The manual also explains that the Subordinate Legislation Act provides exemptions to the RIS requirements under limited circumstances. Matters arising under legislation that is uniform with the legislation of the Commonwealth Government or another State or Territory, for example, are exempt from the requirements, as are direct amendments or repeals. The exclusion of direct amendments is not consistent with the CPA clause 5 guiding principle. Moreover, amendments can impose significant restrictions on competition. The Legal Profession Amendment (Personal Injury Advertising) Regulation 2003, for example, imposes an effective prohibition — a severe restriction to competition — on barristers and solicitors advertising personal injury legal services. This direct amendment to the principal statutory rule was implemented without an accompanying RIS or substantial new evidence to demonstrate a net public benefit (for details, see chapter 4, volume 2).

As for the Commonwealth Government, the principles of accountability and transparency are a key feature of New South Wales's legislative gatekeeping arrangements. As noted above, Ministers must certify that a new regulatory proposal complies with the provisions of the Subordinate Legislation Act before it may be made. The Premier issued a memorandum requesting that Ministers table a copy of the RIS in the same sitting week as when Parliament is notified of the making of a new regulation, or as soon as possible thereafter.

No single statutory independent body has responsibility for overseeing the legislative gatekeeping requirements in New South Wales. However, government departments and agencies are required to provide a copy of each RIS prepared to the Cabinet Office, in accordance with the Subordinate Legislation Act. The office is responsible for providing the Premier with independent policy and strategic advice on all Cabinet and other major policy matters. The Inter-Governmental and Regulatory Reform Branch, in particular, coordinates the Government's implementation of NCP and other regulatory reform initiatives (Mr R. B. Wilkins (Cabinet Office), pers. comm., 24 June 2003). Its scrutiny includes subordinate legislation, although this scrutiny is primarily a statutory function of the Legislation Review Committee (formerly the Regulation Review Committee), which is a joint statutory committee, that scrutinises all Bills introduced to Parliament and all Regulations subject to disallowance according to the criteria set out in the *Legislation Review Act 1987*.[4] The Committee's functions include ensuring regulation complies with the provisions of the Subordinate Legislation Act. The committee may report to Parliament on compliance with the RIS requirements. The Government and the committee also monitor the RIS process and consider refinements where required.

[4] The scrutiny of Bills function of the Legislation Review Committee was enacted under the *Legislation Review Amendment Act 2002* and commenced when the New South Wales Parliament resumed for the spring 2003 sitting.

The Council considers that New South Wales' gatekeeping arrangements are not consistent with the guiding principle and therefore do not meet best practice principles for effective gatekeeping. It made this assessment because direct amendments to principal statutory rules are not subject to the gatekeeping requirements, contrary to the requirements of clause 5 of the CPA. The Council does acknowledge, however, that review or repeal of all amendments will occur when the principal statutory rule is due to sunset under the Subordinate Legislation Act. Nevertheless, the New South Wales Government can implement and maintain a restriction on competition for a number of years before a review is triggered.

Victoria

As outlined in the *Regulatory impact statement handbook* (VORR 1995), which details mandatory guidelines for departments and agencies, the Victorian Government requires that:

> … *all new regulatory proposals must not restrict competition unless it can be demonstrated there is a net benefit to the community and the objectives of that proposal can only be achieved by restriction. Assessment of this competition test is to be included in a RIS*.

In January 1996 the Premier of Victoria issued *Guidelines for the application of the competition test to new legislative proposals*, which apply to all proposed Bills, new subordinate legislation proposals, statutory rules and By-laws. These guidelines require departments and agencies, in analysing new (including amendment and replacement) legislation, to:

- identify the restriction on competition;
- show the restriction is necessary to the objective;
- assess the costs to the community caused by the restriction;
- assess the community benefit; and
- assess whether the benefits outweigh the costs.

Cabinet submissions on legislative proposals must include a section with such an NCP impact assessment. Other formal arrangements also apply to subordinate legislation under the Victorian *Subordinate Legislation Act 1994*, which sets out processes for making and scrutinising subordinate legislation.

The Subordinate Legislation Act requires that a RIS be prepared wherever a proposed statutory rule imposes an appreciable economic or social burden on a sector of the public. The Act provides for exceptions and exemptions from this general requirement, such as for fee increases within prescribed limits and for a proposed statutory rule that is of a machinery nature. The Minister responsible for the regulation is responsible for issuing a certificate for the

exception or exemption. Special temporary exemptions from the requirements may also be provided by the Premier.

For those proposals that do not meet the exception or exemption criteria in the Subordinate Legislation Act, and thus for which a RIS must be prepared, the responsible Minister must ensure independent advice is sought to confirm the adequacy of the RIS. This advice can be provided by the Victorian Office of Regulation Reform, a consultant or a unit within the Government that has the necessary expertise and is independent from those developing the policy and the proposed regulation(s). (The Department of Treasury and Finance advises the Treasurer and Cabinet on NCP issues and assists departments with NCP matters.) Based on the assessment and any other relevant advice, the responsible Minister must certify the adequacy of the RIS. Departments and agencies are encouraged to release the RIS as part of an informed public consultation process, and RISs are made public (for example, through tabling in Parliament) before the regulation is made. After the regulation is made, the Scrutiny of Acts and Regulations Committee reviews the regulation and the adequacy of the RIS.

The Office of Regulation Reform plays a key role in the assessment of RISs. It helps departments and agencies determine whether regulation is needed and guides the preparation of a RIS. The office publishes material related to regulation review, including evaluations of existing regulatory tools and benchmarks on the effectiveness of the regulatory environment against other jurisdictions to identify alternative approaches. It also publishes the *Victorian regulation alert* — an annual report on regulations due to sunset in the financial year to improve awareness of forthcoming regulation and to promote better and earlier consultation between Government agencies before regulatory proposals are developed. The Office of Regulation Reform states that its participation in the early stages of RIS development contributes to the high level of compliance with the RIS requirements of the Subordinate Legislation Act (VORR 2003). No comprehensive RIS compliance reporting is undertaken in Victoria, although the Scrutiny of Acts and Regulations Committee reports on legislation made.

The Council considers that Victoria's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping.

Queensland

Under the Queensland Government's new legislation gatekeeping arrangements, all new (including amending) legislation that restricts competition must be subjected to a public benefit test before Cabinet considers the policy proposal. The type and scope of each review is determined in accordance with the *Public benefit test guidelines* issued by Queensland Treasury (1999). The guidelines require the public benefit test to identify the nature and incidence of all relevant economic, social and cultural costs and benefits to the community of restricting competition compared to other means

of achieving the Government's objectives. They provide explicit guidance on how agencies should assess legislation for compliance with clause 5 of the CPA when undertaking a public benefit test, and require agencies to liaise with Treasury throughout the assessment process.

In addition, under the *Statutory Instruments Act 1992*, departments and agencies must prepare a RIS before making any proposed subordinate legislation that is likely to impose appreciable costs on the community or a part of the community. The Act also requires agencies to include the RIS in their consultation processes on the proposed statutory instrument. It includes guidelines on matters that must be addressed in the RIS. The guidelines explain that a RIS must include an assessment of the costs and benefits of the proposed legislation; if practical and appropriate, the assessment must quantify the benefits and costs, and compare them with the benefits and costs of any reasonable alternative to the legislation. As a minimum requirement, the RIS must include (1) an assessment of the proposed subordinate legislation against the existing arrangements and (2) a qualitative assessment of the costs and benefits. The Business Regulation Reform Unit administers the section of the Act relating to the conduct of a RIS. The unit has also developed both a qualitative and quantitative cost–benefit method that agencies can use for all types of legislation.

The Queensland Treasury monitors and reports on compliance with the gatekeeping arrangements. In 2002, it reported that 69 Acts and 271 Regulations (excluding Proclamations and significant appointments) were enacted. A RIS or public benefit test was prepared for all but six proposals that imposed an appreciable impact on the community or imposed a restriction on competition. For the remaining six proposals, a formal RIS or public benefit test was not prepared because the restriction was assessed for its impact and found to be justified in the public interest to meet health or social objectives (Queensland Government 2003). An example is the *Building and Other Legislation Amendment Act 2002*, which provides that private building certifiers may not approve building work to upgrade existing budget accommodation buildings. Ensuring budget accommodation buildings comply with the Government's fire safety standards are requirements beyond the certification of building standards, such as a consideration of hardship, possible enforcement action and, in some cases, ongoing inspections. These are not functions that a private provider could undertake, so local government has the role of approving building work for compliance with the legislation (Queensland Government 2003).

The Council considers that Queensland's gatekeeping arrangements comply with NCP obligations and meet best practice principles for effective gatekeeping.

Western Australia

Western Australia's *Public interest guidelines for legislation review* (Competition Policy Unit 2001) set the mandatory requirements for all

reviews. These guidelines supplement the *Legislation review guidelines* (Competition Policy Unit 1997), which specifies that Western Australia's CPA obligations are to review all legislation that restricts competition, including Regulations, rules, proclamations, notices, new legislation, amended legislation and local government By-laws.

The review guidelines require a RIS-type analysis, consistent with NCP requirements, be undertaken to assess the costs and benefits of reform. There is no independent statutory body with responsibility for overseeing the legislative gatekeeping requirements in Western Australia. However, the Competition Policy Unit within the Department of Treasury and Finance advises agencies on NCP obligations and encourages agencies to consider NCP principles at an early stage of preparing new law. Western Australia's legislative process contains a mechanism to ensure the department is formally notified of progress on new legislation, so it can monitor agency compliance. Where the department considers that a proposed new law has the potential to restrict competition, it liaises with the proponent agency to ensure the law is appropriately reviewed.

The Government of Western Australia (2003) advised that the gatekeeping process has identified, since 1996, 80 proposals for new laws with the potential to restrict competition. Reviews for those proposals were conducted as required, except where a proposal was not implemented, was assessed before going to Cabinet as not requiring a CPA clause 5 review, or is still at an early stage of preparation.

The Council considers that Western Australia's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping.

South Australia

South Australia requires proposals for new legislation (including proposed amendments and new Regulations) to be accompanied by evidence that the proposal complies with CPA clause 5 requirements. Agencies are required to produce evidence on the costs and benefits of restrictions, which may be made available via:

- a desktop review report;
- a report from a formal public NCP review or a general review that includes NCP issues;
- reference to the NCP issues in the Cabinet submission seeking approval to draft the amendments; and
- reference to the NCP issues in the second reading speech (Bills) or report to the Legislative Review Committee (Regulations).

South Australia's *Guidelines paper for agencies conducting a legislative review under the COAG Competition Principles Agreement*; *reviewing restrictions on competition in proposed new legislation* (Department of Premier and Cabinet 1998, 2001) states that best practice is to release publicly (subject to Ministerial approval) the evidence of a review. It also recommends that a reference to NCP issues be made in the second reading speech of a Bill, because the issues are then on the public record in an accessible form.

South Australian subordinate legislation lapses at the end of 10 years and must be reviewed before it is remade, ensuring all subordinate legislation is subject to the gatekeeping mechanism.

Agencies are required to provide a copy of the evidence supporting a regulatory proposal to the Department of Premier and Cabinet. The department provides advice and training to agencies on NCP compliance. In addition, South Australia has sought the Council's views on NCP compliance when preparing new legislation.

Any proposal that imposes nontrivial regulations on the community (including all new Acts, Regulations, mandatory standards and codes, and amendments to existing legislation) must be accompanied by a RIS evaluating the proposal's effectiveness and efficiency (in terms of net public benefit) in achieving its objective, compared to nonregulatory means[5]. On 23 April 2002, South Australia introduced a new process requiring all regulatory proposals for consideration by Cabinet to assess potential impacts on the community, small business, the environment, families and regions. A separate regional impact assessment report must be attached to the Cabinet submission if there is a significant regional impact. In July 2003, the government re-issued revised guidelines, *Preparing Cabinet submissions* (Premier and Cabinet Circular no. 19), incorporating this initiative.

South Australia advises that its NCP Implementation Unit provided comments on about 110 regulatory impact statements in draft submissions and about 100 Cabinet submissions from July 2002 to December 2002. South Australia is considering system improvements to enable it to collect annual statistics on legislation considered under its gatekeeping process, to include the information in future annual reports to the Council.

The Council considers that South Australia's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping. The Council notes South Australia's intention to report on compliance with the gatekeeping requirements in future NCP annual reports.

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5 If a proposal is likely to impose significant regional impacts, then a regional impact assessment report must be prepared.

Tasmania

Tasmania's mandatory new legislation gatekeeping requirements are detailed in the *Legislation review program procedures and guidelines manual* (Department of Treasury and Finance 2003). Consistent with the CPA, the requirements apply to all (including new or proposed) primary legislation and all subordinate instruments, including Regulations, rules, By-laws, Orders, proclamations and notices made under the legislation. The CPA guiding principle is also made explicit to help guide the reviews.

As outlined in the manual, Tasmania requires departments and agencies to prepare a RIS for new or proposed primary legislation that has at least one major restriction on competition or will impose a significant negative impact on business. Where proposed primary legislation includes a major restriction on competition or impact on business, a rigorous and transparent assessment process is required to establish whether the restriction is justified in the public interest. A less intensive process is required where the proposed primary legislation includes a minor restriction on competition. The Regulation Review Unit, in consultation with the Government agency responsible for the proposal, determines the need to conduct a major or minor assessment.

A major assessment requires preparation of a RIS and the conduct of a mandatory public consultation process. The RIS should be accessible to the general public and explain the objectives of the legislation, the issues surrounding the restriction(s) on competition or the impact on business, and the benefits and costs that flow from the restriction or impact. Agencies must obtain the Regulation Review Unit's endorsement of the RIS and the proposed public consultation program before publicly releasing the RIS. For proposed minor restrictions on competition, Government agencies are required to prepare a brief assessment commensurate with the relative impact of the legislation. The Regulation Review Unit's endorsement of the assessment is required before the proposal is submitted to Cabinet.

The manual states that for proposed subordinate legislation, agencies must observe the *Subordinate Legislation Act 1992*, which requires the preparation of a RIS for proposed subordinate legislation that imposes a significant cost, burden or disadvantage on any sector of the public. The Regulation Review Unit considers this requirement to include subordinate legislation that restricts competition. The Act also requires agencies to conduct public consultation.

Administered by the Regulation Review Unit, Tasmania's gatekeeping mechanism aims at ensuring Tasmania's statute books reflect contemporary conditions and are free of redundant, unnecessary, ineffective or inefficient legislation. Specific arrangements in the *By-Law making procedures manual* (Department of Premier and Cabinet 1997) also ensure all proposed or existing council By-laws that impose restrictions on competition meet the requirements of the CPA.

The Government of Tasmania (2003) reported that more than 700 primary legislative proposals have been assessed since June 1996 under the gatekeeping provisions, with 19 regulatory impact statements prepared. Included in these proposals were significant pieces of legislation, such as the *Teachers Registration Act 1997*, the *Child Care Act 2001* and amendments to the *Gaming Control Act 1993*, which provides for a new exclusive licence to Federal Hotels to operate casinos, Keno and gaming machines in Tasmania (for details on the review of the latter two Acts, see chapter 9, volume 2).

The Council considers that Tasmania's gatekeeping arrangements comply with NCP obligations and meet best practice principles for effective gatekeeping.

The ACT

Once the ACT Government became subject to the provisions of clause 5(5) of the CPA, it introduced requirements for Government agencies to prepare a RIS for proposals that restrict competition. The requirements apply to both primary and subordinate legislation.

In accordance with Cabinet requirements, Government agencies must prepare a RIS for all new and amended primary legislation that restricts competition. This RIS must be attached to relevant Cabinet submissions and identify the problem or issues being addressed, objectives, viable options (regulatory and nonregulatory) for achieving the objectives, an assessment of the costs and benefits, and a strategy for implementing and reviewing the preferred option.

The ACT strengthened its gatekeeping requirements applying to subordinate legislation (which includes Regulations and codes of practice) with the commencement of the *Legislation Act 2001*. The *Guide to regulation in the ACT* (ACT Government 2000) outlines best practice methods for designing regulation that meets the requirements of the Act, including the ACT's CPA clause 5(5) obligations. The RIS requirements are triggered when a subordinate law is likely to impose appreciable costs on the community or part of the community. A RIS for subordinate legislation must meet the same requirements applied to primary legislation.

Consultation with stakeholders is a vital part of the RIS process. Consequently, departments and agencies are required to include details on all consultation undertaken with potentially affected individuals and groups in their RISs. The guide suggests that the first point of consultation should be with the Microeconomic Reform Section of the Department of Treasury, which has responsibility for assisting departments and agencies in the preparation of a RIS.

For transparency and accountability purposes, the RIS for proposed subordinate legislation is tabled in the Legislative Assembly, along with the explanatory statement for the regulation. RISs for primary legislation that

form part of the Cabinet submission are subject to Cabinet-in-Confidence provisions. Accordingly, they are not released to the wider public. In most circumstances, however, a discussion paper would have been released for consultation, to assist with the development of the policy proposal put to Cabinet.

The ACT Treasury oversees Government departments' compliance with the RIS requirements.

The ACT Government (2003) advised 24 pieces of draft legislation have been reviewed since July 2001 for their potential regulatory impact. Each regulatory proposal was assessed as meeting the CPA clause 5 guiding principle. The RIS assessment process is ongoing because ACT legislation is subject to sunset clauses and some legislation may contain a specific review timetable.

The Council considers that the ACT's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping. To improve transparency, however, the Council considers that an expurgated version of the final RIS subject to Cabinet-in-Confidence provisions should, at a minimum, be made available publicly.

The Northern Territory

On 20 June 2003, the Northern Territory endorsed the establishment of a new process — to be known as competition impact analysis (CIA) — to scrutinise the competition policy implications of new and amended legislation. The Northern Territory subjects all new legislation proposals (new Acts, amendments to existing Acts and new or amended Regulations) that may restrict competition or confer significant costs on business to a CIA. Exceptions to the CIA requirement apply where the regulatory impact on the economy or the community is likely to be small and it is clear that the benefits of regulation outweigh the costs. The process provides for a consideration of the legislation's competition impacts, in keeping with the guiding principle of clause 5 of the CPA.

The Northern Territory published *Competition impact analysis principles and guidelines 2003*, which explain Government agencies' obligations when preparing legislation that may restrict competition. The guidelines provide information to help agencies determine whether a CIA must be prepared. They also set out the principles and characteristics of good regulation. Agencies are required to conduct a seven-stage analysis.

1. Identify the problem being addressed and the need for Government involvement.

2. Identify objectives that the Government seeks to attain to correct the problem.

3. Provide a statement of the proposed regulation to explain why legislation is the most appropriate approach.

4. Assess the impact of the proposed regulation by outlining the costs and benefits of the proposed legislation, including direct and indirect economic and social costs and benefits.

5. Provide a statement of consultation, detailing who has or will be consulted, the views expressed by those consulted, and the means of addressing their concerns.

6. Outline how the legislation will be implemented and enforced.

7. Provide a process for review detailing how the legislation will be monitored and how the ongoing effectiveness and efficiency of the legislation will be assessed.

The guidelines also encourage Government agencies to make their CIAs available to the public.

The Northern Territory does not have a single statutory independent body responsible for oversight of the gatekeeping process. Instead the Department of the Chief Minister has prime responsibility for oversight of the competition impact analysis process. To assist in this task it has established an inter-departmental committee comprising representatives from within the department and from the Department of Justice and the Treasury. The Department of Business, Industry and Resource Development is also represented on the committee when it has responsibility for regulatory proposals with the potential to restrict competition. The committee reviews the initial decision to prepare a CIA and coordinates feedback to the agency on the adequacy of the draft analysis. The Department of the Chief Minister provides a statement on whether or not the CIA process has been adequately completed. The statement and CIA must be submitted along with draft legislation/regulation when seeking Cabinet or Executive Council approval. From 2004, the unit will report bi-annually to the Chief Minister, the Treasurer and Chief Executives on agencies' compliance with the CIA process.

The Council considers that the Northern Territory's gatekeeping arrangements comply with NCP obligations and approach best practice principles for effective gatekeeping. It notes that the Northern Territory intends to commence in 2004 reporting on compliance with the arrangements.

Gatekeeping — an ongoing process

The CPA requires all new and amended legislation that restricts competition to be consistent with the guiding principle. It therefore requires governments to have in place an effective gatekeeping mechanism to continue to meet this

commitment. All governments — Commonwealth, State and Territory — have put in place legislative gatekeeping arrangements.

The Commonwealth Government's gatekeeping procedures represent best practice because they require an impact assessment of all regulatory proposals (for primary and subordinate legislation, quasi-regulation and treaties) and are underpinned by detailed guidelines on the conduct of an impact analysis. An independent Office of Regulation Review is empowered to examine agencies' regulatory impact assessments and to advise on the adequacy of the analysis at the decision-making and tabling/transparency stages. It also monitors and reports annually on compliance with the regulation impact analysis guidelines. All other jurisdictions, except New South Wales, subject all primary and subordinate legislation to their gatekeeping requirements. On other aspects, there is more divergence between the models adopted by each jurisdiction: for example, many jurisdictions use Cabinet processes to implement gatekeeping mechanisms for primary legislation, so therefore may not require the final RIS be made available publicly. Monitoring and reporting also vary considerably across the States and Territories.

Moreover, despite the efficacy of the gatekeeping system, governments have implemented some legislation that restricts competition even where it has not been demonstrated that the legislation provides a net benefit to the community and/or the objectives of the legislation could have been achieved without restricting competition. This outcome indicates that an effective gatekeeping mechanism is necessary to achieving good regulatory outcomes, but it will not always be sufficient. The system needs to be supported by the Government and the departments and agencies responsible for undertaking the regulatory impact analysis. Ongoing scrutiny is also important. Over time, experience may highlight deficiencies in the gatekeeping system that need to be addressed, or improvements that could be made to produce more effective and efficient regulatory and administrative outcomes. Responsibility for scrutinising the gatekeeping systems rests with all governments. Consequently, the Council will continue to monitor the new legislation gatekeeping arrangements to ensure governments continue to strive for best practice regulation.

Table 13.2: Gatekeeping arrangements for new legislation

Jurisdiction	*Formal regulatory impact assessment of new and amended primary legislation (Bills)*	*Formal regulatory impact assessment of subordinate legislation*	*Published guidelines for the assessment of the regulatory impact of new regulation*	*Guidelines embody the CPA Clause 5 guiding principle*	*Independent oversight and reporting of gatekeeper arrangements*
Commonwealth	A RIS must be prepared for all proposals that have a direct effect on business, have a significant indirect effect on business or restrict competition.	The requirements that apply to primary legislation also apply to subordinate legislation, quasi-regulation and treaties.	A *Guide to Regulation* (second edition) published by the Office of Regulation Review in 1998 contains guidelines.	The CPA clause 5 requirements are specified in *a Guide to regulation*.	The Office of Regulation Review provides training and guidance to departments and agencies on the RIS requirements. It reports annually on compliance.
New South Wales	Cabinet submissions for new Bills must meet best practice requirements.	Under the *Subordinate Legislation Act 1989*, a RIS is required for all new principal statutory rules, but not for any direct amendments to those rules.	From Red tape to results contains best practice guidelines, and the *Manual for preparation of legislation* details the requirements of the Subordinate Legislation Act.	*From Red Tape to Results* does not contain an explicit statement of the guiding principle, but it states that best practice requires that regulatory systems not restrict competition	No single statutory independent body has responsibility for overseeing the gatekeeping requirements. The Inter-Governmental and Regulatory Reform Branch in the Cabinet Office coordinates implementation of NCP and other regulatory reform initiatives. The Legislation Review Committee provides some scrutiny of Bills and subordinate legislation subject to disallowance according to the criteria set out in the *Legislation Review Act 1987*.
Victoria	Cabinet submissions on legislative proposals must include an NCP impact assessment.	Under the *Subordinate Legislation Act 1994*, a RIS is required for all regulation that imposes an appreciable economic or social burden on any sector of the public.	In 1996, Victoria issued *Guidelines for the application of the competition test to new legislative proposals*.	Victorian guidelines specify the CPA clause 5 requirements.	Ministers must obtain independent (public or private sector) expert advice to confirm the adequacy of a RIS before a regulation can be made. The Office of Regulation Reform advises agencies on the preparation of a RIS and publishes on regulation review matters.

(*continued*)

Table 13.2 continued

Jurisdiction	*Formal regulatory impact assessment of new and amended primary legislation (Bills)*	*Formal regulatory impact assessment of subordinate legislation*	*Published guidelines for the assessment of the regulatory impact of new regulation*	*Guidelines embody the CPA Clause 5 guiding principle*	*Independent oversight and reporting of gatekeeper arrangements*
Queensland	All new primary legislation is subject to a public benefit test to ensure it complies with the CPA Clause 5 guiding principle.	A RIS is required for all new or amended subordinate legislation that is likely to impose 'appreciable costs on business and/or the community'.	Queensland Treasury publishes public benefit test guidelines.	The public benefit test explicitly considers the CPA guiding principle.	The BRRU provides assistance and training to agencies on RIS requirements
Western Australia	All legislation that restricts competition must be reviewed.	All legislation that restricts competition must be reviewed. This includes Regulations, rules, proclamations, notices, new legislation, amended legislation and local government by-laws	West Australia's *Legislation review guidelines* and *public interest guidelines for legislation review* set out the mandatory requirements for reviews of existing, new and amending regulation.	The guidelines make clear Western Australia's CPA obligations.	The Department of Treasury and Finance advises agencies on NCP obligations and must be formally informed of progress on new legislation. The department may present its advice to the Cabinet directly if it considers that the agency proposing the new legislation has not appropriately addressed NCP issues.
South Australia	All proposals for new and amending legislation must be accompanied by evidence that the proposal complies with CPA clause 5 requirements.	All proposals for new and amending regulations must be accompanied by evidence that the proposal complies with CPA clause 5 requirements.	South Australia has guidelines for primary and subordinate legislation.	The guidelines make clear South Australia's CPA obligations.	The Department of Premier and Cabinet provides advice and training to agencies on NCP compliance.

(*continued*)

Table 13.2 continued

Jurisdiction	*Formal regulatory impact assessment of new and amended primary legislation (Bills)*	*Formal regulatory impact assessment of subordinate legislation*	*Published guidelines for the assessment of the regulatory impact of new regulation*	*Guidelines embody the CPA Clause 5 guiding principle*	*Independent oversight and reporting of gatekeeper arrangements*
Tasmania	A RIS is required for new Bills assessed by the RRU to contain a major restriction on competition.	A RIS is required for subordinate legislation that imposes a significant cost, burden or disadvantage on any sector of the public.	Tasmania's guidelines are in the *Legislation review program procedures and guidelines manual* (Chapter 3.2).	The manual requires agencies to apply the NCP tests.	The Regulation Review Unit assesses all proposed legislation. It provides training and advice to agencies and annually reports on compliance.
ACT	A RIS must be attached to Cabinet submissions for all legislative proposals to restrict competition.	A RIS must be prepared for all subordinate legislation that imposes an appreciable burden on business.	The *Guide to Regulation in the ACT*	The guide refers agencies to the NCP tests.	The Microeconomic Reform Section of the Department of Treasury has responsibility for assisting departments and agencies in the preparation of a RIS.
Northern Territory	All draft Bills must be accompanied by a competition impact analysis.	All draft regulations must be accompanied by a competition impact analysis.	Department of the Chief Minister publishes the *Competition impact analysis principles and guidelines 2003*.	The guidelines refer agencies to the CPA tests as principles of good regulation.	There is no independent statutory authority responsible for oversight of the competition impact analysis process. The Department of the Chief Minister has prime responsibility for the gatekeeping arrangements. It is assisted by an interdepartmental Committee comprising representatives from within the Department and from the Department of Justice and the Treasury. The Department of Business, Industry and Resource Development is also represented on the committee when it has responsibility for regulatory proposals with the potential to restrict competition.